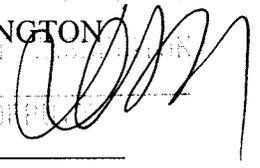


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CLARK COUNTY WASHINGTON

NO. 38422-1-II  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON  
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STATE OF WASHINGTON, Respondent

v.

WILLIAM ROBERT BAILEY, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
THE HONORABLE ROBERT L. HARRIS  
CLARK COUNTY SUPERIOR COURT CAUSE NO. 08-1-00183-1

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BRIEF OF RESPONDENT

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*P.M. 6-26-2009*

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I. STATEMENT OF THE FACTS

The State accepts the statement of facts as set forth by the defendant in the Appellant's brief. Where additional information is necessary, it will be set forth later in this brief. Further, the State believes that many of the issues raised on appeal can be resolved by review of the nature of the defense.

NATURE OF THE DEFENSE

The State charged the defendant by Amended Information (CP 3) with one count of Assault in the Second Degree (Domestic Violence) and one count of Unlawful Imprisonment (Domestic Violence).

The nature of the defense was set out in some detail by the defense attorney in his closing argument when he indicated that the complaining witness was lying about the charges and that she had a motive for making these claims. Part of the final argument by the defense counsel is as follows:

(Mr. Dunkerly, defense attorney):

I hope this is coherent. But we are asking and expect you to do is return a verdict of not guilty in this case. Rachel Bailey is a perjurer. She is an admitted perjurer. She will lie for something for gain or just lie because she can.

To say that the statements that she signed are insignificant is ridiculous. She said under penalty of perjury this is true. She swore to it. You'll have these (indicating).

Then the State gets to introduce these prior state- -- these statements that she made. Now, notice when you're back there, notice the dates, because one -- what she -- what she testified to was she signed the first statement because she was gonna get a truck if she did. And that was on May 6<sup>th</sup>.

She signs another statement on the 23<sup>rd</sup>. That's 17 days later.

So she must have signed it for some other thing or she didn't get the truck, but she still went ahead and signed another one anyway.

So it isn't like something she had time she just did on the spur of the moment, at least the second time, she had time to think about what she did, and she did it again. At least that's what she says, because she says now that these are the ones that aren't true (indicating).

Then she has -- you'll have a statement which is a domestic violence statement. One of them is dated the 22<sup>nd</sup>, the other is a petition for an order of protection. One is dated January 22<sup>nd</sup>, and the other is dated January 23<sup>rd</sup>, the next day.

She comes in, and if you read these statements carefully you will see that her story changes, she can't keep her story straight.

(RP 239, L. 12 – 240, L. 21)

(Mr. Dunkerly, Defense Attorney (Continuing with Closing Arguments)):

And what's even more telling is, I submit to you that if somebody slammed your wrist in a door, you're gonna have some sort of injury to both sides of your wrist. Yet

there's no pictures, no injuries, no claim of any injury, no bruising, no scratch, nothing on the – on the top of her wrist, it's only on the bottom of her wrist.

So I submit that what she says doesn't make sense about having it slammed in the door. And you don't – you don't leave your common sense at home when you come in to be a juror.

Of course, maybe what's really going on is, maybe she doesn't have a good memory, maybe that's what this whole thing's about, maybe she doesn't have a good memory, but that's one of the things you're supposed to consider on credibility is a good memory. Maybe she just – and she doesn't have a good memory because she can't keep track of her lies. She can't – different story, different day.

She has bias or prejudice. She wants a divorce, she wants custody of their child, which they don't have custody of. But she damn well knows that if he's sitting in jail he's not gonna get custody. So it improves her chances of getting custody.

(PR 243, L. 15 – 244, L. 15)

The complaining witness had discussed with the jury some of the problems that she had with the defendant on the evening of their fight.

The defense called in their case Robert Bailey, the father of the defendant who was present during the argument between the defendant and the complaining witness and discussed with the jury the events that triggered this emotional outburst.

Q. (Defense Attorney): Okay. Can you tell us about that argument?

A. (Robert Bailey): Do you want to know why the argument started?

Q. That's fine.

A. Okay, Rachel was doing work crew that week for a previous charge of assaulting Billy, and she obviously had met someone at work crew, and she came home and started arguing with us. She was wanting to leave, saying that she wanted to go back to work crew to finish another day when she didn't have another day to do.

