

62624-8

62624-8HK

NO. 62624-8-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

ALAN T. GROMUS,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Michael Rickert, Judge

RESPONDENT’S BRIEF

SKAGIT COUNTY PROSECUTING ATTORNEY
RICHARD A. WEYRICH, PROSECUTOR

By: ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Office Identification #91059

Courthouse Annex
605 South Third
Mount Vernon, WA 98273
Ph: (360) 336-9460

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 AUG 17 AM 11:23

ORIGINAL

TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| I. SUMMARY OF ARGUMENT | 1 |
| II. ISSUES..... | 2 |
| III. STATEMENT OF THE CASE | 3 |
| 1. STATEMENT OF PROCEDURAL HISTORY | 3 |
| 2. PERTINENT TRIAL TESTIMONY..... | 3 |
| i. Victims, witness and defendant at scene. | 3 |
| ii. Officers and medical personnel having contact with victims, witness and defendant on date of incident. | 11 |
| iii. Testimony regarding statements of Pam Gromus after incident. | 15 |
| iv. Other officer investigation. | 19 |
| v. Expert testimony regarding injuries and memory. | 20 |
| vi. Other witnesses called by Gromus..... | 23 |
| IV. ARGUMENT | 24 |
| 1. THE TRIAL COURT DID NOT ERR IN ADMITTING AND THE STATE DID NOT USE AS SUBSTANTIVE EVIDENCE INCONSISTENT STATEMENTS OF A VICTIM WHO TESTIFIED AS TO AN EVENT AND STATEMENTS MADE..... | 24 |
| i. Case law pertaining to admission of inconsistent statements..... | 25 |
| ii. Motions, instructions and evidence at trial regarding statements of Pam Gromus..... | 27 |
| iii. The trial court did not abuse its discretion in admitting testimony of prior statements of Pam Gromus and the State did not use them as substantive evidence. | 30 |

TABLE OF AUTHORITIES

| | <u>Page</u> |
|---|-------------|
| <u>WASHINGTON SUPREME COURT CASES</u> | |
| <u>Davis v. Globe Mach. Mfg. Co.</u> , 102 Wn.2d 68, 684 P.2d 692 (1984)..... | 25 |
| <u>Fenimore v. Donald M. Drake Const. Co.</u> , 87 Wn.2d 85, 549 P.2d 483 (1976)..... | 25 |
| <u>In re Pers. Restraint of Lord</u> , 123 Wn.2d 296, 868 P.2d 835, <i>clarified by</i> 123 Wn.2d 737, 870 P.2d 964 (1994) | 48 |
| <u>Pilon v. Lindley</u> , 100 Wn. 340, 170 P. 1022 (1918) | 26 |
| <u>State v. Benn</u> , 120 Wn.2d 631, 845 P.2d 289, <i>cert. denied</i> , 510 U.S. 944 (1993)..... | 36 |
| <u>State v. Bourgeois</u> , 133 Wn. 2d 389, 945 P.2d 1120 (1997)..... | 49 |
| <u>State v. Boyer</u> , 91 Wn.2d 342, 588 P.2d 1151 (1979) | 36 |
| <u>State v. Demery</u> , 144 Wn.2d 753, 30 P.3d 1278 (2001) | 41 |
| <u>State v. Dennison</u> , 115 Wn.2d 609, 801 P.2d 193 (1990)..... | 25 |
| <u>State v. Furman</u> , 122 Wn.2d 440, 858 P.2d 1093 (1993)..... | 46 |
| <u>State v. Hancock</u> , 109 Wn.2d 760, 748 P.2d 611 (1988)..... | 27 |
| <u>State v. Henderson</u> , 114 Wn.2d 867, 792 P.2d 514 (1990)..... | 36 |
| <u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007)..... | 41, 45 |
| <u>State v. Lavaris</u> , 106 Wn.2d 340, 721 P.2d 515 (1986) | 26 |
| <u>State v. Lord</u> , 117 Wn.2d 829, 822 P.2d 177 (1991), <i>cert. denied</i> , 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992) | 27 |
| <u>State v. Louie</u> , 68 Wn.2d 304, 413 P.2d 7 (1966)..... | 37 |
| <u>State v. Magers</u> , 164 Wn.2d 174, 189 P.3d 126 (2008) | 46 |
| <u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995) | 41 |
| <u>State v. Ortiz</u> , 119 Wn.2d 294, 831 P.2d 1060 (1992)..... | 41 |
| <u>State v. Pirtle</u> , 127 Wash.2d 628, 904 P.2d 245 (1995) | 45 |
| <u>State v. Powell</u> , 126 Wn.2d 244, 893 P.2d 615 (1995)..... | 26, 46 |
| <u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988)..... | 41 |
| <u>State v. Stein</u> , 144 Wash.2d 236, 27 P.3d 184 (2001)..... | 27 |
| <u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990) | 37 |
| <u>State v. Tharp</u> , 96 Wn.2d 591, 637 P.2d 961 (1981)..... | 49 |
| <u>State v. Vander Houwen</u> , 163 Wn.2d 25, 177 P.3d 93 (2008)..... | 36 |
| <u>State v. Walsh</u> , 143 Wn.2d 1, 17 P.3d 591 (2001)..... | 41 |
| <u>State v. WWJ Corp.</u> , 138 Wn.2d 595, 980 P.2d 1257 (1999)..... | 41 |
| <u>Sterling v. Radford</u> , 126 Wn. 372, 218 P. 205 (1923) | 26, 32 |
| <u>Washburn v. Beatt Equip. Co.</u> , 120 Wn.2d 246, 840 P.2d 860 (1992)..... | 25 |

