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COURT OF APPEALS  
DIVISION II

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NO. 36979-6-II

STATE OF WASHINGTON  
BY

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

STATE OF WASHINGTON,

Respondent,

v.

ALAN BRAZEE,

Appellant.

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FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON

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

The Honorable Beverly Grant, Judge  
The Honorable Frederick W. Fleming, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to observe adequate procedural safeguards regarding appellant's competency to stand trial.

2. The trial court erroneously allowed the State to improperly impeach appellant and another defense witness.

3. The trial court erroneously allowed inflammatory testimony to be considered by the jury.

4. Ineffective assistance of counsel deprived appellant of his constitutional due process right to a fair trial.

5. Cumulative error denied appellant his constitutional due process right to a fair trial.

Issues Pertaining to Assignments of Error

1. Where the trial court initially determined there was reason to doubt competency, did the court violate appellant's constitutional right to procedural due process when it found him competent to stand trial without holding an evidentiary hearing on the issue?

2. The success of appellant's defense to the first degree assault charge hinged on his credibility. Is reversal required because the court, over counsel's objection, erroneously allowed the State to impeach appellant's veracity with evidence of prior misconduct? Is reversal

alternatively required because counsel was ineffective in failing to properly object?

3. A police officer, the alleged victim, testified his encounter with appellant had not only affected him but also his family, and that, as a Christian, he forgave appellant for what he did. Is reversal of the first degree assault conviction required because this irrelevant and unduly prejudicial testimony likely appealed to the passions of the jury and tainted rational deliberation on the verdict? Is reversal alternatively required because counsel was ineffective in failing to properly object?

B. STATEMENT OF THE CASE

1. Procedural History

The State charged appellant Alan Brazee with attempted first degree murder and first degree assault, alleging the crimes were committed with a firearm against a police officer. CP 14-17. The State also charged Brazee with first degree unlawful possession of a firearm, attempting to elude a pursuing police vehicle, and hit and run. CP 14-17. The jury received instructions for the lesser crimes of attempted second degree murder and second degree assault. CP 60-62, 68-70.

The jury found Brazee guilty of first degree assault, attempting to elude, unlawful possession of a firearm, and hit and run. CP 34, 36-38.

The jury returned special verdicts that Brazee was armed with a firearm at the time of the assault, and that he committed this offense against a law enforcement officer who was performing his official duties at the time, knowing the victim was a law enforcement officer. CP 39-41.

The court imposed concurrent, standard range sentences for attempting to elude (29 months), unlawful possession of a firearm (102 months), and hit and run (one year). CP 99, 103, 110-11. The court imposed a 60 month firearm enhancement, to run consecutive with the assault sentence. CP 103. The court also imposed an exceptional sentence of 397 months for the assault, relying on the aggravating circumstance that the assault was committed against a police officer. CP 103, 112-14. This appeal timely follows. CP 89.

2. Trial

The murder and assault charges were the only contested charges at trial. 2RP<sup>1</sup> 860. Defense counsel in opening statement conceded Brazee committed unlawful possession, attempting to elude, and hit and run. 2RP 154-55, 158-59, 166-67. Brazee admitted the same on the stand. 2RP 857-60.

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<sup>1</sup> The verbatim report of proceedings is contained in thirteen volumes, referenced as follows: 1RP - 10/19/05; 2RP - 9/6/07, 9/10/07, 9/13/07, 9/20/07, 9/24/07, 9/25/07, 9/26/07, 9/27/07; 3RP - 10/1/07; 4RP - 11/16/07.

a. Background To The Events Of September 21, 2005

Twenty-six-year-old Brazee grew up in an unstable and dysfunctional household, where his mother introduced him to methamphetamine ("meth") at the age of 13. 2RP 745-47. He maintained a drug lifestyle after leaving home at the age of 15. 2RP 746, 749-51.

A 1999 second degree burglary conviction made him ineligible to possess firearms. 2RP 750. In 2003, he was convicted of first degree possession of stolen property and was confined in the Monroe facility's Special Offender Complex, where he stayed for six months. 2RP 751-55. The environment was bad. 2RP 757. Brazee was confined to his cell for 22 hours each day. 2RP 755. The inmates were mentally ill and "just plain crazy." 2RP 754. They constantly screamed, yelled and kicked doors, which deprived him of sleep. 2RP 755-56. He listened to one inmate scream and die from internal bleeding, which Brazee attributed to injuries inflicted by guards. 2RP 756. Brazee was later transferred to a different complex in Monroe, where his job was to clean the feces, urine, vomit, blood, dirty clothes, and soiled sheets left behind by those placed in the crisis cell. 2RP 759-60.

Brazee was prescribed antipsychotics and psychotropic medication at Monroe. 2RP 757. He was subsequently transferred to McNeil Island,

where he continued to receive antipsychotic medication. 2RP 761. He was released about eight months before the events at issue in this case. 2RP 761-62. Upon release, he stopped taking his antipsychotic medication and went back to using meth on a daily basis. 2RP 762-63, 769.

Braze violated his probation by using drugs. 2RP 764-66. He was confined for a second probation violation, and released about a week before the September 21 events at issue in this case. 2RP 779-80. He went back to using meth "with a vengeance." 2RP 780. Braze had a feeling he was going back to prison. 2RP 781. He ingested meth on the day of the incident. 2RP 790-91.

b. Attempt To Elude and Resulting Vehicle Crash

State trooper Darrin Whalen was patrolling in an unmarked vehicle when he saw the occupants of a red Blazer not wearing their seat belts. 2RP 235, 237, 243. Braze was the driver. 2RP 793. Rachele Norman, Braze's girlfriend, was the passenger. 2RP 715-16, 726-28.

Whalen activated his emergency lights. 2RP 240-42. Braze knew the trooper was trying to pull him over, but eventually accelerated in an attempt to elude. 2RP 793-96.

The day before the incident, Braze had come into possession of a gun when a friend asked him to transport it to the friend's father. 2RP

786-87. The gun was in the car. 2RP 793. Brazee explained he did not pull over for trooper Whalen because he would be sent back to prison when the trooper found the gun in his truck. 2RP 796-97.

Whalen saw Brazee's vehicle erratically pull into a parking lot and continue driving. 2RP 240-41. The vehicle rapidly accelerated onto another street. 2RP 242. Whalen activated the siren at this time. 2RP 242, 244. The Blazer clipped the rear of a vehicle in an intersection and kept driving. 2RP 248, 564-66, 798. Brazee lost control of the vehicle, went off the road, sheared off a telephone pole, plowed through a fence, and came to rest at the corner of a house. 2RP 249, 798-99.