Q. Uh-huh.

A. We figured out that she had met someone, and so an argument just started.

Q. Okay.

A. She was being physical, and –

Q. What do you mean being physical?

A. Well, she likes to yell and scream and usually hitting the wall and hitting Billy. She slapped Billy and things like that.

But at the time she wasn't, she was just hitting the wall and things like that, just being physical.

Q. Uh-huh.

A. And she – the argument got – went outside, and she went to walk down the street, and I told Billy, You need to bring her back in the house, because that's how she got arrested the last time, she was outside screaming her – creaming and yelling.

And so I – I told him that he needed to convince her to come back in the house and settle down.

Q. Uh-huh.

A. He went down – I was out in the front of the house. Actually, I was in front of the neighbor's house. And Billy went – she went down to the corner, which is two houses away.

Q. Could you see them, or see her?

A. Yeah, I was outside, I was just a house away from them.

Q. Okay.

A. And he went up there and grabbed her by the arms and tried to say, Rachel, you need to come in the house. You know, this is how we got in trouble before.

And, you know, we know that – we know that, you know, she –

Q. Was he yelling anything?

A. No.

Q. Okay. Okay. Go ahead.

A. And he was just trying to convince her to come back in the house.

And she stated hitting him, you know, 'cause he was holding her by her arms like this (indicating), saying –

Q. Uh-huh.

A. -- Rachel, you need to come back in the house, so she just started going bam, bam, bam (indicating), hitting him in the face and hitting – hitting him in the chest and all that.

And finally he got her calmed down a little bit and started bringing her back into the house –

Q. Uh-huh.

A. -- and when we got back into the house, she –

Q. Well –

A. I'm sorry.

Q. -- on the way back to the house, was – did he – did he drag her at all, did he knock her down?

A. No.

Q. Did you see him kick her?

A. No.

Q. Did he kick her?

A. No. No, sir.

Q. Okay. Did you ever – did you see him at any point in time bringing her back to the house choke her?

A. No, sir.

Q. Okay, Would you have been in a position to see if he had choked her?

A. Most of the time I was less than 50 feet away.

Q. Okay.

A. Because I was – I was –

Q. Okay, so your – so your answer is yes.

A. Yes, sir.

Q. Okay. All right. So – so they get back to the house. Then what happened?

A. they came back in the house and Rachel calmed down for a little bit. She started screaming again, and I told her go to her room, I just told her, go to your room until you calm down. You can come out and talk about it.

(RP 173, L. 20 – 177 L. 6).

Mr. Bailey also went on to indicate that he observed the complaining witness hitting the walls which caused the injuries (RP 178) and he also indicated to the jury that once the fight was over and she left she left, with a man she had met at the work crew. (RP 179).

Patricia Totten also testified on behalf of the defense. She indicated that she is the defendant's sister (RP 184) and that she had learned about the fight the next day. What she learned about came from the complaining witness and was as follows:

Q. (Defense Attorney): -- that occurred between you and Rachel a few days before that occurred, before this incident?

A. (Patricia Totten): Yes. I had come home and she had told me she hit her wrist, she hit her wrist on the wall and she bursted her blood vessel and her vein right here on her right hand (indicating).

Q. Okay. She told you that?

A. Yes.

Q. And did you see her wrist?

A. Yes, I did.

Q. Was there any visible injury?

A. Yes, there was.

Q. Okay. Did she tell you how that happened?

A. She hit the – she got mad and she hit the wall.

Q. Okay.

A. She was telling me she was being stupid again.  
Because I always tell her not to do that.

Q. Okay. And was anyone else home at that time  
when she told you this?

A. My – everybody was sleeping when I got home.

(RP 185, L. 20 – 186, L. 14).

As part of redirect, the State called Officer David Henderson.

Officer Henderson indicated that the complaining witness had admitted to him that she had slammed her fist into the wall to get the defendant in trouble. (RP 198).

## II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment raised by the defendant is a number of examples of ineffective assistance of counsel claimed by the defendant during the course of the trial. He has broken the examples of ineffective assistance into three categories:

1. Did not object to and challenge hearsay testimony of State's witness Arthur Hooper.
2. Did not object to and challenge inadmissibility of ER404(b) evidence admitted through Mr. Hooper.

