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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35765-1-III

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STATE OF WASHINGTON, Respondent,

v.

MANUEL R. GUZMAN, Appellant.

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**APPELLANT'S BRIEF**

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## I. INTRODUCTION

When Esfeidy Guzman declined to cooperate with the State's prosecution of her husband Manuel<sup>1</sup> for domestic violence assault, the State obtained a material witness warrant to compel her testimony knowing, based upon a defense interview, that she would probably disavow or deny prior statements she made about the events in question and anticipating that it would call her to impeach her with those statements. When Esfeidy testified, she denied any recollection of the events in question or her prior statements. Nevertheless, over defense objection, the trial court allowed the State to introduce the prior statements, which were highly inflammatory, to impeach her.

Acknowledging that her prior statements could not be considered as substantive evidence, the State nevertheless repeatedly emphasized those statements in its closing argument, without objection, to argue that the fact that she made them was circumstantial evidence that a more serious assault had probably occurred. This argument constituted a flagrant and ill-intentioned opinion as to Manuel's guilt. Both the improper admission of the prior statements, and the State's improper

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<sup>1</sup> Because Esfeidy Guzman and Manuel Guzman share a last name, they shall be referred to by their first names in this brief to avoid confusion. No disrespect is intended.

highlighting and use of those statements in argument, likely affected the verdict and require a new trial.

## **II. ASSIGNMENTS OF ERROR**

**ASSIGNMENT OF ERROR NO. 1:** The trial court erred in admitting Esfeidy's out-of-court statements to police to impeach her when she offered no substantive testimony, such that her credibility was not a fact of consequence in the case.

**ASSIGNMENT OF ERROR NO. 2:** The prosecuting attorney committed flagrant and ill-intentioned misconduct by opining that Manuel was guilty because the fact and nature of Esfeidy's prior statements, which were admitted only for impeachment, indicated a more serious assault had probably occurred.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**ISSUE NO. 1:** Whether Esfeidy Guzman's testimony that she lacked all recollection of the night in question and her alleged statements to police was impeachable with her prior statement when she offered no substantive evidence of import to the State's case or any defense.

**ISSUE NO. 2:** Whether it was a reasonable inference from the evidence for the prosecuting attorney to suggest that the substance of Esfeidy

Guzman's prior statements, which were only admitted for impeachment, suggested that something more serious had occurred than she admitted at trial?

#### **IV. STATEMENT OF THE CASE**

Manuel and Esfeidy Guzman are married, in their early twenties, with a four-year-old child at the time in question. RP (Pelletier)<sup>2</sup> 72-73, CP 1. They lived with Esfeidy's parents in a shared home. RP (Pelletier) 56-57. On the night of August 26, Manuel and Esfeidy got into an argument. RP (Pelletier) 59, 67, 90-91. According to Micaela Hernandez, Esfeidy's mother, she was awakened in the night by the child and told that Manuel and Esfeidy were arguing, so she got up and went to their room. RP (Pelletier) 59. Through the slightly opened door, she saw Manuel slap Esfeidy one time. RP (Pelletier) 59-60. She went inside and asked Manuel why he was hitting Esfeidy, and he took her by the shoulders and led her back out of the room. RP (Pelletier) 61. This did not hurt or injure her in any way. RP (Pelletier) 64. Hernandez then went back to bed. RP (Pelletier) 62.

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<sup>2</sup> The Verbatim Reports of Proceeding in this case consist of three volumes, non-consecutively paginated, prepared by certified court reporters Joseph D. King (3.5 hearing), Cheryl A. Pelletier (2 days of trial proceedings), and Katie DeVoir (sentencing). To distinguish the volumes, the brief will cite to the authoring reporter parenthetically and then to the appropriate page number, as RP (Reporter) \_\_.

At about 5:00 a.m., a police officer was called out to the hospital, where he spoke with Esfeidy. RP (Pelletier) 91. He then went to the house to arrest Manuel. RP (Pelletier) 91. When he told Manuel that Esfeidy said he had assaulted her, Manuel said that they had argued over some potatoes she had cooked and that he held her down. RP (Pelletier) 94-95. Based upon the investigation, the State charged Manuel with one count each of assault in the second, third, and fourth degrees, and felony harassment, all carrying domestic violence designations. CP 9-10.

Well before trial, the State became aware that Esfeidy did not want the prosecution to proceed. RP (King) 20. By the time of trial, the State knew that Esfeidy had recanted her prior statements to police and denied that Manuel had assaulted her. RP (Pelletier) 8. At the State's request, the court issued material witness warrants for Esfeidy and her parents to compel their testimony. RP (Pelletier) 36.

