

FILED
Court of Appeals
Division III
State of Washington
11/26/2018 3:13 PM

35765-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

MANUEL R. GUZMAN, Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:
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I. COUNTERSTATEMENT OF ISSUES

- (1) May a claim that a witness was called primarily for impeachment be raised for the first time on appeal?
- (2) Is a witness called primarily for impeachment where she is the alleged victim of the crime and gives substantive testimony of events before, during and after the crime?
- (3) May the testimony of a witness be impeached with prior inconsistent statements?
- (4) May a prosecutor ask a jury to draw reasonable inference from the evidence, including evaluating the credibility of witnesses?
- (5) Where no objection is made to a prosecutor's closing argument, is the issue waived unless the comment was so flagrant and ill-intentioned that it could not have been cured by an instruction?

II. COUNTERSTATEMENT OF THE CASE

Manuel R. Guzman is appealing from his jury trial conviction for Assault in the Fourth Degree (Domestic Violence). (CP 57). Judgment and Sentence was entered on December 19, 2017. (CP 43-52).

The victim in the count for which he was convicted was his wife, Esfeidy Guzman. (CP 37). He was found not guilty of a count of Assault in the Fourth Degree against Esfeidy's mother, Micaela

Hernandez.

The first witness called at trial was Micaela Hernandez. (RP 54). She testified that on August 26, 2017, she was living with her husband Jose Jimenez, her daughter Esfeidy, and Esfeidy's husband Manuel Guzman, who was the defendant in the courtroom. (RP 54-57). The two couples had their own bedrooms. (RP 58). Her daughter and son-in-law had a child living with them who was three or four years old at the time. (RP 58).

She was asked if anything unusual happened on the night in question (previously identified as August 26, 2017). (RP 55, 58). She replied, "Yes." (RP 58). She testified the grandchild came to her and told her that Manuel and Esfeidy were arguing; she then slowly went to the bedroom and heard them arguing; and she looked through the six-inch opening in the door and saw Manuel slap Esfeidy one time. (RP 58-61). She entered the room and asked Manuel why he was hitting Esfeidy. (RP 61). Manuel then grabbed her by the top of the shoulders and pushed her out of the room. (RP 62). When she woke up the next morning, her daughter was not in the house. (RP 62). She went looking for her daughter and saw her car at the hospital. (RP 63). She entered the hospital and was able to see her daughter. (RP 63). She also spoke with the police officer who was in the

courtroom. (RP 63).

Jose Jimenez testified that Micaela Hernandez is his wife and Esfeidy Guzman is his daughter. (RP 67). He was asked about the events on August 26, when he spoke to the police officer in the courtroom. (RP 67). When asked if anything usual happened on that occasion, he replied "yes." (RP 67). He woke up because he heard voices louder than usual. (RP 67). He got up and went out of his room to see what was going on. (RP 68). He saw that he wife was being told to get out of the bedroom. (RP 68). The defendant Manuel Guzman told her to get away from the door because he was going to close the door. (RP 69). He told the defendant to calm down and they would talk about it in the morning. (RP 69-70). He then went back to bed because he had to get up early to go to work. (RP 70). He got up at 3:00 or 4:00 in the morning and did not see his daughter or Manuel Guzman at that time. (RP 70-71).

Esfeidy Guzman was then called and proved to be a very reluctant or hostile witness. Her entire testimony was as follows:

Q: First of all, for the record, could you please state your name and spell your last name?

A: My name is Esfeidy. My last name is G-U-Z-M-A-M.

Q: And the court reporter would probably appreciate it if you would also spell your first name?

A: E-S-F-E-I-D-Y

Q: And how old are you?

A: 25.

Q: And what kind of work do you do?

A: I'm a para educator for the Pasco School District.

Q: Are you married?

A: Yes.

Q: Who is your husband?

A: Manuel Guzman.

Q: And is that the gentleman who is here in court today?

A: Yep.