3. Did not offer a limiting jury instruction to prevent the jury from considering the 404(b) evidence as evidence of Mr. Bailey's propensity to assault his wife.

In determining whether a defendant received constitutionally sufficient representation, the Appellate Court applies the two-part Strickland test. State v. Tilton, 149 Wn.2d 775, 783-84, 72 P.3d 735 (2003); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, the defendant must show that trial counsel's performance was deficient based on the entire record. Tilton, 149 Wn.2d at 784; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). In making this determination, it is presumed that the defendant received effective representation. Tilton, 149 Wn.2d at 784; State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996). Representation is not deficient if trial counsel's conduct can be characterized as legitimate trial strategy or tactics. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Second, the defendant must show that the deficient performance prejudiced him. Tilton, 149 Wn.2d at 784. This showing is made when there is a reasonable probability that, but for trial counsel's errors, the result of the trial would have been different. Hendrickson, 129 Wn.2d at 78. To establish ineffective assistance of

counsel, the defendant must show both prongs of the test. Hendrickson, 129 Wn.2d at 78.

The first part of the claim is that the State presented inflammatory and inadmissible hearsay through the witness Arthur Hooper, the father of the complaining witness. The claim, as set forth, was based on observations made by Mr. Hooper of his daughter's bruises and other injuries that were related to activities with the defendant. Also, in this area of concern (RP 48 – 49) the witness indicated that they had attempted to confront the defendant and discuss this with him. He also discussed during this section of testimony that they tried to get the daughter into a shelter and that there had been multiple attempts to help her in the relationship between her and the defendant.

The complaining witness in the case also testified. She indicated that her relationship with the defendant (her husband) had been abusive prior to the date in question of January 14, 2008 (RP 53). During cross examination of the complaining witness she acknowledged that she wanted to divorce the defendant and that she had wanted to do so for quite some time. (RP 72). She further indicated that she wanted custody of the child and that she didn't want the defendant to have any custody rights to the child. (RP 73).

During the questioning of the witness Mr. Hooper, the defense attorney did raise objections to some of the areas. For example, the defense attorney objected to statements concerning what the daughter had told the father about the incident in question (RP 42 – 43) some of those objections were sustained and others led to restatement of the questions. Further, the deputy prosecutor attempted to have the witness discuss what the daughter had told him about the incident in question and those objections were sustained by the court. The deputy prosecutor attempted to show these comments to be excited utterances but the court was not buying it. (RP 45 – 46).

Another example of an objection made by the defense attorney was an objection to relevancy on the question of trying to help the daughter out of this relationship. That objection was overruled (RP 48). On cross examination of Mr. Hooper the defense attorney was zeroing in on the fact that the complaining witness had not immediately referred this to police but that there was a delay in reporting any type of inappropriate activity between her and the defendant.(RP 49 – 50).

A trial court's admission of evidence is reviewed for abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). The appellate court will not disturb a trial court's rulings on the admissibility of evidence absent an abuse of the court's discretion. Abuse of discretion

exists “when a trial court’s exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons.” State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Although, it is not a traditional hearsay exception, the court’s have acknowledged that domestic violence situations pose peculiar problems and thus prior history between the parties can become extremely important, especially when the defense is directly attacking the credibility of the complaining witness as was attempted in our case.

State v. Magers, 164 Wn. 2d 174, 189 P.3d 126 (2008), is instructive on these domestic violence issues. As the court stated in that opinion:

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."

## B. Credibility

The State also contends that the Court of Appeals erred when it concluded that the evidence that Magers had been in custody for fighting and that he was arrested for domestic violence was not admissible on the issue of the victim's credibility. The trial court admitted this evidence based on its determination that it was admissible pursuant to ER 404(b) to assist the jury in assessing the victim's credibility. ER 404(b) provides that [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

To justify the admission of prior acts under ER 404(b), there must be a showing that the evidence (1) serves a legitimate purpose, (2) is relevant to prove an element of the crime charged, and (3) the probative value outweighs its prejudicial effect. State v. DeVries, 149 Wn.2d 842, 848-49, 72 P.3d 748 (2003) (citing State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995)). Evidence is relevant if it has a tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401.