After crashing, Brazee jumped out with the gun and started running away with Norman into nearby woods. 2RP 249-50, 256, 799. Brazee took the gun because he did not want police to find the gun in the car and be charged with unlawful firearm possession. 2RP 809. Whalen chased them on foot and eventually caught Norman. 2RP 252, 260-61. Brazee kept running. 2RP 261, 732.

c. Brazee's Encounter With Officer Guerrero

Pierce County Sheriff Deputy Andrew Guerrero heard the radio dispatch report of a Blazer being pursued and headed toward the scene to assist in containment. 2RP 386-88. Kevin Copeland, who was working

in a yard outside Gary's Sandoval's residence, walked towards the crash, saw a patrol vehicle coming down the road, and started walking back to the yard. 2RP 305-08, 311. At this point Brazee entered the yard and said "I need help. I won't hurt you." 2RP 311, 330. Brazee did not make any threats. 2RP 315, 331. Brazee was looking for a place to hide. 2RP 813. He heard the sirens and knew police were looking for him. 2RP 814. Copeland flagged Guerrero down. 2RP 311, 314-15, 388-90.

When Guerrero arrived, thoughts raced through Brazee's head. 2RP 817. He was trapped and gave up trying to escape. 2RP 817. He did not want to go back to prison. 2RP 817. He did not want to lose his girlfriend. 2RP 817. He wanted to die. 2RP 818. But he did not have the courage to shoot himself. 2RP 819.

Events unfolded rapidly. 2RP 818. According to Brazee, Guerrero immediately drew his weapon. 2RP 818, 821. Brazee gave a statement to police after the event, in which he said he had his gun out before Guerrero. 2RP 878-79. In any event, he pulled out his gun at about the same time Guerrero pulled his. 2RP 823, 875.

Brazee did not say anything to Guerrero. 2RP 821. Brazee dropped his shirt that he had over his gun and raised it. 2RP 818, 821.

In pointing his gun at Guerrero, Brazee expected to die. 2RP 822. Brazee testified he did not pull the trigger while he pointed the gun at Guerrero. 2RP 823. He did not rack the slide while facing Guerrero. 2RP 822-23. He did not try to kill Guerrero and did not intend to shoot him when he pointed the gun. 2RP 823, 842. He intended to provoke Guerrero into shooting him by pulling his gun. 2RP 842. Brazee was shot before he finished leveling his gun at Guerrero. 2RP 818-19, 821-22.

Guerrero's account differed. According to Guerrero, he immediately exited his vehicle and yelled at Brazee to get on the ground. 2RP 391-92. Brazee was saying "I'm sorry, I'm sorry" as he walked behind Copeland, and said something about hitting a car. 3RP 396. Brazee walked towards Guerrero with his hands in the air, and as he started to bend at the waist, he pulled out a gun from behind his back. 2RP 393-94. Brazee pulled his gun out first, and Guerrero pulled his gun in response. 2RP 394-95, 420, 424. Guerrero reached for his gun as soon as he saw Brazee reaching behind his back. 2RP 420, 424. As Guerrero drew his gun, Brazee told him "to drop [his] fucking gun." 2RP 397, 425.

Guerrero testified Brazee tried to pull the trigger as soon as Guerrero pulled his gun. 2RP 398, 400, 427. When Brazee pointed the gun at Guerrero but did not fire a round, Guerrero saw Brazee's gun had a

"stovepipe" jam 2RP 428-29, 455, 458. A stovepipe occurs when the cartridge gets lodged in the ejection port, causing the gun to malfunction. 2RP 398-99, 639, 649. Guerrero saw an unspent round sticking out from the ejection port, causing the malfunction. 2RP 429. Brazee pulled the slide on the gun after the malfunction occurred. 2RP 458. A gun cannot fire when there is a stovepipe jam. 2RP 650.

In an interview the same day of the shooting, Guerrero said he did not know whether Brazee actually pulled the trigger, "but the gun was jammed, so every indication to me tells me he did or wanted to." 2RP 450. In speaking with his supervising officer minutes after Brazee's eventual surrender, Guerrero did not say anything about Brazee pulling the trigger. 2RP 681-82, 684. Guerrero inferred Brazee pulled the trigger because he heard a click, but was not sure if the click came from the gun. 2RP 398, 425-28.

Forensic Scientist Brenda Lawrence testified a stovepipe typically occurs with a fired cartridge case. 2RP 613, 639, 641. But stovepipes also occur as a result of incorrectly pulling back the slide rather than firing the weapon. 2RP 640-42. Lawrence testified the most likely cause of the stovepipe in Brazee's gun was due to incorrectly racking the slide. 2RP 658-59. She could not say the gun had been fired during the incident. 2RP

656. Brazee's gun makes a light click when the trigger is pulled with the safety on. 2RP 654.

Guerrero shot Brazee. 2RP 400-02, 433. Guerrero told his supervisor that he shot Brazee as Brazee was raising his gun up. 2RP 684.

According to Guerrero, Brazee fell to the ground, where he tried to clear the jam. 2RP 404-05, 435. Brazee said "you better fucking kill me, 'cause I'm gonna kill you." 2RP 460. Guerrero yelled at Brazee to drop the gun. 2RP 405. Brazee rolled over and pointed the gun at Guerrero again while he lay on the ground. 2RP 405, 439, 463. Guerrero assumed Brazee had cleared the malfunction. 2RP 439. He fired again, hitting Brazee once. 2RP 406, 433, 440. Guerrero described Brazee as still "desperately trying to clear that malfunction" after he was shot while on the ground. 2RP 407, 434-35.

According to Brazee, he decided to kill himself by his own hand after first being shot by Guerrero and falling to the ground. 2RP 825. He racked the slide of his gun, trying to load it. 2RP 826-27. He looked up and saw Guerrero with his gun leveled at him. 2RP 827. Guerrero shot him in the arm. 2RP 828. Brazee denied pointing the gun at Guerrero while on the ground. 2RP 828.

Brazee then put it his gun to his head and pulled the trigger a number of times. 2RP 830, 884. He noticed his gun was jammed. 2RP 830-31. He tried to clear the jam, but was unable to do so. 2RP 831.

Other eyewitnesses gave accounts that agreed and differed in some respects from the respective version of events given by Guerrero and Brazee. According to Copeland, Brazee did not say anything to Guerrero. 2RP 317. He did not see Brazee pull the trigger or attempt to pull the trigger. 2RP 336.

Sandoval, the homeowner, saw Brazee standing near Copeland. 2RP 506, 511, 525. Sandoval flip flopped and equivocated on who pulled a gun out first. 2RP 514-15, 522-24, 532-33, 536-37. Sandoval initially observed the unfolding events while standing in front of his truck. 2RP 530. On direct, Sandoval testified it looked like Brazee tried to squeeze the trigger but nothing happened. 2RP 515-16. On cross, Sandoval acknowledged he told the police that he could not tell if Brazee pulled the trigger. 2RP 531-32. His memory was "definitely" fresher at the time he gave the statement, which was the same day as the event. 2RP 523, 531-32. Sandoval did not see any malfunction in the gun that would cause it not to fire. 2RP 516. Sandoval did not see Brazee's gun stovepipe. 2RP 534-35. He did not hear any noises from Brazee's gun. 2RP 520.