WASHINGTON COURT OF APPEALS CASES

Degroot v. Berkley Constr., Inc., 83 Wn. App. 125, 920 P.2d 619 (1996) .. 27
State v. Aguirre, 146 Wn. App. 1048, *rev. granted* 165 Wn.2d 1036 (2009)
(unpublished opinion)..... 50
State v. Barrow, 60 Wn. App. 869, 809 P.2d 209, *rev. denied* 118 Wn.2d
1007, 822 P.2d 288 (1991) 35
State v. Caldwell, 47 Wn. App. 317, 734 P.2d 542, *rev. denied*, 108 Wash.2d
1018 (1987)..... 50
State v. Casteneda-Perez, 61 Wn. App. 354, 810 P.2d 74 *rev. denied*, 118
Wn.2d 1007, 822 P.2d 287 (1991) 35
State v. Clinkenbeard, 130 Wn. App. 552, 123 P.3d 872 (2005) 26, 33
State v. Dickenson, 48 Wn. App. 457, 740 P.2d 312 (1987) 26, 32
State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996)..... 34, 35
State v. Gakin, 24 Wn. App. 681, 603 P.2d 380 (1979), *rev. denied*, 93
Wn.2d 1011 (1980)..... 36
State v. Hagler, 150 Wn. App. 196, 208 P.3d 32 (2009) 49
State v. Hodges, 118 Wn. App. 668, 77 P.3d 375 (2003)..... 48
State v. Johnson, 40 Wn. App. 371, 699 P.2d 221 (1985)..... 26
State v. Kelley, 146 Wn. App. 370, 189 P.3d 853 (2008), *rev. granted*, 165
Wn.2d 1027, 203 P.3d 379 (2009) 49, 50
State v. Lynn, 67 Wn. App. 339, 835 P.2d 251 (1992)..... 41
State v. Madison, 53 Wn. App. 754, 770 P.2d 662 (1989) 41
State v. Moses, 129 Wn. App. 718, 119 P.3d 906 (2005)..... 37
State v. Newbern, 95 Wn. App. 277, 975 P.2d 1041 (1999) 26, 27, 31, 32
State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 *rev. denied*, 163 Wn.2d
1053 (2008)..... 50
State v. Pentland, 43 Wn. App. 808, 719 P.2d 605, *rev. denied*, 106 Wn.2d
1016 (1986)..... 50
State v. Saunders, 120 Wn. App. 800, 86 P.3d 1194 (2004) 48

FEDERAL CASES

Kuhn v. United States, 24 F.2d 910 (9th Cir.1928), *reversed in part and*
rehearing denied 26 F.2d 463 (1928), *cert. denied*, 278 U.S. 605, 49 S.Ct.
11, 73 L.Ed. 533 (1928)..... 26
United States v. Barrett, 539 F.2d 244 (1st Cir.1976)..... 32
United States v. Dennis, 625 F.2d 782 (8th Cir.1980)..... 32
United States v. Gravely, 840 F.2d 1156 (4th Cir.1988) 32
United States v. McCrady, 774 F.2d 868 (8th Cir.1985) 32
United States v. Morgan, 555 F.2d 238 (9th Cir.1977)..... 32

OTHER STATE'S CASES

Judson v. Fielding, 227 A.D. 430, 237 N.Y.S. 348 (1929)..... 32

WASHINGTON COURT RULES

RAP 2.5..... 41

TREATISES

1 John William Strong, *McCormick on Evidence* § 34 (4th ed.1992).... 26, 32

2 Wigmore on Evidence, § 1040 32

5A Karl B. Tegland, Washington Practice, Evidence § 256 (3d ed.1989) ... 26

5B Karl B. Tegland, Washington Practice, Evidence § 705.7 (5th ed (2007)46

WASHINGTON PATTERN INSTRUCTIONS - CRIMINAL

Washington Pattern Instruction 1.02 34, 40

Washington Pattern Instruction 5.30 27, 37

I. SUMMARY OF ARGUMENT

Allen Gromus appeals his convictions for two counts of Assault in the First Degree of his wife and a tenant, claiming that the trial court erred and the prosecutor committed misconduct in admission of evidence of prior inconsistent statements of the his wife. However, because the prior inconsistent statements were impeachment, the prosecutor did not use the statements as substantive evidence, and the trial court gave proper limiting instructions, the admission and use of the statements was not error.