The State relies on State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996), to support its contention that evidence of prior acts of violence is admissible, in a criminal case where domestic violence is alleged, in order to assist the jury in assessing the victim's credibility. In Grant, the crime victim changed her story after initially denying that she was assaulted by the defendant. The trial court admitted evidence of the defendant's prior assaults on the victim under ER 609(a). On appeal, Division One of the Court of Appeals held that the evidence was admissible under ER 404(b), reasoning that evidence of prior acts of

violence toward the victim helps the jury assess the credibility of the victim at trial and understand why the victim told conflicting stories.

Magers relied upon a decision of Division Two of the Court of Appeals, Cook, 131 Wn. App. 845, with regard to the admission of evidence under ER 404(b). In Cook, the court indicated that evidence of past acts of violence by the defendant toward the victim is admissible to assess the victim's state of mind only. In Cook, the victim recanted earlier statements to the police that the defendant, the victim's boyfriend, had assaulted her. The trial court admitted evidence of the defendant's past violence toward the victim with a limiting instruction to the jury to consider the evidence introduced to assess the credibility of the victim. On appeal, Division Two agreed with the reasoning of Division One in Grant that a defendant's prior acts of domestic abuse against the alleged victim are admissible under ER 404(b), but only "to [assist the jury in assessing] the victim's state of mind at the time of the inconsistent act," not "for the generalized purpose of assessing the victim's credibility." Cook, 131 Wn. App. at 851. The court explained that instructing the jury to assess the evidence in terms of the victim's credibility would put emphasis on the husband's prior conduct, suggesting that it is more likely that he had a propensity to act violently against the victim. The court went on to say that if the jury is instructed to assess the evidence in terms of the victim's state of mind, the jury would focus on the state of mind rather than the defendant's propensity to abuse the victim. The Court of Appeals' decision here was consistent with the decision in Cook, the court indicating that the evidence of prior domestic violence is admissible only to enable the jury to assess the victim's state of mind, not her credibility.

We agree with the rationale set forth by the court in Grant, at least insofar as evidence of prior domestic violence is concerned. As Karl B. Tegland has observed in his handbook on Washington evidence, "[i]n prosecutions for crimes of domestic violence, the courts have often admitted evidence of the defendant's prior acts of domestic violence

on traditional theories ... . Recently, however, the courts have occasionally been persuaded to admit such evidence on less traditional theories, tied to the characteristics of domestic violence itself.” 5D **Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence** ch. 5, at 234 (2007-08). Tegland discussed the admission of such evidence in his evaluation of Grant:

[T]he defendant was charged with assaulting his wife[.] [T]he defendant's prior assaults against his wife were admissible on the theory that the evidence was “relevant and necessary to assess Ms. Grant's [the victim's] credibility as a witness and accordingly to prove that the charged assault actually occurred.” ... “The jury was entitled to evaluate her credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim.”

Id. at 234-35 (fourth alteration in original) (quoting Grant, 83 Wn. App. at 106, 108). We adopt this rationale and conclude that prior acts of domestic violence, involving the defendant and the crime victim, are admissible in order to assist the jury in judging the credibility of a recanting victim. Here, evidence that Magers had been arrested for domestic violence and fighting and that a no-contact order had been entered following his arrest was relevant to enable the jury to assess the credibility of Ray who gave conflicting statements about Magers's conduct.

(State v. Magers, 164 Wn.2d at 183 – 186).

The state submit’s that the defense attorney did make objections and some of those objections were sustained but others were not. The trial court exercised its discretion in allowing this evidence to come forward because it completed the overall picture of the activities between the

parties. The overall canvas being painted by the defense was a total lack of credibility on the part of the complaining witness as it existed in the timeframe in question. The defense was not disputing that this was a rocky marriage, that divorce was contemplated, and that child custody was extremely important. In fact, they wanted to emphasize that point to the jury. This rocky relationship included attempts to get the complaining witness into a shelter (ostensively for protection).

The defense also complains of the hearsay statements about prior assaults. The example, on page 18 of their brief and found at RP 48, was a question dealing with whether or not he had seen his daughter with injuries prior to this. He responded to that but went on to indicate that these were caused by the defendant. It appears that this would be inappropriate hearsay but was not being requested by the State in the nature of its question. The fact of no objection plays into the overall strategy of the defense to not get the jury off on a tangent concerning other activities when they are focusing primarily on the fact of credibility as it relates to the incident in question.