When Brazee drew the slide back, Guerrero fired three quick shots. 2RP 515-17, 517, 535. Sandoval did not hear Brazee say anything to any officer along the lines of "shoot me or I'm going to shoot you" or anything else. 2RP 533, 543. He did not see Brazee manipulate the slide while on the ground. 2RP 540.

After Guerrero shot Brazee a second time, other officers arrived on the scene and yelled at Brazee to put the gun down. 2RP 831-32. Deputy Kevin Fries started negotiating with Brazee. 2RP 193. Brazee was yelling he did not want to go back to prison and wanted to die. 2RP 212, 462.

State trooper Johnny Alexander arrived and took over negotiation. 2RP 410, 481, 485. Brazee was scared, in pain, and acting irrationally. 2RP 496, 498, 500. He was not hostile towards Alexander and did not point the gun at any of the officers during negotiations. 2RP 490, 499-500, 831.

Brazee told Alexander he wanted to die. 2RP 488, 497, 833. Alexander asked why he wanted to die. 2RP 488. Brazee said because he had shot a cop. 2RP 488, 497. He also indicated he had injured someone in a collision. 2RP 488. Alexander assured him everyone was okay, but Brazee constantly indicated he wanted to kill himself and did not want to go back to prison. 2RP 488, 497.

Brazeo pointed the gun at his own head. 2RP 410, 440, 489-90. But his gun would not work. 2RP 833, 883-84. Alexander noticed the gun had a stovepipe. 2RP 489, 499. Brazeo pulled the trigger at least once while the gun was aimed at his neck, but the gun did not fire because of the stovepipe. 2RP 491, 500.

Brazeo mentioned having a daughter during the course of negotiations, which Alexander used as a tactic to help convince Brazeo to see that taking his life would not benefit her. 2RP 489, 491, 501. Brazeo has no children. 2RP 758. At trial, Brazeo did not recall mentioning a daughter to Alexander or saying he had shot a cop. 2RP 834, 848, 882. By this time, he had been shot twice, was hurt, confused, and may have been going into shock. 2RP 882-83.

Brazeo eventually gave up, ejected the magazine, cleared the chamber, and dry fired the gun up in the air. 2RP 195, 215. Brazeo lay bleeding on the ground. 2RP 277-78. He was incoherent when trooper Whalen attempted to read him his Miranda<sup>2</sup> rights. 2RP 279-81. Whalen did not expect him to be very coherent, given that he had just been shot and there was a possibility that he was going into shock. 2RP 280.

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<sup>2</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Brazee needed surgery and surgical appliances inserted into his body to repair the damage caused by a gunshot to the forearm and hipbone. 2RP 695, 699. Brazee expressed suicidal thoughts in the hospital where he was treated for his wounds. 2RP 696. The hospital instituted 24-hour suicide observation and recommended Pierce County Jail do the same after he was transferred to that facility. 2RP 696-97.

The psychiatric nurse at the hospital diagnosed Brazee with bipolar and schizoaffective disorders, as well as suicidal ideation. 2RP 700. Brazee had methamphetamine in his system when he entered the hospital. 2RP 701. The hospital prescribed risperdal, an antipsychotic drug. 2RP 704.

Brazee told someone at the hospital that "he shot at police so that they would try to kill him." 2RP 708. The discharge physician had seen this scenario before and even had a name for it: "death by cop." 2RP 712.

C. ARGUMENT

1. THE COURT VIOLATED BRAZEE'S DUE PROCESS RIGHTS IN PROCEEDING TO TRIAL WITHOUT OBSERVING ADEQUATE PROCEDURAL REQUIREMENTS TO DETERMINE COMPETENCY.

Once a trial court finds a reason to doubt competency, it is constitutionally required to hold an evidentiary hearing to determine competency before proceeding to trial. Reversal on all counts is required

because the trial court found reason to doubt Brazee's competency but failed to hold a hearing before proceeding to trial.

a. After Finding Reason To Doubt Competency, The Court Ultimately Found Brazee Competent Without Conducting A Proper Hearing On The Matter.

On October 19, 2005, the Honorable Kathryn J. Nelson found reason to doubt Brazee's fitness to proceed and ordered Western State Hospital to perform a competency evaluation pursuant to RCW 10.77.060. CP 6-9. CP 9. Judge Nelson further ordered "that this action be stayed during this examination period and until this court enters an order finding the Defendant to be competent to proceed." The order also indicates the State moved for the competency evaluation. CP 6.

On January 5, 2006, the competency report was filed. CP 127-34. Dr. Barry Ward, the examining psychologist and author of the report, diagnosed Brazee with personality disorder (not otherwise specified; with borderline and antisocial features). CP 131. Dr. Ward described Brazee's personality disorder as "profound." CP 131. Dr. Ward further diagnosed Brazee with rule out psychotic disorder (not otherwise specified, by history), rule out malingering, depressive disorder (not otherwise specified), methamphetamine dependence and polysubstance abuse. CP 131. Dr. Ward concluded Brazee was competent, writing Brazee "does not currently

demonstrate signs of acute major mental illness" and "we see no functional deficits in knowledge, judgment, ability or decision making ability that would be expected to interfere with competency." CP 131-32.

That same day, the Honorable Beverly Grant found Brazee competent, and entered the following order:

THIS MATTER is before the court pursuant to the defendant's court ordered evaluation for competency at Western State Hospital. In accordance with RCW 10.77.060 the defendant has been evaluated, and the court has reviewed the report of BARRY WARD, J.D., Psy.D., Licensed Psychologist, dated 01/04/05, having considered the records and the files in this matter, Forensic mental Health report, and the comments of counsel for the State and defendant, the court is satisfied that the defendant is competent to understand the proceedings against HIM, and to assist in His own defense. Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED that defendant, ALAN ROBERT BRAZEE, is competent to understand the present criminal proceedings against HIM, and to assist in HIS own defense.

CP 135-36.

An evidentiary hearing on Brazee's competency never took place.

The case proceeded to trial.

- b. Due Process Requires The Court To Conduct An Evidentiary Hearing Whenever There Is Reason To Doubt Competency.

