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Court of Appeals
Division III
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35765-1-III

STATE OF WASHINGTON, Respondent,

v.

MANUEL R. GUZMAN, Appellant.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

AUTHORITIES CITED.....ii

I. ARGUMENT.....1

1. The argument that Officer Nunez should not have been allowed to testify concerning Esfeidy Guzman’s prior statements when she asserted a lack of recollection at trial was thoroughly litigated below and is not raised for the first time on appeal1

2. The authorities relied upon by the State are inapplicable, not binding, and fail to support the State’s argument2

II. CONCLUSION.....5

CERTIFICATE OF SERVICE7

AUTHORITIES CITED

State Cases

State v. Bobach, 68 Wn. App. 438, 842 P.2d 1053 (1993).....4

State v. Cohen, 179 Wn. App. 1038, ___ P.3d ___, 2014 WL 749030 (2014).....2, 3

State v. Jones, 144 Wn. App. 284, 183 P.3d 307 (2008).....4

State v. Lavaris, 106 Wn.2d 340, 721 P.2d 515 (1988).....2

State v. Newbern, 95 Wn. App. 277, 975 P.2d 1041 (1999).....4

Court Rules

ER 613.....1

ER 801.....1

RAP 2.5.....2

Other Sources

Teglund, Karl, 5A Wash. Prac. § 613.4 (2018)4

Teglund, Karl, 5A Wash. Prac. § 613.6 (2018).....4

Teglund, Karl, 5A Wash. Prac. § 613.11 (2018).....5

V. ARGUMENT

1. The argument that Officer Nunez should not have been allowed to testify concerning Esfeidy Guzman's prior statements when she asserted a lack of recollection at trial was thoroughly litigated below and is not raised for the first time on appeal.

The State contends that Guzman challenges the impeachment of Esfeidy Guzman for the first time on appeal. *Respondent's Brief* at 14-15. This contention is flatly incorrect. After Esfeidy Guzman testified, the court went into recess and defense counsel informed the court,

If we may. This might be something, since we're researching, that I am anticipating some questions may be asked of Officer Nunez as far as trying to get in prior inconsistent statements. I would just argue that the hearsay exception does not apply. She did not make an inconsistent statement. She said she didn't recall.

RP (Pelletier) 80-81. Thereafter, the State argued the same provisions of the Washington Practice series that it points to here on appeal. RP (Pelletier) 83-84; *Respondent's Brief* at 18-19. The parties then argued about how ER 613 and ER 801(d)(1) interacted concerning the use of Esfeidy Guzman's prior statements, and defense counsel reiterated that her lack of recollection was not an inconsistent statement under ER 801, and ER 613 applied to the State's examination of Esfeidy Guzman, not Officer Nunez. RP (Pelletier) 85-86.

As the record shows, whether Esfeidy Guzman's testimony that she lacked recollection of the events in question could be impeached with earlier unsworn statements about the events in question was raised, argued, and decided before the trial court. RAP 2.5 is, therefore, inapplicable. The State argues that Guzman may not raise for the first time on appeal whether it violated the rules of evidence and *State v. Lavaris*, 106 Wn.2d 340, 721 P.2d 515 (1988) by calling Esfeidy Guzman for the primary purpose of impeaching her with her prior unsworn statement, but Guzman has not asserted this argument on appeal. *Respondent's Brief* at 15; *Appellant's Brief* at 2 (Assignments of Error). To the contrary, Guzman challenges the admission of Officer Nunez's testimony about Esfeidy Guzman's prior statement – exactly the issue that was addressed below. Accordingly, the State's argument that the court should decline to review the error is specious.

2. The authorities relied upon by the State are inapplicable, not binding, and fail to support the State's argument.

On the substance of the arguments, the State's primary argument for affirmance is its reliance on a distinguishable unpublished case, *State v. Cohen*, 179 Wn. App. 1038, ___ P.3d ___, 2014 WL 749030 (2014). *Respondent's Brief* at 16-17. But in *Cohen*, the witness testified that after

she got drunk, she remembered being in her bed and throwing a candleholder at a man who was leaving her bedroom, making eye contact with a man she thought was the defendant when she left the bedroom, and begging her neighbor to call the police while two men stood outside her door. *Id.* at *1. Although she denied recollection of statements she made to police, she described her injuries and conceded that somebody strangled her. *Id.* at *2. Thus, in *Cohen*, the witness provided sufficient testimony to establish that she had been the victim of a crime; she simply failed to identify the perpetrator.