Q: All right. Do you have children?

A: Yes.

Q: How many children do you have?

A: One.

Q: How old?

A: Four.

Q: We're going to be talking about the events of August 25 and August 26 of 2017. Do you remember those events?

A: Not really.

Q: Do you remember when you talked to the police officer that day?

A: Not really.

Q: You've forgotten that just since August?

A: I was very sick that day, as I have told you before. I was on medicine. I hadn't slept that day.

Q: All right.

A: I don't remember much.

Q: All right. Well, let's talk about what you do remember. Who was living with you at that time.

A: My family.

Q: Your family. And then who was your family?

A: My parents, my husband, and my son.

Q: All right. Your parents, your husband and your son. How long had you all been living together in one house?

A: It varies. We move out and move in.

Q: All right. Let's talk about in August. How long had you been living with your parents and your husband and son at that time?

A: I don't -- I can't give you a certain number.

Q: All right. Was it, a month? Two months?

A: Probably, yeah.

Q: So two months you had been living there, what

would you say?

A: I don't want to give you an exact number if I can't remember it.

Q: Very well. At any rate, on that date, when you had contact with the police, you were living there with your husband, Manuel Guzman; correct?

A: Why.

Q: And your son and then your parents also lived in that house; correct?

A: Yes.

Q: Where was that house?

A: What? I don't understand the question.

Q: What's the location of the house, the address of the house?

A: It's on the east side of Pasco.

Q: On the east side of Pasco. And what's the street address?

A: Wehe.

Q: All right. You and your husband had your bedroom and your parents had their bedroom; correct?

A: Yes.

Q: All right. Now, were there any unusual, out-of-the-ordinary events that happened that night?

A: No.

Q: Do you remember having an argument with your

husband that night?

A: Probably.

Q: Probably did, okay. What was the argument -- how did the argument start?

A: I don't remember.

Q: Do you remember telling Officer Nunez here that it started over the way you were cooking potatoes?

A: Like I said, I don't remember. I was very sick that day.

Q: What were you sick from?

A: I had stepped up and the night before I was really sick because I cooked something else and made my hands burn. So I had to sleep with like ice because it was hurting. So I was very -- I couldn't sleep all night, so I was sleep deprived.

Q: All right. So as a result of this argument, did you have any physical contact with your husband?

A: Like I said, I don't remember well.

Q: Do you remember telling Officer Nunez that he slapped you twice and poked you with his finger causing pain each time?

A: I don't remember.

Q: Do you remember telling him that he punched you on the right thigh?

A: I don't remember.

Q: Okay. All right. At some point did your mother intercede in all of this and come to your bedroom. ?

A: She heard us arguing probably and she came because, I don't know, she was my mom.

Q: After your mother came to your bedroom, what happened?

A: We asked her to leave.

Q: Why did you ask her to leave?

A: Because it's our - - where it's our marriage, we handle it.

Q: So you asked you mother to leave. What happened after you asked you mother to leave?

A: We closed the door.

Q: Closed the door. Then what happened?

A: I don't know.

Q: Did you see your father at any time? Did he get up also?

A: Probably.

Q: Do you remember, did he talk to you at all.

A: No.

Q: All right. How did Manuel react to your mother having intervened and seen what was going on?

A: He asked her to leave.

Q: He asked her to leave, okay. After she left, how did he react then?

A: Like I said, I don't know. I probably tried to go to

sleep or something.

Q: Well, do you remember telling Officer Nunez here that it made him, made him very angry that your mother had come in and seen you being hit?

A: Like I said, I was really sleepy. I was sick. I had taken medication. I don't remember well.

Q: So what did he - - what did he do after your mother left?

A: I don't remember. We probably went to sleep.

...

Q: ... Do you remember telling Officer Nunez that your husband grabbed you by the neck and tightly squeezed your neck so you couldn't breathe?

A: I don't remember.