The conviction of an accused while legally incompetent violates the constitutional right to a fair trial under the Due Process Clause of the

Fourteenth Amendment. Pate v. Robinson, 383 U.S. 375, 378, 385, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). The constitutional standard for competency to stand trial is whether the accused has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and to assist in his defense with "a rational as well as factual understanding of the proceedings against him." In re Fleming, 142 Wn.2d 853, 861-62, 16 P.3d 610 (2001) (citing Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)) (internal quotation marks omitted). Under Washington statute, a criminal defendant is incompetent if (1) he lacks an understanding of the nature of the proceeding; or (2) is incapable of assisting in his defense due to mental disease or defect. RCW 10.77.010(14). "It is fundamental that no incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity continues." State v. Wicklund, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982).

The "[f]ailure to observe procedures adequate to protect an accused's right not to be tried while incompetent to stand trial is a denial of due process." Fleming, 142 Wn.2d at 863. In Pate, the state competency statute at issue directed the trial court to hold a competency hearing on its own motion whenever there was a "bona fide reason" to doubt competency.

Pate, 383 U.S. at 378. The United States Supreme Court held the trial court's failure to hold a hearing violated due process because the evidence before the trial judge was sufficient to raise a genuine doubt regarding competency. Id. at 385. It is settled that a defendant's due process right to a fair trial requires the trial court to conduct an evidentiary hearing whenever there is reason to doubt a defendant's competency, even if the defendant does not request such a hearing. See, e.g., Odle v. Woodford, 238 F.3d 1084, 1087 (9th Cir. 2001); United States v. Denkins, 367 F.3d 537, 547 (6th Cir. 2004); Johnson v. Norton, 249 F.3d 20, 26 (1st Cir. 2001); Silverstein v. Henderson, 706 F.2d 361, 369 (2nd Cir. 1983).

Consistent with this constitutional mandate, once the trial court makes a threshold determination that there is "reason to doubt" the defendant's competency pursuant to RCW 10.77.060, the court must appoint an expert and order a formal hearing to determine competency before proceeding to trial. State v. Marshall, 144 Wn.2d 266, 278, 27 P.3d 192 (2001); State v. Lord, 117 Wn.2d 829, 901, 822 P.2d 177 (1991). At minimum, due process requires the trial court to make findings of fact and conclusions of law after an evidentiary hearing on the matter of competency. State v. Israel, 19 Wn. App. 773, 776, 777-78, 577 P.2d 631 (1978).

Here, Judge Nelson found reason to doubt Brazee's competency pursuant to RCW 10.77.060 and ordered a competency evaluation to determine Brazee's capacity to understand the proceedings and assist in his own defense. CP 6-9. Judge Nelson appropriately tolled the trial period until the court entered an order finding Grier competent to proceed. CP 9. An order for evaluation under RCW 10.77.060(1)(a) automatically stays the criminal proceedings until the court determines that the defendant is competent to stand trial. CrR 3.3(e)(1). Tolling is necessary because neither side can go forward with trial preparation until the defendant is found competent to proceed. State v. Jones, 111 Wn.2d 239, 245, 759 P.2d 1183 (1988) ("When the trial court determines that there is reason to doubt the defendant's competency pursuant to RCW 10.77.060(1), the proceedings are placed in limbo.").

Judge Grant, who was not the same judge who found reason to doubt Brazee's competency, found Brazee competent to proceed without conducting the required evidentiary hearing. CP 135-36. In so doing, the court violated Brazee's procedural due process right to an evidentiary hearing on the matter of competency prior to proceeding to trial. Pate, 383 U.S. at 377, 385-86; Israel, 19 Wn. App. at 776, 777-78.

c. The Constitutional Right To A Competency Hearing Cannot Be Waived After The Court Finds Reason To Doubt Competency.

Due process was not satisfied where the court found Brazee competent in the absence of a proper hearing on the matter. A defendant whose competency is in doubt cannot waive his right to a competency hearing and the issue can be raised for the first time on appeal. Medina v. California, 505 U.S. 437, 449-50, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992); Pate, 383 U.S. at 378, 384. Brazee's due process right to an evidentiary hearing therefore remained intact despite defense counsel's apparent decision not to request one, as it was incumbent upon the court to conduct a formal hearing on its own motion. Pate, 383 U.S. at 385; Williams v. Woodford, 384 F.3d 567, 603 (9th Cir. 2004) ("state trial judge must conduct a competency hearing, regardless of whether defense counsel requests one, whenever the evidence before the judge raises a bona fide doubt about the defendant's competence to stand trial.").

Although considerable weight should be given to an attorney's opinion regarding a client's competency, such opinion cannot be determinative of the issue. State v. Swain, 93 Wn. App. 1, 10, 968 P.2d 412 (1998). Indeed, "counsel is not a trained mental health professional, and [her] failure to raise petitioner's competence does not establish that

petitioner was competent. Nor, of course, does it mean that petitioner waived his right to a competency hearing." Odle, 238 F.3d at 1088-89 (trial court erred in not conducting evidentiary hearing even though no one questioned defendant's competence over the course of two years of pre-trial proceedings and twenty-eight days of trial). For these reasons, failure of the defense attorney to ask for a competency hearing may not be considered dispositive evidence of the defendant's competency. Id. A reason to doubt competency does not magically disappear because the defendant no longer contests the issue.

Reliance on a written competency report cannot substitute for an evidentiary hearing on the issue of competency. "It is the duty of the trial court to make a specific judicial determination of competence to stand trial, rather than accept psychiatric advice as determinative on this issue." United States v. David, 511 F.2d 355, 360 n.9 (D.C. Cir. 1975). "In the final analysis, the determination of competency is a legal conclusion; even if the experts' medical conclusions . . . are credited, the judge must still independently decide if the particular defendant was legally capable of reasonable consultation with his attorney and able to rationally and factually comprehend the proceedings against him." United States v. Makris, 535 F.2d 899, 908 (5th Cir. 1976). The court has an independent duty to

makes its own determination of competency. Pate, 383 U.S. at 385; Williams, 384 F.3d at 603. By apparently accepting the written competency report without conducting the necessary hearing to test its assertions, the court abandoned its ongoing duty to make an informed and independent decision regarding Brazee's competency.

d. The Remedy is Reversal Of The Convictions.

This Court should reverse the conviction because the court's failure to adhere to adequate procedural safeguards in determining competency violated Brazee's right to a fair trial. Pate, 383 U.S. at 377, 385-86; Israel, 19 Wn. App. at 776, 777-78. Reversal rather than remand for a retroactive competency hearing is required, given the inherent difficulties of such a nunc pro tunc determination even under the most favorable circumstances. Pate, 383 U.S. at 387; Drope v. Missouri, 420 U.S. 162, 183, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975).