The defendant claims that the prior assault evidence was offered to show propensity to assault his wife. It appears that this history was extremely limited and was not emphasized by the prosecution or defense. Further, as indicated in the long discussion above, this appears to be

appropriate under 404(b) and is not used for purposes of propensity but is used for one of the other exceptions to those rules.

The defendant also claims that it was ineffective assistance of counsel to not request a limiting instruction concerning the history of domestic violence. Further, that this caused prejudice to the defendant.

A trial court need not give a limiting instruction absent a party's request. State v. Myers, 133 Wn. 2d 26, 36, 941 P. 2d 1102 (1997).

Where a party fails to request a limiting instruction, our courts have consistently held that such a failure can be presumed to be a legitimate tactical decision designed to prevent reemphasis on the damaging evidence. State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000).

This is consistent with State v. Price, 126 Wn. App. 617, 649, 109 P.3d 27 (2005) where Division II indicates:

“we can presume that counsel did not request a limiting instruction regarding the use of ER 404(b) evidence of prior bad acts because “to do so reemphasize this damaging evidence” to the jury. State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d. 942 (2000); State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447, review denied, 121 Wn.2d 1024 (1993).

The State submits that the appellate system has repeatedly held that failure to request a limiting instruction for evidence admitted under ER 404 may be a legitimate tactical decision not to reemphasize damaging

evidence. Giving the defense attorney's decision the exceptional deference required in the circumstances, the appellate courts have concluded that the decision to forgo a limiting instruction can be characterized as legitimate trial tactics. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

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

The second assignment of error raised by the defendant is a claim that the trial court abused its discretion when it allow a detective to vouch for the complaining witnesses credibility.

The area of testimony from Detective Boswell is incorporated in RP 111 – 119. A copy of the Report of Proceedings for those pages is attached as an appendix to this brief and incorporated by this reference.

The State submits that this is not vouching for the credibility of a witness but is testimony concerning what the officer observed and then the nature of the complaint that was being made by the complaining witness. The Officer is not giving an opinion as to truthfulness or credibility of the complaining witness by conducting her investigation.

Improper opinion testimony violates the defendant's constitutional right to a jury trial by invading its fact-finding province. State v. Dolan, 118 Wn. App. 323, 329, 73 P. 3d 1011 (2003).

Washington courts view conservatively claims that testimony constitutes an opinion on guilt. City of Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P. 2d 658 (1993). Testimony that does not directly comment on the defendant's guilt or the veracity of a witness is helpful to the jury and is based on inferences from the evidence is not improper opinion testimony. Heatley, 70 Wn. App. at 578. "The fact that an opinion encompassing ultimate factual issues supports the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt." Heatley, 70 Wn. App. at 579.

In Heatley, Division One considered whether a police officer's testimony that Heatley was "obviously intoxicated" and "could not drive a motor vehicle in a safe manner" constituted an improper comment on the defendant's guilt. 70 Wn. App. at 577. Because the evidence supported the opinion and the testimony did not contain a direct opinion of Heatley's guilt, the court concluded the testimony was not improper. Heatley, 70 Wn. App. at 579 – 80.

Detective Boswell's testimony regarding the investigation and arrest merely described the investigation in general terms and the fact that

she ultimately arrested the defendant. At no point did Boswell comment on whether she personally believed the defendant was guilty or on the credibility of the witnesses. This testimony did not amount to a direct statement that the detective believed the defendant was guilty, nor did it allow the jury to infer that Boswell believed defendant Bailey was guilty. Because Boswell's testimony did not amount to opinion of guilt testimony, defense counsel's failure to object does not establish deficient performance nor does it demonstrate an abuse of discretion by the Trial Court. Cf. State v. Kirkman and Candia, 159 Wn.2d 918,931,936, 155 P.3d 125 (2007).

The State submits that there was no vouching for credibility of a witness by one of the investigating officers.