Gromus also claims the limiting instruction improperly commented on the evidence. However, Gromus requested the limiting instruction and the instruction did not convey the court's opinion on the case. Gromus claims that violation of a motion in limine was reversible error. The trial court had actually not ruled on the motion and the trial court's indication that it would have admitted the evidence indicated that there was no violation of the motion. Gromus contends that the prosecutor elicited opinion evidence from officers as to the guilt of the defendant. The defense had raised the issue of the opinion of the officers to discredit the investigation and defense actually is the one who asked the opinion of the officers before the jury.

Finally, Gromus contends that the trial court erred in imposing deadly weapon enhancements on the charge of Assault in the First Degree by

means of a deadly weapon. Although this claim has been settled previously by the Court of Appeals, this issue is currently under review by the Washington Supreme Court.

II. ISSUES

1. Where the defendant's wife testified and claimed that she either denied or did not recall making a number of statements, did admission and use of the impeachment evidence amount to substantive evidence?
2. Where the trial court provided a limiting instruction directing that the jury was not to consider the prior statements as substantive evidence, was admission and use of the statements improper?
3. Where the defense sought the limiting instruction and the instruction did not express the trial court's opinion as to the weight of the evidence or belief as to the case, was the instruction reversible error?
4. Where defense sought to discredit the investigation by showing that officers did not focus on a claimed other suspect and defense counsel actually directly questioned the officer that he did not believe anyone else committed the offense, was admission of officers' opinion an impermissible comment on the defendant's guilt?
5. Where the trial court had reserved ruling on a motion in limine and the trial court later decided that it would have admitted the evidence, was unobjected to questioning reversible error?

6. If there was error, did error reach the level of cumulative error meriting reversal, or would the error be more properly considered harmless?

7. Did the trial court err in imposing a deadly weapon enhancement, where prior decisions indicate that a charged deadly weapon enhancement can be imposed even where that is an element of the offense?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On September 30, 2007, Alan Gromus was arrested for two counts of Assault in the First Degree with a Deadly Weapon for assaulting his wife and a tenant with a baseball bat. CP 4.

On July 10, 2008, Gromus was found guilty of two counts of Assault in the First Degree and a Deadly Weapon Enhancement. CP 147-150.

On October 29, 2008, Gromus was sentenced between the bottom and the middle of the standard range at 124 months. CP 213, 215.

On November 14, 2008, Gromus timely filed a notice of appeal. CP 220-230.

2. Pertinent Trial Testimony

The State summarizes pertinent trial testimony, based upon the involvement of the witness in the case.

i. Victims, witness and defendant at scene.

There were four people at the scene when officers Greg O'Connor,

Pamela (Pam) Gromus, Alan Gromus and Traci Gromus.

Greg O'Connor was a tenant of Alan and Pam Gromus. 7/1/08 RP 9, 37.¹ On September 30, 2007, O'Connor returned home from shopping when he heard a commotion outside followed by a scream. 7/1/08 RP 11-2. O'Connor went outside and saw Alan Gromus sitting on someone. 7/1/08 RP 21. Gromus had his hands on either end of a baseball bat holding it against the person's throat. 7/1/08 RP 23. At first both of them were still. 7/1/08 RP 24. Then the person underneath started thrashing around. 7/1/08 RP 25. O'Connor asked Alan if he needed help. 7/1/08 RP 27-8. Alan stood up. 7/1/08 RP 28.