2. **THE COURT ERRED IN ADMITTING PREJUDICIAL REBUTTAL EVIDENCE TO IMPEACH BRAZEE.**

Over defense counsel's objection, the court improperly allowed the State to impeach Brazee with extrinsic evidence that he was driving a stolen car on the day of the incident. Reversal is required because this evidence undermined Brazee's credibility in a case where acquittal on the first degree assault charge hinged on whether it believed his testimony that he did not

pull the trigger or intend to harm Guerrero. Reversal is alternatively required because counsel was ineffective in failing to prevent admission of this evidence.

- a. The Jury Heard Extrinsic Evidence That Brazee Knowingly Bought A Stolen Car, And Were Directed To Consider This Evidence For Impeachment Purposes.

The prosecutor in his opening statement informed the jury that Brazee was driving a stolen vehicle on the day in question. 2RP 133. Defense counsel, in his opening, said Brazee bought the car from a friend. 2RP 158.

As part of the State's case in chief, trooper Whalen testified that Norman said Brazee told her to run because the vehicle was stolen. 2RP 262.

As part of the defense case in chief, Norman testified Brazee purchased the Blazer from a friend of his. 2RP 720. On cross examination, the prosecutor asked if it was true that the Blazer was stolen the day before. 2RP 740. Norman said no. 2RP 740. Defense objected on hearsay grounds, which was overruled. 2RP 740-41. Then the prosecutor rephrased the question, asking if she saw Brazee steal the vehicle. 2RP 741. She answered no, and that she was there when he purchased it. 2RP 741.

On direct examination, Brazee testified he bought the Blazer from a friend for \$400 the day before the September 21 incident. 2RP 782-83. He did not think it was stolen. 2RP 783-84. Asked if he received the title, Brazee answered "It was paperwork and I believe it was a title. It's something I asked, Zac,<sup>3</sup> you know, 'Is this legit?' and he says, 'Yeah, it's legit,' and he handed me a paper. It wasn't a handwritten bill of sale. It was like a registration or a title." 2RP 784. Brazee assumed the paperwork was legitimate. 2RP 785. On cross examination, the prosecutor asked if Brazee had stolen the vehicle the day before the incident. 2RP 860-65. Brazee denied the allegation. 2RP 861, 865. Brazee also denied he had anything to do with the Blazer being stolen. 2RP 865.

After the defense rested, the State sought to call Jeff Dickerson as a rebuttal witness to testify his Blazer had been stolen on September 20, 2005. 2RP 895. The State also wanted to call a police officer to testify Dickerson had reported the vehicle stolen. 2RP 895. The prosecutor gave two reasons for wanting to introduce this evidence. First, the prosecutor claimed it contradicted Norman's testimony that she saw Brazee purchase the vehicle a week before the incident. 2RP 896. Second, it contradicted Brazee's "account of what he says is the truth about how he came into

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<sup>3</sup> Brazee bought the car from Zac. 2RP 782.

possession of that vehicle." 2RP 896. "So, the purpose for the rebuttal testimony is to contradict both of those witnesses on a subject matter that was introduced in the defense case in chief." 2RP 896-97.

Defense counsel objected on the grounds that the issue of the vehicle being stolen was collateral to any issue in the case, it was not relevant or probative, and any probative value was outweighed by the prejudicial nature of the testimony. 2RP 892-95, 899, 902.

Counsel pointed out the prosecution wanted to use this impeaching evidence to argue Brazee's "a thief and you can't believe what he says on the witness stand because he's a thief." 2RP 899. The court responded the probative value of the testimony outweighed any prejudicial effect because Brazee had already admitted to being convicted of two crimes of dishonesty. 2RP 899-900, 902, 903. Counsel countered the two crimes of dishonesty were remote in time from the event at issue. 2RP 902.

The court thought the evidence was admissible for "impeachment purposes and not so much, you know, evidence of other crimes." 2RP 900. According to the court, evidence regarding the stolen car was "probative of his credibility." 2RP 902. The "bottom line" was that the State was entitled to introduce the rebuttal evidence to show Brazee was "a liar" and

that the evidence was necessary to show Brazee was "lying." 2RP 901, 903.

The court agreed Norman's testimony regarding when Brazee purchased the vehicle was "of little consequence." 2RP 900. The court did not articulate why use of the impeachment evidence against Norman was admissible.

At the prosecutor's request, the court instructed the jury that this evidence was admitted for the limited purpose of assessing the credibility of Brazee and Norman, and were not to consider the evidence for any other purpose. CP 50; 2RP 904-05. Dickerson and the officer testified in accord with the offer of proof. 2RP 905-912. In arguing Brazee was not credible, the prosecutor in closing referenced the circumstances under which Brazee came into possession of the vehicle. 3RP 44, 61, 124.

b. Standard of Review

"This court reviews the correct interpretation of an evidentiary rule de novo as a question of law." State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion only if "the rule is correctly interpreted." Id. "[D]iscretion does not mean immunity from accountability." Carson v. Fine, 123 Wn.2d 206, 226, 867 P.2d 610 (1994). A trial

court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). "The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). Failure to adhere to the requirements of an evidentiary rule can thus be considered an abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

c. The Court Erred In Failing To Sustain Objection On Grounds That The Impeaching Evidence Was Collateral and Unfairly Prejudicial.

The prosecutor claimed the rebuttal evidence contradicted the testimony of Brazee and Norman. 2RP 896-97. Assuming the validity of this claim, the challenged evidence constitutes "impeachment by contradiction." The rebuttal evidence should not have been admitted because it was collateral to the issues at trial.

The general rule is that "impeaching evidence affects only the credibility of the witness and is incompetent to prove the substantive facts

encompassed therein." Jacqueline's Wash., Inc. v. Mercantile Stores Co., 80 Wn.2d 784, 788, 498 P.2d 870 (1972). But when extrinsic evidence is used to contradict the substantive testimony of a witnesses on a fact in issue, the evidence is merely rebuttal in impeachment form, and thus within the category of impeachment by contradiction. Id. Evidence *properly* admitted to impeach by mere contradiction constitutes an exception to the general rule limiting use of impeachment evidence to credibility and is competent to prove the substantive facts encompassed in such evidence. Id. at 789.

"To be admissible, such extrinsic evidence must be independently competent and must be admissible for a purpose other than that of attacking the credibility of the witness." Id. (citing State v. Oswald, 62 Wn.2d 118, 122, 381 P.2d 617 (1963)). In other words, the rebuttal evidence must have "direct and independent relevance to a material fact in issue." Id. This requirement conforms to the established rule that "a witness cannot be impeached on matters that are collateral to the principal issues being tried." Oswald, 62 Wn.2d at 120. "This rule is nothing more than a reflection of the universal rule that evidence is not considered relevant unless it is both probative and material to the issues at trial." 5 K. Tegland, *Evidence Law and Practice* § 607.19 at 409 (5th ed. 2007). In assessing whether a matter

is collateral, the reviewing court asks if the fact at could have been admitted into evidence for any purpose independently of the contradiction. Oswalt, 62 Wn.2d at 121.