Q: And do you remember telling Officer Nunez that he did that more than once?

A: No, I don't remember.

Q: You don't remember that? Okay. Do you remember telling Officer Nunez that your husband told you he was going to kill your parents and make you watch while he did that?

A: No, I don't remember that.

Q: At some point, did your husband fall asleep?

A: Most likely, I guess, I don't remember.

Q: What did you do after your husband fell asleep?

A: I don't know.

Q: Did you leave the house?

A: I'm guessing, since we're here.

Q: So why did you leave the house?

A: Like I said, I was sick.

Q: Did you take your child with you?

A: Yeah, I take him everywhere.

Q: Where did you go when you left the house?

A: I don't know. If I was sick, maybe it was somewhere to get help since I was sick.

Q: Did you go to Lourdes Hospital?

A: Probably. That's the only thing that's open.

Q: All right. Do you remember that you talked to the officer here when he came to the hospital?

A: I already told you that I don't remember.

Q: You don't remember giving a complete statement to Officer Nunez about everything that happened?

A: I was very sick. I had taken medicine. I hadn't slept like I said. I don't remember.

(RP 72-79).

Counsel addressed the court outside the jury's presence on whether extrinsic evidence would be permitted of Esfeidy's prior inconsistent statements for purposes of impeachment. (RP 79-88).

The prosecutor explained that Esfeidy's testimony was the third version she had given: First, there were her statements to Officer Nunez immediately after the incident; second, when interviewed by counsel, she said the assault did not happen and that she had been badgered by the officer into making the statements; and third, during her testimony she claimed for the first time to have a partial lack of memory. (RP 82). The State argued that the witness did not present a total lack of memory or fail to give any substantive testimony, but only claimed to not remember certain details of the events and making certain statements to Officer Nunez. (RP 82-84). The State further argued that the instant case was controlled by KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 613.6 which deals with material omissions and failure to remember. (RP 82-83).

The treatise states in part:

[I]f a witness testifies at trial about an event but claims to have no knowledge of a material detail, or no recollection of it, most courts permit a prior statement indicating knowledge of the detail to be used for impeachment. It has been suggested that the court should exercise some discretion in administering the rule, and that the prior statements should be excluded if the witness's lapse of memory seems genuine and not feigned.

The trial court agreed that TEGLAND § 613.6 was on point. (RP 87).

In exercising its discretion, the court found that witness's claimed lack

of memory was not genuine. (RP 87-88). Accordingly, the court ruled that “the officer may testify regarding the previous statements solely for purposes of impeachment.” (RP 88).

Officer Jacinto Nunez testified that he arrested defendant on August 26, 2017. (RP 90-92). After being advised that the officer was investigating an allegation that defendant assaulted his wife, defendant spontaneously stated, “I held her down.” (RP 94). Defendant was then advised of his constitutional rights and stated that he and his wife had been in an argument over the manner in which she had cooked some potatoes. (RP 95).

The officer also testified to the statement made to him by Esfeidy: That defendant had assaulted her by punching her in the thigh, by poking her with his finger several times in a manner that caused her pain, and by slapping her; that after her mother left the room defendant became angrier because her parents were going to know he had assaulted her; that he began to threaten her by telling her he was going to kill her parents and make her watch; and that he twice put his hands around her neck and squeezed hard enough that she was unable to breathe. (RP 98). Immediately after the testimony, the trial court orally instructed the jury:

There have been questions asked of this witness

regarding what a previous witness told him regarding what had occurred that night. This testimony is being offered for the limited purpose of impeaching the previous witness's 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 evaluating the credibility of the previous witness.

(RP 100). At the close of the case, the trial court also gave the jury written Instruction No, 5, which read:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of alleged prior out-of-court statements of witness Esfeidy Guzman and may be considered by you only for the purpose of evaluating the credibility of her testimony. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this instruction.

(CP 26).