Before trial commenced, Manuel moved to exclude photographs that allegedly depicted prior injuries he had inflicted on Esfeidy, citing ER 404(b). RP (Pelletier) 40. The court granted the motion. RP (Pelletier) 43. During the argument on the motion, the State advised that it would be necessary to impeach Esfeidy's credibility. RP (Pelletier) 41. It acknowledged that based upon how she responded in a pretrial defense

interview, Esfeidy was anticipated to testify that the police officer who responded to the hospital badgered her into making statements implicating her husband. RP (Pelletier) 42-43.

When the State called Esfeidy at trial, she reported that she had been very sick and was taking medication on August 26. RP (Pelletier) 73-74. Because of that, she denied remembering what happened that night or what she told the officer. RP (Pelletier) 73, 79. The State then asked her if she recalled making several statements to the police, including that twice Manuel grabbed her around the neck and squeezed until she couldn't breathe, and that he said he would kill her parents and make her watch. RP (Pelletier) 78. Manuel's objection that the questions were argumentative and asked and answered was overruled, and Esfeidy responded that she did not remember making the statements. RP (Pelletier) 78.

Subsequently, outside the presence of the jury, the parties discussed whether the responding officer should be allowed to testify about what Esfeidy told him at the hospital. Again, the State argued that the prior statements were inconsistent with her claim at trial to lack memory of the events in question and should be admitted to impeach her credibility. RP (Pelletier) 84. As such, the State acknowledged that the

statements were not admissible as substantive evidence. RP (Pelletier) 85. The defense objected, arguing that her lack of memory was not an inconsistent statement. RP (Pelletier) 86. Finding that Esfeidy's lack of memory was not genuine, the trial court admitted the prior statements for impeachment, on condition that a limiting instruction be given. RP (Pelletier) 87-88.

Thereafter, the responding officer testified that Esfeidy told him Manuel had punched her in the thigh, poked her repeatedly, and slapped her. When her mother came into the room, he became angry because she had seen him hit Esfeidy, so then he choked her twice, threatened to kill her parents and make her watch, and spanked their child. RP (Pelletier) 98. At the defense request, the court gave a limiting instruction after this testimony, stating:

Ladies and gentlemen of the jury, if I could have your attention for a moment. There have been questions asked of this witness regarding what a previous witness had told him regarding what had occurred that night. This testimony is being allowed for the limited purpose of impeaching the previous witness' testimony. It's not to be considered by you as substantive evidence. In other words, not to be considered by you as proof of the matter being asserted in these actual statements, but rather solely for the purpose of you evaluating the credibility of the previous witness. Thank you.

RP (Pelletier) 100. The officer also testified that when he arrested Manuel, he told him Esfeidy had reported that he assaulted her and Manuel responded, “Uh, I held her down.” RP (Pelletier) 94.

At the conclusion of its case, the State conceded that it had insufficient evidence to proceed on felony assault and harassment charges and requested instructions on two counts of fourth degree assault, one pertaining to Esfeidy and one to Hernandez. RP (Pelletier) 115. In its closing argument, the State argued that Esfeidy was not a credible witness, and that her prior statements could only be considered to evaluate her truthfulness. RP (Pelletier) 143. However, it argued that circumstantial evidence supported the idea that something more serious happened than what the testimony reflected because of the fact that she had gone to the ER and had reported something more serious to the police, thereby asking the jury to infer the truth of her prior statements. RP (Pelletier) 145. In its closing and rebuttal, it repeatedly drew attention to the substance Esfeidy’s prior statements by stating multiple times that the jury was not being asked to decide if Manuel put his hands around Esfeidy’s neck and strangled her. RP (Pelletier) 145, 161.

The jury convicted Manuel of fourth degree domestic violence assault against Esfeidy and acquitted him of fourth degree assault against

Hernandez. RP (Pelletier) 166, CP 37-39. The trial court sentenced him to 364 days in jail with 304 suspended for five years and placed him on supervision for 24 months. CP 46, 47, RP (Devoir) 10. Manuel now appeals, and has been found indigent for that purpose. CP 55, 57.

## **V. ARGUMENT**

1. Because Esfeidy Guzman's credibility was not of consequence in light of her total lack of memory of the events in question, it was error for the trial court to admit her out-of-court statement to impeach her credibility.

It is long established that a prosecutor may not call a witness for the sole purpose of impeaching that witness with testimony that would otherwise be inadmissible. *State v. Lavaris*, 106 Wn.2d 340, 345, 721 P.2d 515 (1986). Yet, that is precisely what happened here, where the State had advance notice that Esfeidy had recanted and repudiated her prior statement and still called her as a witness for the sole purpose of impeaching her with the prior statement. The State knew as early as six weeks before trial that Esfeidy was not cooperating and further knew the morning of trial that Esfeidy would not testify consistent with her prior statement and intended to impeach her credibility. RP King 20; RP (Pelletier) 41-43.