The trial court found the challenged evidence admissible only for impeachment purposes rather than evidence of other crimes. The court's own ruling shows the evidence was collateral to the issues in the case. Unfortunately, the court did not understand the legal significance of determining the evidence was only probative of credibility as opposed to an independent substantive purpose. The court's ruling is not entitled to deference because the court did not correctly interpret the evidentiary rule at issue. DeVincentis, 150 Wn.2d at 17.

But even if the evidence was not collateral, inquiry into non-collateral matters remains forbidden if the inquiry is unduly prejudicial under ER 403. State v. Descoteaux, 94 Wn.2d 31, 38-39, 614 P.2d 179 (1980), overruled on other grounds, State v. Danforth, 97 Wn.2d 255, 257 n.1, 643 P.2d 882 (1982). The trial court ruled the evidence was probative of Brazee's credibility and that its probative value was not outweighed by the prejudicial effect because the jury already knew Brazee had been convicted of two crimes of dishonesty. But, as defense counsel pointed out, those convictions were from 1999 and 2003. 2RP 750-51, 902. The

vehicle was stolen the day before the events in question and Brazee testified about the vehicle's status in connection with the case.

The recent nature of the impeachment evidence sets it apart from the remote crimes of dishonesty admitted against Brazee and amplifies its prejudicial effect. See State v. Gregory, 158 Wn.2d 759, 798-800, 147 P.3d 1201 (2006) (although defense counsel impeached state's witness with admission of other crimes of dishonesty under ER 609, trial court's error in precluding defense counsel from impeaching witness with evidence of a lie under ER 608(b) was not harmless because the lie was recent and made in connection with the case). The court thus erred in failing to sustain counsel's objection on grounds of unfair prejudice as well.

Defense counsel also argued the rebuttal testimony would not contradict anything said by Brazee. 2RP 898-903. Counsel was correct. On cross-examination, Brazee denied stealing the vehicle. The rebuttal evidence does not show otherwise. The rebuttal evidence shows someone stole the vehicle, but it was not Brazee, who by his own testimony bought the vehicle the day after it was stolen. The rebuttal evidence does not even contradict Brazee's assertion that he did not know the car was stolen. Neither the man whose vehicle was stolen nor the police officer that took the report testified about the circumstances under which Brazee purchased

the vehicle because they had no such knowledge. Any argument that Brazee knew he bought a stolen vehicle could only be based on the evidence Brazee and Norman presented in their own testimony.

The rebuttal evidence did not contradict Brazee's testimony on the issue. And if there is no contradiction, then the evidence did not qualify as impeachment by contradiction and could not be admitted on that ground.

Error is harmless only if it is "trivial" and "in no way affected the final outcome of the case." Oswalt, 62 Wn.2d at 122. The prosecutor did not consider the evidence trivial, as shown by the fact he fought so hard for its admission. Neither did the trial judge, who aptly recognized the evidence was being offered to flat out show Brazee was a liar.

The prosecutor correctly argued the key issue in the case was whether Brazee intended to shoot Guerrero. 3RP 40, 43, 62, 65, 69-70. Defense counsel agreed. 3RP 73-74, 115. In choosing between the first and second degree assault options, the jury's verdict turned on whether it found Brazee's story credible that he did not intend to inflict great bodily harm on Guerrero.<sup>4</sup> The first degree assault verdict shows the jury did

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<sup>4</sup> A person commits first degree assault if, "with intent to inflict great bodily harm," he "[a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death." RCW 9A.36.011(1)(a). As instructed, Brazee committed second degree assault if, "under circumstances not amounting to assault in the first  
(continued...)

not believe him. There is a reasonable probability that the improper impeachment evidence affected the outcome of the trial.

d. Rebuttal Testimony Regarding The Stolen Vehicle Was Alternatively Inadmissible Because It Constituted Impermissible Extrinsic Evidence Of Impeachment.

The impeachment evidence was not admissible on other grounds. The prosecutor proclaimed he only offered the rebuttal evidence to impeach Brazee and Norman and obtained a jury instruction to that effect.

"ER 608(b) expressly prohibits an attack on witness credibility through resort to extrinsic evidence for proof of specific instances of witness conduct."<sup>5</sup> State v. Benn, 120 Wn.2d 631, 652, 845 P.2d 289 (1993) (trial court did not err in refusing to allow the defense to call a confidential informant to the witness stand to rebut denial of drug dealing by state witness). The cross-examiner attempting to impeach must "take the answer"

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<sup>4</sup>(...continued)  
degree," he "assaulted" Guerrero with a deadly weapon. RCW 9A.36.021-(1)(c); CP 70.

<sup>5</sup> ER 608(b) provides as follows: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."

of the witness without resort to extrinsic evidence, and is therefore precluded from calling another witness to contradict the answer given. State v. Barnes, 54 Wn. App. 536, 540, 774 P.2d 547 (1989); State v. Simonson, 82 Wn. App. 226, 234, 917 P.2d 599 (1996). The State could not properly call rebuttal witnesses to impeach Brazee's testimony on the issue.

e. Defense Counsel Was Alternatively Ineffective In Failing To Raise Proper Objections.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

To the extent, if any, defense counsel should have objected on ER 608 grounds, counsel was ineffective in failing to do so. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). No legitimate strategy justified the failure to object on that ground. He tried to keep the evidence out.

Counsel was also ineffective in failing to object to (1) the prosecutor's opening statement, which raised the issue of the stolen vehicle for the first time; and (2) Whalen's testimony, given as part of the State's case in chief, that Brazee told Norman to run because the car was stolen. Given counsel's later objection to evidence that the vehicle was stolen, there is no legitimate reason why he should not have objected earlier. The failure to object on the proper grounds at the proper time was prejudicial for the same reasons set forth above.

f. Defense Counsel Did Not Waive Objection To The Rebuttal Evidence.

A party may waive objection to rebuttal evidence if the objecting party was the first to raise the subject matter at trial. 5 K. Tegland, Evidence Law and Practice § 103.15 at 80 (5th ed. 2007); Short v. Hoge, 58 Wn.2d 50, 54, 360 P.2d 565 (1961).

Brazee did not waive objection to the State's rebuttal evidence in testifying on direct examination that he bought the vehicle and did not know

it was stolen. The State introduced the issue in its opening statement before Brazee or his defense counsel ever said a word. 2RP 133. Moreover, a State's witness was the first to raise the issue during the State's case in chief, when trooper Whalen testified that Brazee told Norman to run because the vehicle was stolen. 2RP 262. The prosecutor's argument that it sought admission of the evidence "on a subject matter that was introduced in the defense case in chief" is simply wrong. 2RP 896-97. The State, not the defense, injected the issue into the case. Given defense counsel's insistence that the issue was collateral, it is likely Brazee would not have even raised the subject had the State not told the jury during opening statement that the evidence would show Brazee was driving a stolen vehicle.