The jury returned a verdict finding the defendant guilty of Assault in the Fourth Degree against Esfeidy Guzman. (CP 37). The jury further found that the defendant and the victim were members of the same family or household. (CP 39). The jury found the defendant not guilty of Assault in the Fourth Degree against Micaela Hernandez. (CP 38).

III. ARGUMENT

(A) IMPEACHMENT EVIDENCE WAS PROPERLY ADMITTED.

Defendant argues on appeal that Esfeidy Guzman was improperly called for the primary purpose of impeaching her with her prior statements. However, there is no indication that this alleged error was ever raised in the trial court. A claim of error may be raised for the first time on appeal under RAP 2.5(a)(3) only if the error is manifest and truly of constitutional magnitude. *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). *See also State v. Barton*, 28 Wn. App. 690, 693, 626 P.2d 509 (1981) (“With the exceptional of jurisdictional or constitutional issues, appellate court will review only issues which the record shows have been argued and decided at the trial court”).

Constitutional issues typically associated with impeachment by prior inconsistent statement include violation of right to counsel, violation of right to remain silent, statements given involuntarily, or statements by the defendant or others barred by search or seizure violations. KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 613.19. None of those issues are present here. Moreover, confrontation rights are not violated where, as here, the

declarant testifies at the proceeding and is available for cross-examination. *State v. Price*, 158 Wn.2d 630, 639-47, 146 P.3d 1183 (2006). While the court stated in *State v. Lavaris*, 106 Wn.2d 340, 721 P.2d 515 (1988), that the State may not call a witness for the primary purpose of impeachment with otherwise inadmissible evidence, it reached that conclusion solely based on cases interpreting the federal rules of evidence and not any constitutional provision. *Lavaris*, 106 Wn.2d at 344-46. As the rule against calling a witness for the primary purpose of impeachment is not of constitutional magnitude, it may not be considered for the first time on appeal.

In any event, defendant's reliance on *Lavaris* is misplaced. After acknowledging the general rule mentioned above, the court went on to state:

Castro's testimony was essential in many areas of the State's case. Castro was integrally involved in the events leading up to the victim's death and was, in fact a participant in the murder. This in and of itself was relevant to the issues before the jury and entitled the jury to hear Castro's version of the events. Additionally, Castro's testimony corroborated the testimony of Nichols concerning the circumstances (dates, times, and places) leading up to the murder. He corroborated Nichols' testimony in other respects, placing himself at the scene of the crime the night before the murder. His testimony only began to diverge from Nichols' testimony when he testified concerning the homicide and the

events which incriminated himself and Lavaris. We conclude the State did not call Castro for the primary purpose of eliciting his testimony in order to impeach him with testimony that would have been otherwise inadmissible. We hold the trial court did not err in admitting the impeachment testimony of Francisco Castro.

Lavaris, 106 Wn.2d at 346-47. The instant case is on all fours with *State v. Cohen*, 179 Wn. App. 1038, 2014 WL 749030, No. 41632-8-II (2014) (an unpublished opinion cited pursuant to GR 14.1 for such persuasive value as the court deems appropriate). *Cohen* involved a domestic violence victim, Ms. Rivera, who completely recanted her report to the police. “By the time of trial, the prosecutor anticipated that Rivera’s testimony would not incriminate Cohen.” Nonetheless, the prosecutor called Rivera as a witness. She was impeached with, among things, her prior statement to a police officer that Cohen had strangled her. The court stated:

Citing *State v. Lavaris*, 106 Wn.2d 340, 721 P.2d 515 (1986), Cohen next asserts the prosecutor called Rivera primarily for the purpose of eliciting testimony that could later be contradicted by otherwise inadmissible hearsay testimony elicited from the State’s other witnesses. But *Lavaris* refutes Cohen’s assertion . . .

...