Although the State may impeach its own witness under ER 607, it may only do so under limited circumstances. When, for example, the witness gives other testimony that is essential and helpful to the State, impeachment of some discrepancies is not improper because the primary purpose of calling the witness is not impeachment. *Lavaris*, 106 Wn.2d at 346-47.

This exception does not apply here. Esfeidy testified repeatedly that she did not remember the events of the evening or her prior statements to police. She provided no particularly helpful testimony supporting the State's case. RP (Pelletier) 72-79. Moreover, the State already knew from a pretrial interview that Esfeidy had repudiated her prior statement and stated she had been badgered into the accusations by the responding officer, and thus had no basis to believe she would offer any testimony helpful to the case. RP (Pelletier) 82.

Particularly instructive in these circumstances is *State v. Allen S.*, 98 Wn. App. 452, 989 P.2d 1222 (1999), *review denied*, 140 Wn.2d 1022 (2000), where the court squarely asked "whether a party may impeach a person who claims at trial not to remember anything relevant to the case" and answered in the negative. *Id.* at 453. In that case, just as in this case, a witness denied any recollection of making statements to law

enforcement and the State impeached him with the prior statements to law enforcement. *Id.* at 455, 457-58.

In reaching its conclusion that the impeachment was improper, the *Allen S.* court analyzed extensively who can impeach, who can be impeached, and how impeachment can be accomplished. *Id.* at 459. Recognizing that ER 607 abrogated common law limitations on a party's ability to impeach its own witness, the *Allen S.* court observed that which party can impeach a witness presents a different question than whether a witness may be impeached – a question associated with relevance. *Id.* at 459. Thus, where a witness's credibility is not a fact of consequence to the action, impeachment is not permitted. *Id.*

The *Allen S.* court then reviewed a number of cases in which witnesses testified they could not remember anything, and impeachment was held to be improper because the witnesses had not given injurious testimony about any fact damaging to the State's case that would call for impeachment. *Id.* at 460-62. Accordingly, the *Allen S.* court concluded that a person may be impeached only if her credibility is a fact of consequence in the action, and a person's credibility is not a fact of consequence when she fails to say anything pertinent to the case. *Id.* at 464. It expressly addressed witnesses who claim a total lack of memory

and stated that under such circumstances, “a prior statement by the witness is inadmissible regardless of whether the lapse of memory is genuine because . . . there is simply no testimony to impeach.” *Id.* at 465.

This is precisely the circumstance here. Esfeidy repeatedly testified that she did not remember anything on the night in question due to her sickness. She provided no affirmative testimony helpful to the State that rendered her credibility relevant. “[W]hen the credibility of the person being impeached is not a fact of consequence to the action, the impeaching party’s purpose cannot be impeachment and its ‘primary purpose’ – indeed, its only purpose – is to admit the evidence for substantive use.” *Id.* at 465. This use is improper.

The effect of the error was to introduce irrelevant, inadmissible, and highly inflammatory accusations that the State subsequently emphasized to the jury repeatedly and asked them to consider as proof that “something had happened more than what she was willing to testify here when she was on the witness stand yesterday.” RP (Pelletier) 145. This consequence will be found prejudicial and deserving of a new trial if, within reasonable probability, the outcome of the trial would have been materially affected if the error had not occurred. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Only when the improperly

admitted evidence “is of minor significance in reference to the overall, overwhelming evidence as a whole” will the error be considered harmless.

*Id.*

The error certainly had an effect here. The only other testimony of any potentially illegal behavior was insignificant and underwhelming by comparison. Part of the evidence came from Hernandez, who said only that she saw Manuel slap Esfeidy a single time during an argument. RP (Pelletier) 59. She offered no testimony as to whether Esfeidy appeared hurt or offended, no information about whether the slap was hard or soft, and no context about Esfeidy and Manuel’s marriage that would allow the jury to evaluate the amount of physical contact that they consented to with each other. The other portion came from Manuel’s statement to police, when he responded to the accusation that he assaulted Esfeidy by saying “Uh, I held her down.” RP (Pelletier) 94. This ambiguous admission of *de minimus* physical contact is hardly overwhelming evidence of a harmful and offensive assault.

Moreover, the State drew attention to the substance of the prior statements no less than six times in its closing and rebuttal arguments. RP (Pelletier) 143-44, 147, 161. There was no purpose for this behavior but to remind the jury of the substance of the statements so that it could

continue to argue that something more serious happened than a mere slap warranting conviction. It is very likely, then, that the State obtained the exact outcome it aimed for – a verdict based not upon the strength of its substantive evidence, but based on passion and outrage in light of the prior accusations.

Because the prior testimony was not admissible for impeachment, the trial court erred in admitting it. The error likely affected the jury's verdict, and a new trial is required.

2. The prosecuting attorney committed flagrant and ill-intentioned misconduct in closing argument by offering an opinion as to guilt and inviting the jury to draw impermissible inferences from the evidence.