In the present case, by contrast, Esfeidy Guzman did not testify to any facts that would have established a crime against anyone. Moreover, the issue in *Cohen* was whether the State committed misconduct in calling the witness for the primary purpose of impeaching her and whether trial counsel was ineffective for failing to object. 2014 WL 749030, at *4-5. Because the prior statements in *Cohen* could have been admitted under other exceptions to the hearsay rule, and because the defendant's trial strategy was supported by allowing the witness to testify, the *Cohen* court concluded no error had occurred. *Id.* These conclusions are inapplicable to the present case because Guzman does not challenge the State's decision to call Esfeidy Guzman as a witness, only the admission of inadmissible and damaging hearsay through Officer Nunez.

Notably, however, while the State relies extensively on the Washington Practice series, its reliance is quite selective. For example, the State does not acknowledge Teglund, Karl, 5A Wash. Prac. § 613.4 (2018), which states:

Occasionally counsel has a potentially damaging statement at hand, but the witness has not yet given any testimony that is contrary to the statement. In this situation, the courts do not allow counsel to ask the witness whether the witness made the prior statement and then, upon denial, to introduce the statement into evidence under the guise of impeachment. The statement is objectionable as hearsay and inadmissible unless it is within some exception to the hearsay rule.

This is, of course, precisely how the State proceeded in its examination of Esfeidy Guzman.¹ See RP (Pelletier) 76-79. Further, the State fails to point out that § 613.6 applies only “if the witness testifies at trial about an event but claims to have no knowledge of a material detail, or no recollection of it.” Teglund, Karl, 5A Wash. Prac. § 613.6 (2018). The example cited therein of *State v. Newbern*, 95 Wn. App. 277, 975 P.2d

¹ However, Guzman did not object to this manner of proceeding below and it is not argued as grounds for relief on appeal. It is pointed out solely to discount the State’s reliance on *State v. Bobach*, 68 Wn. App. 438, 842 P.2d 1053 (1993), because the State needed not be prepared to prove the substance of Esfeidy Guzman’s statements had it not improperly confronted her with them in the first place. *Respondent’s Brief* at 21. Further, because Guzman opposed the admission of Nunez’s testimony, any error predicated upon the State’s failure to present the testimony would have been invited. See, e.g., *State v. Jones*, 144 Wn. App. 284, 298, 183 P.3d 307 (2008) (appellate court may decline to review a claim of error if the appellant induced the trial court to make the error).

1041, *review denied*, 138 Wn.2d 1018 (1999), involves a case where the witness testified about a shooting by stating it was an accident, but denied recollection of prior statements to police. Here, by contrast, Esfeidy Guzman did not testify “about an event,” she denied recollection of the events alleged by the State due to sickness, the influence of medication, and lack of sleep. RP (Pelletier) at 73-74, 76, 78, 79. The case is thus entirely unlike *Newbern*, where the witness offered substantive evidence concerning the alleged crime.

The State also proffers a quotation from § 613.11 of the Washington Practice series to the effect that a witness’s denial of recollection of making a statement will be treated as a denial. *Respondent’s Brief* at 21. The quotation does not appear in the current cited section of the series and its provenance is unknown. *See* Teglund, Karl, 5A Wash. Prac. § 613.11 (2018).

For the foregoing reasons, the explanations offered by the State concerning the admission of Officer Nunez’s testimony and the State’s use of it in closing argument fail. Because the prior statements were inadmissible for impeachment when she gave no meaningful substantive testimony, and because the State’s repeated reliance on those statements to

in flame the jury was improper, the judgment of conviction should be reversed.

II. CONCLUSION

For the foregoing reasons, Manuel Guzman respectfully requests that the court REVERSE his conviction for fourth degree assault and REMAND the case for a new trial.

RESPECTFULLY SUBMITTED this 26 day of December, 2018.

TWO ARROWS, PLLC

A handwritten signature in black ink, appearing to read "Andrea Burkhart", written over a horizontal line.

ANDREA BURKHART, WSBA #38519
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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Reply Brief upon the following parties in interest, pursuant to prior agreement of the parties, by e-mailing a copy to:

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A handwritten signature in black ink, appearing to read "Andrea Burkhart", written over a horizontal line.

Andrea Burkhart
Signed this 26 day of December, 2018, at
Kennewick, WA

BURKHART & BURKHART, PLLC

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