Lavaris involved a murder trial where the State called (1) the defendant’s accomplice, who testified to events leading up to the murder but did not implicate the defendant, and (2) a detective who impeached the

accomplice by describing the accomplice's confession, which incriminated both the defendant and the accomplice. Because the accomplice testified to events leading up to the murder, our Supreme Court held that the State *did not* call the accomplice for the primary purpose of eliciting the detective's other inadmissible testimony.

Similarly, the State elicited Rivera's testimony of her version of the events leading up to and following the attack. Thus, the prosecutor did not call Rivera for the primary purpose of impeaching Rivera with other witnesses' otherwise inadmissible hearsay testimony.

(Citations omitted).

In the instant case, the witness was the actual victim of the crime. As such, she was integrally involved in the events. The jury was entitled to hear her version of the events. While she did not incriminate defendant, she testified to the event leading up to and following the crime. She gave considerable testimony that was beneficial to the State. She established the location of the events. (RP 75). She acknowledged she probably had an argument with defendant on the night in question. (RP 75). She testified that her mother intervened because of probably having heard the argument. (RP 76). She testified after her mother came to her bedroom, she and defendant asked her to leave. (RP 77). She testified that after she left, they closed the door. (RP 77). She testified that her father probably also got up at that time. (RP 77). She also testified that

she later left the house, took her child with her, and went to the hospital. (RP 79). These facts were helpful to the State not only regarding the count in which she was a victim, but also the count of Assault in the Fourth Degree in which her mother was the alleged victim. Moreover, her testimony established the domestic relationship between she and defendant (RP 73-75), an element which the State needed to prove. Since the State elicited the victim's version of the events leading up to and following the attack, she was not called for the primary purpose of being impeached. The trial court did not err in allowing her testimony to be impeached.

Relying on *State v. Allen S.*, 98 Wn. App. 452, 898 P.2d 1222 (1999), defendant nonetheless argues impeachment evidence was improperly admitted. However, *Allen S.* is clearly not on point. As defendant acknowledges at 9, the question answered in *Allen S.* was "whether a party may impeach a person who claims at trial to not remember *anything* relevant to the case." *Allen S.*, 98 Wn. App. at 453 (emphasis added). In the instant case, the witnesses did not claim to remember *nothing* relevant to the case. As demonstrated above, she testified to many events before, during and after the assault. As previously noted, the trial court relied on TEGLAND § 613.6, which distinguishes between a witness who claims a total lack

of memory and one who only asserts a partial lack of memory:

[If] a witness testifies at trial about an event but claims to have no knowledge of a material detail, or no recollection of it, most courts permit a prior statement indicating knowledge of the detail to be used for impeachment. It has been suggested that the court should exercise some discretion in administering this rule, and that the prior statement should be excluded if the witness's lack of memory seems genuine and not feigned.

If the witness claims a total lack of memory and give no substantive testimony on the factual issue at hand, a prior statement by the witness is inadmissible regardless of whether the lack of memory is genuine because there is simply no testimony to impeach.

(Footnotes omitted). Professor Tegland cites with approval to *State v. Newbern*, 95 Wn. App. 277, 975 P.2d 1041 (1999) (In prosecution for attempted murder, shooting victim had given detailed statement to police implicating defendant; at trial, however, she claimed not to recall giving any statement to police, and said the shooting was an accident; prior statement to police held admissible for impeachment; court rejected defense argument that because victim could not recall events, there was no testimony to impeach; court said prior statements were admissible to impeach testimony that shooting was an accident.)

Here, Esfeidy Guzman was asked, "Now, were there any unusual, out-of-the-ordinary events that happened that night?" to

which she answered, "No." (RP 75). Her statements to Officer Nunez at the emergency room directly contradicted her testimony that no unusual, out-of-the-ordinary events occurred. It is anticipated that defendant may argue the statements were not necessarily inconsistent if he assaulted his wife on a daily basis. Such an argument would have no merit. Both the victim's mother (RP 58) and her father (RP 67) testified that the events were unusual. Moreover, the fact that the young child went to the grandparents' room and woke the grandmother to tell her about the argument is further evidence of the unusual character of the events. (RP 58-59). Professor Tegland explains:

A statement need not directly contradict the witness's testimony in order to justify the use of the statement for impeachment. The Washington courts have often said that the test for inconsistency is as follows: "Inconsistency is to be determined, not by the individual words or phrases alone, by the *whole impression or effect* of what has been said or done. On a comparison of the two utterances are they in effect inconsistent? Do the two expressions appear to have been produced by inconsistent beliefs?"

KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 613.5 (emphasis original; footnotes omitted). Here, the victim's statements to Officer Nunez at the hospital and her testimony at trial appeared to be produced by different belief systems.

The trial court acted properly in finding the victim's claimed lack

of memory was not credible. TEGLAND § 613.6 n. 4 cites with approval to *United States v. Rogers*, 549 F.2d 490 (8th Cir. 1976), which states “a claimed inability to recall, *when disbelieved by the trial judge*, may be viewed as inconsistent with previous statements when the witness does not deny that the previous statement were in fact made.” *Id.* at 496 (emphasis added). “[An] unwilling witness often takes refuge in a failure to remember, and the astute liar is sometimes impregnable unless his flank can be exposed to an attack of this sort.” *Id.* (citation omitted). Here, the witness claimed to not remember the statements but did not expressly deny making them.

For purposes of introducing extrinsic evidence of the prior statement, “[i]f the witness does not admit or deny making the statement but indicates doubt, lack of memory, or lack of knowledge, the answer of the witness will be treated as a denial.” KARL B. TEGLAND; WASHINGTON PRACTICE: EVIDENCE § 613.11. Indeed, the State’s failure to produce extrinsic evidence would have been error. *State v. Babich*, 68 Wn. App. 438, 842 P.2d 1053 (1993).

The trial court acted properly in all respect in admitting impeachment evidence. There was no error.

(B) CLOSING ARGUMENT WAS PROPER.

Even though no objection was made at trial, defendant argues on appeal that the prosecutor's closing argument was improper. While a prosecutor may not express to the jury an independent, personal opinion of the defendant's guilt, the prosecutor may properly argue from the evidence that defendant is guilty. *State v. McKenzie*, 157 Wn.2d 44, 53-54, 134 P.3d 221 (2006). Where other evidence contradicts the testimony of a witness, it is appropriate for the prosecutor to question the credibility of that witness. *Id.* at 59-60.

The prosecutor repeatedly emphasized that the prior statements of the victim were to be used only for evaluating her testimony as a witness. (RP 144, 161). The prosecutor compared the victim's testimony with that of her mother:

Now, you had chance to observe [the mother's] demeanor while testifying. Clearly her demeanor was very truthful and straightforward. Now, you could see that she wasn't holding anything back whatsoever. That you could, I think, sense, even with her speaking through an interpreter, that this was emotional for her. She clearly had clear recollection of the events. She clearly testified what she saw, and she has absolutely no motive of any kind whatsoever to fabricate anything about what she saw.

Now as far as what Esfeidy herself said about it, the judge told you her prior statements could be used to evaluate her credibility as a witness. And, unfortunately, she wasn't a very credible witness. . . .

(RP 143). The prosecutor went on to give reasons from the evidence why she should not be considered credible. (RP 143-44). He continued:

And you can also consider the circumstantial evidence that she did get up, take her child with her, left in the middle of the night and went to the emergency room. Now, why does a person do that? Why would she have done that if she had not been assaulted? Why would she get up in the middle of the night, take her child with her, leave her husband there in bed, go to the emergency room? And then when the police are called to the emergency room, when she talks to Officer Nunez, she makes this report of having been assaulted in a serious manner. Why would she do that?

...