To the extent, if any, counsel waived objection to the rebuttal evidence by eliciting testimony on the issue from Norman and Brazee during direct examination, then counsel was ineffective for that reason. See State v. Bradley, 141 Wn.2d 731, 736, 10 P.3d 358 (2000) (invited error doctrine does not preclude review where defense counsel ineffective in inviting the error). The evidence was prejudicial and, given counsel's insistence that the issue was collateral, the decision to raise it as part of Brazee's case in chief cannot be deemed legitimate.

That being said, rebuttal evidence offered to explain, clarify, or contradict other evidence remains inadmissible if it is unduly prejudicial under ER 403 or collateral to material issues in the case. 5 K. Tegland, Evidence Law and Practice § 103.15 at 81 (5th ed. 2007); In re Welfare of Shope, 23 Wn. App. 567, 568-69, 596 P.2d 1361 (1979) (in indecent liberties case, court properly refused to admit testimony of two defense witnesses who would have refuted victim's testimony that he had never been involved in street hustling or appeared in public while dressed in "drag" because the issue was collateral); State v. Smith, 115 Wn.2d 434, 442-44, 798 P.2d 1146 (1990) (in theft case, since defendant first raised issue of his limited income, state had right to develop issue during cross examination, and the evidence was otherwise admissible because it was not unfairly prejudicial under ER 403); State v. McFadden, 63 Wn. App. 441, 450-51, 820 P.2d 53 (1991) (recognizing evidence admissible through the open door is still subject to exclusion on ER 403 grounds), overruled on other grounds, State v. Adel, 136 Wn.2d 629, 640, 965 P.2d 1072 (1998).

Counsel did object on grounds that the issue was collateral and that the prejudicial effect of the rebuttal evidence outweighed any probative value. For the reasons already set forth above, the court erred in not sustaining the objection on those grounds.

3. OFFICER GUERRERO'S INFLAMMATORY TESTIMONY PREJUDICED BRAZEE'S RIGHT TO A FAIR TRIAL.

Officer Guerrero injected irrelevant testimony into the proceedings that likely provoked an emotional reaction rather than a rational decision. The trial court erred in allowing Guerrero to so testify despite defense counsel's attempt to prevent the testimony. In the alternative, counsel was ineffective in failing to properly object to the testimony.

- a. The Trial Court Allowed Officer Guerrero To Talk About How The Crime Affected Himself And His Family, And That, As A Christian, He Forgave Brazee For What He Had Done.

On direct examination, Guerrero testified Brazee said "you better fucking kill me" after being shot and falling to the ground. 2RP 404. Guerrero could not remember Brazee saying anything else at this point. 2RP 404. On cross examination, Guerrero confirmed the extent of the statement. 2RP 437-38, 440. On redirect, the prosecutor elicited, for the first time, Guerrero's testimony that Brazee actually said "you better fucking kill me, 'cause I'm gonna kill you." 2RP 460, 462. In asking about Brazee's alleged statement of "I'm gonna kill you," defense counsel on re-cross questioned Guerrero as follows:

Q: You didn't remember earlier when I asked you about what Mr. Brazee said that he said "I'm gonna kill

you." You didn't remember that about an hour ago when I was asking you questions, did you?

A: You know, sir, I'm trying to put this behind me. I want to forget about how I met Mr. Brazee and how we had to cross paths. I want to forget it to the point where I want to be able to look him in the eye and tell him I forgive him for this.

Q: Officer, with all due respect --

A: No. If you are going to ask me a question, I'd like to answer it.

Mr. Quigley: Your honor, I would ask the witness answer my question.

The Court: I am going to allow him to finish his answer.

Mr. Quigley: All right. Go ahead.

A: I want to put this behind me, and it's affected me more than I thought it would. It's affected my family. When an officer is involved in a shooting, it doesn't only involve the officer. It involves his family. And, yeah, I want to forget about this. And I also want to tell him I forgive him. As a Christian, I feel I owe him that.

Mr. Quigley: And I think we all understand that. But, the point is that today, two years after this event, a very traumatic event, one which you want to put behind you, your memory of this event isn't as good as it was on the day of the event; isn't that true?

A: I'd have to agree with you, saying that it probably would not be as accurate, because I don't have notes to look at like you do, sir.

2RP 464-65.

b. Guerrero's Testimony Should Not Have Been Allowed Because It Was Unresponsive.

Guerrero's answer was unresponsive and defense counsel was right to request that Guerrero be directed to answer the question put to him. Guerrero's desire to put the incident behind him and his benevolent act of forgiveness had nothing to do with counsel's question that Guerrero did not say anything about Brazee making the statement during initial cross-examination. Instead of properly honoring counsel's request, the court allowed Guerrero to continue with his unresponsive answer regarding the impact of the crime on Guerrero and his family.

Unresponsive answers are objectionable. Beam v. Beam, 18 Wn. App. 444, 450, 569 P.2d 719 (1977); Lundberg v. Baumgartner, 5 Wn.2d 619, 625, 106 P.2d 566 (1940). Although defense counsel did not formally object on grounds of unresponsiveness, counsel's request to the court that Guerrero be directed to answer the question was its functional equivalent, and put the court on notice that counsel had a problem with what was being said. Evidentiary error will be preserved for review if the ground for objection asserted on appeal was apparent from the context at trial. State v. Black, 109 Wn.2d 336, 340, 745 P.2d 12 (1987).

c. In The Alternative, Defense Counsel Was Ineffective In Failing To Properly Object To Guerrero's Testimony Or Defuse Its Prejudicial Effect.

In the event this Court finds counsel failed to lodge a timely and proper objection to Guerrero's testimony, then counsel's failure constitutes ineffective assistance. Guerrero's answer was not only unresponsive, but also irrelevant under ER 401 and 402 and unduly prejudicial under ER 403. Counsel should have objected on these grounds to prevent the jury from considering this testimony as it deliberated on Brazee's fate.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." ER 401. "Evidence which is not relevant is not admissible." ER 402.

Guerrero's allegation that Brazee's actions affected his family and that Guerrero, as a Christian, forgave Brazee, was of no consequence to any issue in this case. This evidence did not make it more probable that Brazee committed any of the charged crimes. It merely informed the jury about how Guerrero dealt with the aftermath of his encounter with Brazee and how that encounter had adversely impacted not only himself but also his family. Evidence is inadmissible when it could do nothing "but distract the attention of the jury from the real inquiry and in no wise enlighten them

as to the guilt or innocence of the appellant." State v. Clem, 49 Wash. 273, 275, 94 P. 1079 (1908).