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

The third assignment of error raised by the defendant is if the court does not believe that this was error by the trial court to allow the testimony from Detective Boswell, clearly it was ineffective assistance of counsel. However, the nature of the questioning of the officer dealt with the statements made by the complaining witness as to where and how she received her injuries. This plays into the overall strategy of the defense

because, as noted at the beginning of this brief, the defense had witnesses that not only observed that none of this assaultive behavior or unlawful imprisonment took place but that the injuries to the complaining witness were self inflicted. Further, they had a witness testify that this was acknowledged and admitted by the complaining witness. In fact, one of those witnesses that indicated this was an investigating officer. The overall strategy raised in this case is one of total lack of credibility on the part of the complaining witness with a strong motivation to fabricate this for the purposes of getting the defendant in trouble.

If she could get him in trouble, she could obtain custody of the child and take him out of the equation. The State submits that this was strong motivation for the complaining witness and raised all of these questions of credibility with the jury. There was no question that she had minor injuries, but the only question was how she got those injuries. Nevertheless, there is nothing in Detective Boswell's testimony that would indicate that this was a personal opinion of guilt.

V. RESPONSE TO ASSIGNMENT OF ERROR NO. 4

The Fourth assignment of error is a claim of cumulative error.

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 defendant has not met his burden or proving that there was an accumulation of errors in this case.

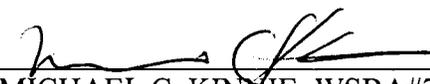
VI. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 24 day of June, 2009.

Respectfully submitted:

ARTHUR D. CURTIS  
Prosecuting Attorney  
Clark County, Washington

By:   
MICHAEL C. KINNE, WSBA#7869  
Senior Deputy Prosecuting Attorney

**APPENDIX "A"**

**Detective Boswell's Testimony (in part)  
(RP 111 – 119)**

1 Q. Okay. And did you have an opportunity to view her  
2 injuries?

3 A. Yes.

4 Q. Did you take any pictures --

5 A. I did.

6 Q. -- of those injuries? (Pause; reviewing  
7 exhibits.) I have what's been marked Plaintiff's  
8 identification 1. Can you identify that picture for  
9 me.

10 A. That is a picture of Rachel's right wrist and arm,  
11 with a scrape, laceration on her -- about the middle of  
12 her forearm.

13 Q. Okay. And did she indicate to you how she  
14 received that scrape?

15 A. Yes. She said this -- this occurred during the  
16 assault. She wasn't exactly sure at what point she  
17 sustained that injury.

18 Q. Okay. And does that picture look the same, if not  
19 similar to it did on that -- the date that you took the  
20 picture?

21 A. Yes.

22 Q. Okay. I have what's been marked Plaintiff's  
23 identification No. --

24 THE COURT: What number was that?

25 MS. BANFIELD: That was 1, Your Honor.

1 THE COURT: Okay.

2 BY MS. BANFIELD: (Continuing)

3 Q. Plaintiff's identification No. 2. What's that a  
4 picture -- well, I'm actually going to hold that aside.

5 Plaintiff's identification No. 3. What's that a  
6 picture of?

7 A. That's a closer picture of Rachel's -- the inside,  
8 if you will, of Rachel's right wrist, showing a  
9 reddened area.

10 Q. Okay. And did she indicate how she had received  
11 that injury?

12 A. Yes, she did.

13 MR. DUNKERLY: Objection, hearsay.

14 MS. BANFIELD: Okay.

15 THE COURT: (Pause.) The question again.

16 MS. BANFIELD: Did -- well, it didn't call for  
17 hearsay yet.

18 BY MS. BANFIELD: (Continuing)

19 Q. But did -- did -- did she indicate --

20 MR. DUNKERLY: But it will.

21 BY MS. BANFIELD: (Continuing)

22 Q. Did she indicate how she received the injury?

23 A. Yes.

24 Q. Okay. And was it a part of the altercation?

25 A. Yes.

1 MR. DUNKERLY: Objection, Your Honor, it's  
2 hearsay.

3 THE COURT: All right, I'll permit that.

4 BY MS. BANFIELD: (Continuing)

5 Q. I have what's been marked Plaintiff's  
6 identification No. 4. What is that a picture of?

7 A. This is a picture of the underside or the inside  
8 of both of her wrists, both of Rachel Bailey's wrists.

9 Q. Uh-huh.

10 A. Just for comparison for the size of her wrists and  
11 the redness of her right wrist.

12 Q. Okay. Now, these pictures, do you notice a  
13 difference in the picture?

14 A. Between her -- the size of her --

15 Q. Yeah.

16 A. -- wrists? (Pause; reviewing exhibits.) It's  
17 not -- the picture's not the best picture. Sometimes  
18 they don't work very well to show, but I notice that  
19 there is more redness, yes, on her --

20 MR. DUNKERLY: I'm gonna object, Your Honor,  
21 to --

22 THE WITNESS: -- right wrist.

23 MR. DUNKERLY: -- any continued explanations of  
24 the photographs until they've been admitted.

25 THE COURT: She may testify as to what she

1 observed.

