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COURT OF APPEALS  
DIVISION II

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COURT OF APPEALS  
STATE OF WASHINGTON  
BY JW  
DEPUTY

NO. 38381-1-II  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON, Respondent

v.

KEVIN M. BREIMON, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
THE HONORABLE DIANE M. WOOLARD  
CLARK COUNTY SUPERIOR COURT CAUSE NO. 08-1-01134-8

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BRIEF OF RESPONDENT

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I. STATEMENT OF THE FACTS

The State accepts the statement of the facts as set forth by the defendant.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the court erred in allowing impeachment of prior inconsistent statements because the complaining witness had acknowledged that she had misled the authorities and therefore further impeachment was not allowed under the rules.

The primary witness that discussed this, Deputy Jeremy Brown, discussed it during re-direct examination. The prosecutor made it clear at that point that the reason the evidence was being requested was for the purposes of showing the victim's statement of mind. (RP 98, L8-9). Prior to that the objections made by the defense concerning hearsay were sustained. The objections did not raise impeachment of prior inconsistent statements. (RP 44, L20-21, "Hearsay"; RP 46, L19-22, "Hearsay"; RP 49, L18-23, "Hearsay").

Case law has indicated that the state of mind and fear of bodily injury are appropriate subjects to discuss with recalcitrant complaining

witnesses in domestic violence situations. As recently indicated in State v.

Magers, 164 Wn.2d 174, 183, 189 P.3d 126 (2008):

Although the Court of Appeals said that the evidence was not admissible to prove “reasonable fear of bodily injury” because “Magers never disputed this element,” this is an incorrect conclusion. Magers, 2006 Wash. App. LEXIS 1967, at 7. We say that because in a criminal case, a not guilty plea puts the burden on the State “to prove every essential element of a crime beyond a reasonable doubt.” State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006) (citing State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996) (quoting State v. Hanna, 123 Wn.2d 704, 710, 871 P.2d 135 (1994))). The State, therefore, bears the burden of proving every element of second degree assault, including the element of assault which is defined as the “reasonable fear of bodily injury.” Consequently, the State properly presented evidence of Ray's “reasonable fear of bodily injury” to prove the element of assault as defined in the jury instructions. Therefore, we conclude that evidence of Magers's prior bad acts, including the acts leading to his arrest for domestic violence and that he had been in trouble for fighting, was properly admitted to demonstrate Ray's “reasonable fear of bodily injury.

-(State v. Magers, 164 Wn.2d 174, 183, 189 P.3d  
126 (2008))

The claim on appeal of improper impeachment was never raised at the trial court level. Thus, the trial court never had an opportunity to rule on it.

A party's failure to object to testimony at trial generally precludes appellate review as to whether that testimony should have been excluded.

State v. Perez-Cervantes, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000) (citing State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)). A party may assign error in the appellate court only on the specific ground given at trial. State v. Koepke, 47 Wn. App. 897, 911, 738 P.2d 295 (1987) (citing State v. Smith, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985)). If a specific objection is overruled and the evidence admitted, the court will not reverse on the basis of a different rule that could have been argued but was not. State v. Ferguson, 100 Wn.2d 131, 138, 667 P.2d 68 (1983) (citing 5 K. Tegland, Wash. Prac., Evidence § 10, at 25 (2d ed. 1982)).

Our defendant may argue different grounds for excluding the evidence if the error is manifest and affects a constitutional right. RAP 2.5(a)(3); State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004) (citing State v. Roberts, 142 Wn.2d 471, 500-01, 14 P.3d 713 (2000)). He has not, however, provided a manifest constitutional error analysis in his brief. Accordingly, the rule mandates decline to review the issue. RAP 10.3(a)(5); Thomas, 150 Wn.2d at 868-69 (citing State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992)).

Generally, a trial court's evidentiary errors are not of constitutional magnitude. Thus, the Appeal court will reverse only if the outcome of the trial would have been different if the error had not occurred. State v. Thach, 126 Wn. App. 297, 311, 106 P.3d 782, *review denied*, 155 Wn.2d

1005 (2005); State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). The Court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)). But an error in admitting evidence does not require reversal unless it prejudices the defendant. Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). The improper admission of evidence is harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. Thieu Lenh Nghiem v. State, 73 Wn. App. 405, 413, 869 P.2d 1086 (1994). Where the error arises from a violation of an evidentiary rule, that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993).

The State submits that there is overwhelming evidence of the assault that took place against the complaining witness. Further, the evidence is clear that the assaults were at the hands of the defendant. The concerns raised by the defendant in the appellate brief were never addressed at the trial court level. Further, the error, if any, does not show prejudice to the defendant. In fact, the inconsistencies of the complaining

witness were exactly what the defense wanted to argue to the jury. That is, that she could not be believed and it is hard to determine which version is true. Was the version that she supplied to the police the correct version, or was the correct version the one that she was giving to the jury? Because of that, the claim is that this created a reasonable doubt. (RP 142-143).

This becomes even more obvious when we examine the basis of the issue in Number 2.

### III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is ineffective assistance of counsel in that he failed to object to questioning of one of the witnesses and failed to object to improper impeachment evidence as it related to the testimony of Amy Harlan.

The response given here by the State dovetails to the response given in the previous response to Assignment of Error No. 1. The defense maintains that there was no potential benefit to the defense from allowing this type of “unnecessarily harmful” evidence coming to the jury and therefore it prejudiced the defendant’s case. (Brief of Appellant, page 11). The State submits that nothing could be further from the truth.

The witness called by the prosecution was Amy Harlan. Ms. Harlan is a victim advocate in the Domestic Violence Prosecution Center.