So really the only way Esfeidy could not have been assaulted [as her testimony suggested] is it's just totally out of the blue. The toddler comes into the grandparent's room, woke up the grandmother, and brought the grandmother into the room and the grandmother saw the defendant hitting Esfeidy Guzman. And then in the middle of the night then, Esfeidy Guzman, totally unrelated to that, goes to the emergency room, and then makes this report to Officer Nunez totally out of the blue. I mean, that would be what anyone would have to believe to [think] that there was not an assault that had occurred that night.

(RP 144-47).

Two cases from other jurisdictions are instructive. In *City of Cleveland Heights v. Brewer*, 673 N.E.2d 215 (Ohio App. 1996), neighbors called police upon hearing an apparent domestic incident in

progress. The police could hear defendant's wife scream, "Get off of me. Leave me alone." The defendant opened the door only when the police threatened to enter forcibly. The wife had a scratch on her neck and was visibly shaken. The defendant was placed under arrest. The victim gave a written statement indicating she had been assaulted and had called out to the neighbors for help. At trial, the victim recanted and denied any physical contact by defendant. The written statement was admitted for purposes of impeachment. The trial judge found defendant guilty. The appellate court stated:

Although not used as substance evidence of the offense, the written statement could adversely affect the wife's credibility. The trial judge could reasonably conclude that the wife's written statement corresponded so closely with the testimony of the police officer and the neighbor that her recantation should be afforded little or no weight.

Brewer, 673 N.E.2d at 215.

In the instant case, while the Esfeidy's prior statements were not substantive evidence, they called into question the credibility of her testimony. Given her mother's testimony that she saw defendant hit Esfeidy and defendant's own statement that he held her down, the evidence clearly showed an assault had taken place.

In *Anderson v. State*, 102 So.3d 304 (Miss. App. 2012), the

defendant's husband called 911 and reported having been bitten on the arm by defendant. At trial, he was uncooperative and claimed to not remember much of the events. Other evidence supported the assault charge. The trial court found: "[T]he picture painted from what was going on during the 911 call and what Sergeant Brown said when he got there, makes it pretty clear that the stories they heard at the time are the real stories here." The trial court further stated: "I don't believe he would have called 911 unless he thought there was a serious issue here." *Anderson*, 102 So.3d at 309. The appellate court affirmed the conviction. *Anderson*, 102 So.3d at 311. See also NANCY McKENNA, DOMESTIC VIOLENCE PRACTICE AND PROCEDURE § 7:412 (Westlaw) (discussing *Anderson* and other cases where convictions were obtained with reluctant domestic violence victims).

In the instant case, it may be inferred that Esfeidy would not have made her report to Officer Nunez in the emergency room unless she thought there was a serious issue. Merely using her report to the police as a reason to doubt her recanting testimony does not convert the content of the statements into substantive evidence.

The prosecutor argued for the same inferences drawn by the trial courts in *City of Cleveland Heights v. Brewer* and *Anderson v.*

State. There was nothing improper about the argument.

Even if the argument was improper, where, as here, no objection was made to the argument, the issue is considered waived unless the comment was so flagrant and ill-intentioned that it could not have been remedied by a curative instruction. *McKenzie*, 157 Wn.2d at 52. There was certainly nothing here that could not have been corrected at trial.

IV. CONCLUSION

On the basis of the arguments set forth herein, it is respectfully requested that the conviction of Manuel R. Guzman for Assault in the Fourth Degree (Domestic Violence) be affirmed.

Dated this 26th day of November, 2018

Respectfully submitted,
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Prosecuting Attorney

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Andrea Burkhart Andrea@2arrows.net	I hereby certify that a copy of the foregoing was delivered to opposing counsel sent via this Court's e-service by prior agreement of the parties pursuant to GR30(b)(4). I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Dated <u>NOV 26</u> 2018, Pasco WA <u>Lilly Guajardo</u> Lilly Guajardo Original e-filed at the Court of Appeals; 500 N. Cedar Street, Spokane, WA 99201
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November 26, 2018 - 3:13 PM

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