In reviewing claims of prosecutorial discretion, the reviewing court considers the prosecutor's remarks in "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). "A defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt." *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996), *review denied*, 131 Wn.2d 1018 (1997).

Although the defendant bears the burden of showing that a prosecuting attorney's arguments are both improper and prejudicial, the primary question is always whether such a feeling of prejudice has been engendered in the minds of the jury as to deny the defendant a fair trial. *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010); *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). In considering whether reversal is required, the question is not whether there is sufficient evidence to sustain the verdict, but whether the comments inappropriately appealed to the jury's passion and prejudice and encouraged a verdict based upon improper argument. *In re Glasmann*, 175 Wn.2d 696, 710-11, 286 P.3d 673 (2012).

Failure to object to the misconduct at the time of trial waives the issue, unless the misconduct is so flagrant and ill-intentioned that it could not be cured by an appropriate instruction. *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). Employing arguments that have been deemed improper in prior published opinions can be deemed flagrant and ill-intentioned. *Fleming*, 83 Wn. App. at 214.

Because a prosecutor's argument carries significant persuasive force with the jury, prosecutors may not express personal opinions as to the defendant's guilt. *Glasmann*, 175 Wn.2d at 706-07. Furthermore, it is

improper to ask a jury to consider matters not in evidence, or employ arguments calculated to inflame the passions or prejudices of the jury. *Id.* at 704, 705. In *Glasmann*, the State's use of an unflattering booking photo of the defendant with the words "GUILTY, GUILTY, GUILTY" superimposed over his face in its closing argument was held to be an impermissible opinion on guilt as well as the injection of unadmitted evidence into the jury's consideration, and constituted flagrant and ill-intentioned misconduct that likely affected the jury verdict. *Id.* at 707-08.

In considering whether a prosecutor's statements constitute an impermissible opinion, courts evaluate whether it is clear that counsel is not arguing an inference from the evidence. *In re Lui*, 188 Wn.2d 525, 561, 397 P.3d 90 (2017). Here, the prosecutor repeated the substance of Esfeidy's prior statements twice, even though the substance of the statements was not admissible, and then asked the jury to infer that the fact that she said such things meant that something more serious had occurred than what the jury had heard from her. RP (Pelletier) at 144-45. It also told the jury that the only way an assault had not occurred was if Esfeidy made the statement "totally out of the blue." RP (Pelletier) at 147. This is not arguing an inference from the evidence, it is asking the jury to consider what was not admitted – the substance of the statements – to conclude that Manuel was probably guilty. It is also misstating the burden

of proof as to whether an assault occurred; in fact, an assault had not occurred if the jury had a reasonable doubt as to whether any of Manuel's contact with Esfeidy was offensive or harmful. *See, e.g., State v. Barrow*, 60 Wn. App. 869, 875-76, 809 P.2d 209, *review denied*, 118 Wn.2d 1007 (1991).

The prosecutor was well aware that the substance of the statements was not a proper subject for the jury's consideration, but nevertheless chose to disregard that limitation and urge the jury to infer that no person would say such things unless they were truthful. It also highlighted the substance of the statements repeatedly, for no purpose except to remind the jury of their inflammatory content:

And, yes, her prior statements indicating that he did grab her by the neck and assaulted her in a more serious manner, that's not substantive evidence of anything; but it's not necessarily for you to find that he grabbed her by the neck or stopped her from breathing, or assaulted her in a more serious manner.

...

Ms. Bennett talks about the fact that the things Esfeidy said to the officer, that they're not to be considered as substantive evidence. And yes, that's certainly relevant and certainly significant. If the defendant were being charged with putting his arm -- putting his hands around the victim's neck and strangling Esfeidy, yes, then it would be certainly relevant. The things she said previously out of court are not things to be considered as evidence. But that's not what you're being asked to decide. You're not being asked to

decide whether he put his hands around her neck and prevented her from breathing. That's not what you're being asked to decide.

RP 144, 161. The result was to inflame the jury with repeated reminders of what Esfeidy had said, while disingenuously disavowing the importance of the statements.

Under these circumstances, the prosecuting attorney's arguments amounted to an improper opinion as to guilt rather than a reasonable inference from the evidence. Moreover, the misconduct was pervasive and inflammatory, serving only to ring the bell repeatedly under the false pretense that the State was not really asking the jury to answer the door. There was no other purpose for the conduct but to hammer home to the jury that Manuel was probably guilty because of what Esfeidy had said to police, when the jury was not permitted to draw that inference under the law. As in *Glasmann*, this can only be inferred to have infected the jury and tainted its verdict. Accordingly, a new trial is required.

**VI. 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 10 day of August, 2018.

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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 Brief upon the following parties in interest, pursuant to prior agreement of the parties, by e-mailing a copy to:

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