(RP 93). As part of her duties she had an opportunity to talk to the complaining witness. The complaining witness told her that she was not truthful with the police and that she described how she hurt her finger, which was different than what she told the police. She maintained that she had slammed her finger in a car door and the defendant didn't have anything to do with it. (RP 94-95).

On cross-examination, the defense attorney asked her if she had made a false complaint to the police and she admitted that she had. (RP 95, L19-22). On re-cross, the following question and answer took place:

QUESTION (Defense Attorney): Did she indicate that she [complaining witness] was fearful, might be fearful, because she had lied to the police and prosecutor about him?

ANSWER (Ms. Harlan): I believe she was afraid of that.

-(RP 96, L16-19)

The State submits that rather than being harmful to the defense this in fact was helpful in showing the inconsistencies of the complaining witness and the fact that she could not be believed. As the defense sets forth in the Appellate Brief:

The question for the jury in this case was which version of Johnson's story was more credible: her trial testimony that she lied in order to have Breimon removed from her apartment, or her accusations of Assault and Harassment.

-(Appellate Brief, page 12)

The State agrees that credibility was central to this case. As the defense attorney pointed out in closing argument:

In this case, applying that to this case, what's happened here is the State is trying to manufacture a case. If you will think back, no witness testified that she was assaulted or she was harassed. Nobody said that. She testified she was not assaulted, she was not harassed, and then they bring in the statements she made to the officer to try to get this guy out of her place. They bring those out and then they want you to believe those, but they don't want you to believe her testimony here today.

They're manufacturing a case. There is no real case here. There's not some victim saying, oh, golly I was assaulted, I was harassed, I was scared to death and all that. None of that happened. It's bizarre. They manufactured a case, and they want you to accept that as something that's really a real case. It's not.

-(RP 143, L4-19)

The federal and state constitutions guarantee a defendant the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127

Wn.2d 322, 335, 899 P.2d 1251 (1995). To prevail in an ineffective assistance of counsel claim, the defendant must show that (1) his trial counsel's performance was deficient and (2) this deficiency prejudiced him. Strickland, 466 U.S. at 687. Deficient performance is that which falls below an objective standard of reasonableness. State v. Horton, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). To demonstrate prejudice, the defendant must show that his trial counsel's performance was so inadequate that he was deprived of his right to counsel and that there is a reasonable probability that the trial result would have been different, thereby undermining confidence in the outcome. Strickland, 466 U.S. at 694; In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). If he fails to establish either deficient performance or prejudice, the Appellate Court need not address the other element because an ineffective assistance of counsel claim requires proof of both elements. In re Pers. Restraint of Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

The Appellate Court initially presumes that defense counsel's decisions regarding the manner in which to conduct a trial falls within the wide range of reasonable professional assistance. Pirtle, 136 Wn.2d at 487 (citing Strickland, 466 U.S. at 689). Because a presumption runs in favor of effective representation, the defendant must show that his trial counsel

lacked legitimate strategic or tactical reasons for not objecting to the witness's testimony. See McFarland, 127 Wn.2d at 336.

A decision concerning trial strategy or tactics will not establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994); State v. Hermann, 138 Wn. App. 596, 605, 158 P.3d 96 (2007). "The decision to object is a classic example of trial tactics." State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

The State submits that there has been no showing here of ineffective assistance of counsel. The lack of objection clearly demonstrates that there was a tactical decision being made by the experienced trial attorney. Because of that the defendant cannot show that he did not receive effective representation.

#### IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error raised by the defendant is a claim of cumulative errors depriving him of a fair trial. The State submits that there has not been an accumulation of errors here to constitute use of the cumulative error doctrine. A defendant may be entitled to a new trial when errors cumulatively produced at trial were fundamentally unfair. In re Personal Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835, clarified

by, 123 Wn.2d 737, 870 P.2d 964 (1994) (citing Walker v. Engle, 703 F.2d 959, 963 (6th Cir. 1983)). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. Lord, 123 Wn.2d at 332.

The State submits that the doctrine does not apply in these circumstances.

V. RESPONSE TO ASSIGNMENT OF ERROR NO. 4

The fourth assignment of error raised by the defendant is a claim of clerical error on the face of the Judgment and Sentence (CP 80). The claim is that on the first page of the Judgment and Sentence an improper box had been checked by the court. To determine whether a clerical error exists, the Court uses the same test used to determine clerical error under CR 60(a), the civil rule governing amendment of judgments. State v. Snapp, 119 Wn. App. 614, 626, 82 P.3d 252, review denied, 152 Wn.2d 1028, 101 P.3d 110 (2004).

The State agrees that this matter should be returned to the trial court. The State does not believe that resentencing is necessary, but merely an order correcting the clerical error.

VI. CONCLUSION

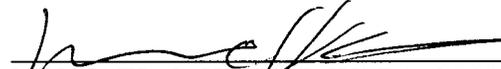
The defendant received a fair trial and the convictions should be affirmed. An order correcting the clerical error should be entered by the trial court.

DATED this 24 day of March, 2009.

Respectfully submitted:

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By:

  
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DECLARATION OF  
TRANSMISSION BY MAILING

STATE OF WASHINGTON )

: ss

COUNTY OF CLARK )

On March 25, 2009, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO: David Ponzoha, Clerk Court of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	Catherine E. Glinski Attorney at Law PO Box 761 Manchester, WA 98353-0761
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DOCUMENTS: Brief of Respondent

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Jennifer Casley  
Date: March 25, 2009.  
Place: Vancouver, Washington.