Evidence showing impact on the victim and victim's family may be permissible in the penalty or sentencing phase of a criminal proceeding. See Gregory, 158 Wn.2d at 850-52 (describing circumstances where victim impact evidence properly admitted in penalty phase of death penalty trial); State v. Cuevas-Diaz, 61 Wn. App. 902, 906, 812 P.2d 883 (1991) (impact on others may justify exceptional sentence). Indeed, at Brazee's sentencing, Guerrero provided testimony that basically repeated what he told the jury in his unresponsive answer. 4RP 8-10.

But such testimony had no place in the guilt phase of Brazee's trial. Washington courts have not addressed this precise issue in any depth, but other jurisdictions soundly condemn the practice of allowing the jury to consider victim impact testimony during the guilt phase of a trial. See, e.g., Clark v. Commonwealth, 833 S.W.2d 793, 796-97 (Ken. 1991) (characterizing victim impact testimony as "sensationalizing tactics which tend to pressure the jury to a verdict on considerations apart from evidence of the defendant's culpability."); Justice v. State, 775 P.2d 1002, 1010-11 (Wyo. 1989) (victim impact testimony during the guilt phase must not be permitted "unless there is a clear justification of relevance."); United States

v. Copple, 24 F.3d 535, 545-46 (3rd Cir. 1994) (principal effect of victim impact testimony "was to highlight the personal tragedy they had suffered as victims of the scheme. The testimony was designed to generate feelings of sympathy for the victims and outrage toward Copple for reasons not relevant to the charges Copple faced.").

As in Justice, the victim's testimony on how it affected him in connection with his life after the crime was "absolutely irrelevant with respect to the issues before the jury." Justice, 775 P.2d at 1010. Guerrero's testimony could not in any way serve to establish any of the elements of the crimes for which Brazee stood accused. Given such abject irrelevancy, "[t]he only purpose must have been to attempt to arouse the passions of the jury." Id.

Because the only effect of Guerrero's testimony could have been to inflame the jury against Brazee, it was also objectionable under ER 403 as unduly prejudicial.<sup>6</sup> Evidence is unfairly prejudicial "if it has the capacity to skew the truth-finding process." State v. Read, 100 Wn. App. 776, 782-83, 998 P.2d 897 (2000). Guerrero's testimony shifted the focus

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<sup>6</sup> ER 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

toward the victim's tragedy and away from the issue of proof beyond a reasonable doubt.

Guerrero's testimony that he forgave Brazee "as a Christian" is also troubling. The testimony portrayed the officer in a sympathetic light. The noble act of bestowing forgiveness on one who has done him and his family wrong constitutes an appeal to juror emotions. Such testimony encouraged the jury to convict Brazee, not on the basis that the State proved every element of the crime beyond a reasonable doubt, but on the basis that Brazee had harmed a good man.

Defense counsel tried to keep Guerrero's improper testimony out, but the trial court allowed the jury to hear it. Once Guerrero finished his answer, at which point its irrelevant and prejudicial nature had been fully revealed, reasonable trial counsel would have objected and requested an appropriate curative measure.

In In re Pers. Restraint of Davis, defense counsel's decision not to object to victim impact testimony was a legitimate trial strategy because "[c]ounsel may not have wanted to risk emphasizing the testimony with an objection." In re Pers. Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

In contrast, counsel's decision not to object after Guerrero finished his answer cannot be characterized as legitimate strategy. Counsel attempted to foreclose Guerrero from giving the unresponsive answer by asking the court to direct Guerrero to answer his question. In so doing, he put the jury on notice that he did not want them to hear this testimony. Counsel unavoidably emphasized the testimony by trying to prevent its admission in front of the jury. The court's ruling that Guerrero would be allowed to finish his answer further emphasized the testimony. See State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984) (trial court lent aura of legitimacy to the state's improper questioning by overruling objection). Under these circumstances, the jury could not be expected to simply forget what Guerrero said. Counsel did not fail to object on the basis that he did not want to emphasize the testimony. The testimony was already emphasized.

In the event this Court determines a curative instruction could have remedied the prejudice resulting from Guerrero's testimony, then counsel was ineffective in failing to request such an instruction. There was no sound reason not to, given the fact that the testimony was already emphasized.

The standard of prejudice for an ineffective assistance of counsel claim is essentially the same for evidentiary error: an error is prejudicial if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001); Thomas, 109 Wn.2d at 226. "A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). "Evidence likely to provoke an emotional response rather than a rational decision is unfairly prejudicial." State v. Johnson, 90 Wn. App. 54, 62, 950 P.2d 981 (1998).

Guerrero's testimony falls squarely within this category. Evidence that Brazee harmed Guerrero's family, and that Guerrero forgave him anyway because he was a Christian, likely provoked an emotional response rather than a rational decision on whether the State provide its case beyond a reasonable doubt.

Evidence of Brazee's guilt for first degree assault was not overwhelming. There was contradictory evidence on whether Brazee pulled the trigger and had the intent to inflict great bodily harm. By appealing to the emotions of the jury, Guerrero's improper testimony may have tipped

the balance in favor of conviction for first degree rather than second degree assault. Reversal of the first degree assault conviction is required.

4. REVERSAL IS REQUIRED BECAUSE A COMBINATION OF ERRORS CUMULATIVELY PRODUCED AN UNFAIR TRIAL.

Every criminal defendant has the constitutional due process right to a fair trial under Article I, section 3 of the Washington Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007); State v. Braun, 82 Wn.2d 157, 166, 509 P.2d 742 (1973). Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); Johnson, 90 Wn. App. at 74. Even where some errors are not properly preserved for appeal, the court retains the discretion to examine them if their cumulative effect denies the defendant a fair trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). In addition, the failure to preserve errors can constitute ineffective assistance of counsel and should be taken into account in determining whether the defendant received an unfair trial. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980).

As set forth above, it was error to allow Guerrero's inflammatory testimony or, alternatively, counsel was ineffective in failing to properly object to that testimony. Additionally, it was error to admit evidence of the stolen vehicle for impeachment purposes or, alternatively, counsel was ineffective in failing to properly object. Even if one of these errors, standing alone, did not affect the outcome of Brazee's trial, there is a reasonable probability their cumulative force influenced deliberations on the assault charge for the reasons set forth in the preceding arguments.

D. CONCLUSION

For the reasons stated, this Court should reverse Brazee's convictions and remand for a new trial.

DATED this 20th day of October, 2008.

Respectfully Submitted,

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Attorney for Appellant

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 36979-6-II
	)	
ALAN BRAZEE,	)	
	)	
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 20<sup>TH</sup> DAY OF OCTOBER 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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**SIGNED** IN SEATTLE WASHINGTON, THIS 20<sup>TH</sup> DAY OF OCTOBER 2008.

x Patrick Mayovsky