2 MR. DUNKERLY: Okay.

3 BY MS. BANFIELD: (Continuing)

4 Q. So, what you're saying is that you observed all --  
5 that this picture make- -- is -- is this picture  
6 similar to the day that you took the picture?

7 A. Yes.

8 Q. But did you -- are you saying that you were able  
9 to clearly see a difference at the time that you took  
10 the picture?

11 A. Yes.

12 Q. Okay. I've got what's been marked Plaintiff's  
13 identification No. 10. What is that a picture of?

14 A. That is the right side of Rachel's neck.

15 Q. Okay.

16 A. Just below her ear, to just above her collarbone  
17 (indicating).

18 Q. Okay. And why did you take that picture?

19 A. To document the long red bruise or reddened area  
20 on her neck and just in front of it, towards the front  
21 of her neck, a more circular bruise on her neck  
22 (indicating throughout).

23 Q. Okay, so that's what you were attempting to  
24 document.

25 A. Yes.

1 Q. And you were able to visibly see that the day that  
2 you took the picture?

3 A. Yes.

4 Q. Okay. And I'm showing you what's been marked  
5 Plaintiff's identification No. 9. What is that a  
6 picture of?

7 A. It's the same side of her neck, of Rachel's neck.

8 Q. Uh-huh.

9 A. She was able to pull her sweater down just a  
10 little bit so I could back the picture off and see a  
11 little bit better, but it also shows the redness and  
12 some scratching towards the bottom of the redness on  
13 her neck.

14 Q. Okay. And is that -- is that what you -- what you  
15 were trying to capture with your camera, was that  
16 consistent with what she said occurred?

17 A. Yes.

18 Q. Okay. The injury was consistent with what she had  
19 said occurred?

20 A. Yes.

21 Q. Okay. I have what's been marked -- sorry, I  
22 started going backwards, back and forth. No. 8,  
23 Plaintiff's identification 8. What's that a picture  
24 of?

25 A. That's a picture of a scrape or laceration on

1 Rachel's back.

2 Q. Okay. And does it look the same if not similar as  
3 the day that you took it?

4 A. Yes.

5 Q. And did she indicate that that had happened during  
6 the altercation?

7 A. Yes.

8 Q. I have what's been marked Plaintiff's  
9 identification No. 7. What's that a picture of?

10 A. That's of the same injury but further back so you  
11 can see that the injury is on Rachel's back.

12 Q. Okay.

13 A. It's for identification.

14 Q. Great. So this one is the scratch or laceration,  
15 and --

16 A. Yes.

17 Q. -- Plaintiff's identification 8 and 9 is just a  
18 fuller picture of her back with the laceration?

19 THE COURT: 7?

20 MS. BANFIELD: 7. Sorry. Thank you, Your Honor.

21 THE WITNESS: Yes.

22 MS. BANFIELD: Okay. Thank you.

23 BY MS. BANFIELD: (Continuing)

24 Q. And it looks the same if not similar?

25 A. Yes.

1 Q. I have what's been marked Plaintiff's  
2 identification 6. What's that a picture of?

3 A. That is a picture of Rachel's left shin.

4 Q. Okay. And what were you trying to capture there?

5 A. Three noticeable bruises on the front of her shin.

6 Q. Okay. And did she indicate how she'd received  
7 those bruises?

8 A. She did.

9 MR. DUNKERLY: Objection again, hearsay.

10 THE COURT: She can answer that.

11 BY MS. BANFIELD: (Continuing)

12 Q. I think you did, yeah, your answer was yes?

13 A. Yes.

14 Q. Okay. And that was received during the  
15 altercation?

16 A. Yes.

17 Q. And what's been marked Plaintiff's identification  
18 No. 5. What's that a picture of?

19 A. That is again a more -- a fuller picture, showing  
20 that it's Rachel's leg that in fact I was photographing  
21 and to show the proximity of the bruises.

22 Q. Okay. And that looks the same if not similar to  
23 the day that you took the pictures.

24 A. Yes.

25 Q. Excuse me.

1 MR. DUNKERLY: (Pause; reviewing exhibits.) No,  
2 I'll object for the record to the admission of  
3 these exhibits.

4 THE COURT: Excuse me?

5 MR. DUNKERLY: Huh? Sufficiency of foundation.

6 THE COURT: Okay, we have, what, 3, 4, 5, 6, 7, 8  
7 and 9 and 10?

8 THE CLERK: There's 1 and 2.

9 THE COURT: Huh?

10 THE CLERK: We have 1 and 2.

11 MR. DUNKERLY: 1 and 2.

12 THE COURT: Oh, and 1 and 2, that's right.  
13 They'll be admitted.

14 MS. BANFIELD: Thank you. May I publish them to  
15 the jury?

16 THE COURT: You may.

17 MS. BANFIELD: (Publishing exhibits.)

18 BY MS. BANFIELD: (Continuing)

19 Q. And all of these injuries that you tried to  
20 capture, did the -- were -- was -- were they consistent  
21 with the -- what Ms. Bailey had explained happened?

22 MR. DUNKERLY: Objection, sufficiency of  
23 foundation.

24 THE COURT: Excuse me?

25 MR. DUNKERLY: Sufficiency of the foundation.

1 This requires some sort of expertise that the  
2 officer may be lacking.

3 THE COURT: You may answer.

4 THE WITNESS: Yes, they were consistent with what  
5 she reported.

6 BY MS. BANFIELD: (Continuing)

7 Q. You've had the benefit of hearing that there were  
8 some discrepancy with the time line here. Do the  
9 injuries -- do -- and do the injuries reflect a --  
10 something that transpired around the time on or about  
11 the time that was reported?

12 A. Yes.

13 MR. DUNKERLY: Objection, Your Honor, sufficiency  
14 of foundation.

15 THE COURT: I'll sustain that question.

16 MR. DUNKERLY: Okay. I'd move to strike and ask  
17 the jury be instructed to disregard.

18 THE COURT: There was no answer.

19 MR. DUNKERLY: Huh?

20 THE COURT: There was no answer.

21 MR. DUNKERLY: Oh, there was no answer, okay. I  
22 thought there was.

23 BY MS. BANFIELD: (Continuing)

24 Q. Did Ms. Bailey explain to you why she believed  
25 that she knew what time -- how much -- the time had

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 BY [Signature]

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

STATE OF WASHINGTON,  
 Respondent,

No. 38422-1-II

v.

Clark Co. No. 08-1-00183-1

WILLIAM ROBERT BAILEY,  
 Appellant.

DECLARATION OF  
 TRANSMISSION BY MAILING

STATE OF WASHINGTON )  
 ) : ss  
 COUNTY OF CLARK )

On June 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	LISA TABBUT ATTORNEY AT LAW PO BOX 1396 LONGVIEW WA 98632
	WILLIAM BAILEY 13933 CENTER STREET PORTLAND OR 97236	

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 L. Jackson  
 Date: 6/25, 2009.  
 Place: Vancouver, Washington.

# PHOTOCOPY SERVICE REQUEST

Separate Form Must Accompany EACH Request

Date: July 1, 2009

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Case No: **384221** (no hyphens)

Case Name: **State v William Robert Bailey**

Indigent Defense? Yes  No

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COURT OF APPEALS  
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)  
Respondent, )  
)  
v. )  
William Robert Bailey )  
(your name) )  
)  
Appellant. )

No. 38422-1-II

STATEMENT OF ADDITIONAL  
GROUNDS FOR REVIEW

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
MAY 16 PM 2:55  
BY REPORT

I, William R. Bailey, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

The jury asked if they could convict me of a lesser charge, like Assault 4, but was instructed that this was not an option and that they had to convict me of Assault 2 or nothing.

Additional Ground 2

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If there are additional grounds, a brief summary is attached to this statement.

Date: 5-10-09

Signature: William Bailey

New Address: 3609 SE 42<sup>nd</sup> Ave #17  
Portland, OR 97206  
503-847-1450