At that point, O'Connor realized that the person underneath Gromus was his wife, Pam. 7/1/08 RP 29. Pam gasped for help. 7/1/08 RP 30. Gromus stepped over Pam and attacked O'Connor striking him with the bat in the arm. 7/1/08 RP 30-1. O'Connor fled, but Gromus pursued him. 7/1/08 RP 33. O'Connor tried to get into the house and close the door and lock it. 7/1/08 RP 3304. Gromus pursued O'Connor through a closed door crashing it into him. 7/1/08 RP 34. O'Connor got thrown to the floor but got to his feet. 7/1/08 RP 35-6. O'Connor grabbed the bat that Gromus still had. 7/1/08 RP 3y. O'Connor yelled at Gromus telling him he was his

¹ The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number.

tenant, but Gromus did not respond. 7/1/08 RP 37-8. Gromus and O'Connor struggled over the bat before O'Connor fell to the floor. 7/1/08 RP 38-9. Gromus got on top of O'Connor and O'Connor bit down on Gromus's thumbs when Gromus reached into his mouth. 7/1/08 RP 40-1. Gromus told O'Connor if he was okay and asked O'Connor to let go. 7/1/08 RP 45. O'Connor thought Gromus was being deceptive, so he did not let go. 7/1/08 RP 45-6. O'Connor heard Pam yell to her daughter Traci to call the police. 7/1/08 RP 46. Gromus told O'Connor to calm down and then jumped on O'Connor's chest with both his knees. 7/1/08 RP 48, 50. O'Connor told Gromus the police were coming and asked him to get off. 7/1/08 RP 50-2. After Gromus got off of him, O'Connor realized that his foot and leg were injured. 7/1/08 RP 53.

Gromus came back at O'Connor by crashing through the door again knocking O'Connor on his back. 7/1/08 RP 54, 56. However, this time Gromus went by O'Connor. 7/1/08 RP 56. O'Connor crawled to his room, locked the door and dialed 911. 7/1/08 RP 59.

O'Connor was taken to the hospital where he found out his ankle was broken. 7/1/08 RP 61. O'Connor had surgery on the ankle which involved insertion of a metal plate. 7/1/08 RP 63. O'Connor also had a bruised shoulder. 7/1/08 RP 61.

Pam testified that she recalled September 30, 1997. 6/25/09 RP 169.

Pam Gromus had helped a tenant, Daniel McClaren, move out of his apartment. 6/25/09 RP 170-5. When she got back to the house, Pam fixed dinner. 6/25/09 RP 176-7. She believed Alan was drinking mango juice with rum in it. 6/25/09 RP 177-8. Pam testified that after dinner, she went to purchase rum for Alan. 6/25/09 RP 179. Pam bought two bottles. 6/25/09 RP 181. Pam went in the house and delivered the rum and then went outside with Alan. 6/25/09 RP 183-4. Pam testified she recalled showing him a broken piece off her bug guard and asked if he could glue it on. 6/25/09 RP 184. Pam claimed that she had picked the piece of bug guard up and walked over to her vehicle to show Alan where the damage was. 6/25/09 RP 190-1. Pam recalled Allen walking over to an ice chest by the truck before she was struck. 6/26/08 RP 85. Pam claimed that weeks after the incident, she recalled seeing a man with a gray sweatshirt nearby. 6/27/08 RP 60. Pam said she did not recall if she was hit in the face. 6/25/09 RP 197. She recalled two blows to the side of her face. 6/25/09 RP 198. Pam recalled Greg O'Connor calling Alan's name. 6/26/08 RP 89. Pam recalled Alan leaning over her, but did not recall if he had a bat in his hands. 6/26/08 RP 91-2. Pam recalled making the statement to officers that her husband had a bat across her neck choking her. 6/26/08 RP 98. Pam did recall someone attacking Alan. 6/26/08 RP 93. Pam said she did not see who hit her, so it was possible that it was her husband. 6/30/08 RP 28. Pam admitted that she

did go into the house and tell Traci that Alan hit her with a bat. 6/25/09 RP 199. Pam also told 911 operators that her husband had hit her with a bat. 6/26/08 RP 94. Pam was taken to the hospital after the incident and told officers there that her husband had hit her with a bat and strangled her. 6/25/08 RP 26-8, 46-51, 92. Pam received a fracture of the right cheekbone causing significant swelling requiring several days delay before surgery. 6/25/08 RP 125. In addition to the injury to her cheekbone, Pam testified that she had a leg fracture that required a cast. 6/27/08 RP 63-4.

During cross-examination of Pam, defense tried to establish that Daniel McClaren or one of his friends had been angry about McClaren being evicted from an apartment that the Gromuses rented to him. 6/27/08 RP 100-3, 122-46. Pam recounted what she recalled of the incident. 6/27/08 RP 147-75. Pam also recounted what she recalled about the statements she made from the time of the 911 call and other individuals later. 6/27/08 RP 169-76. Pam also described her memory of the events after the incident. 6/27/08 RP 173-9. Pam also described that she recalled people coming over from school, but that she did not remember anything that they talked about. 6/27/08 RP 180. Pam claimed that after she weaned herself off of the pain medication that she began to recover snippets of memories about what had occurred. 6/27/08 RP 183. Pam described that during the first two weeks or so while on medication she believed that Alan had hit her with the baseball

bat. 6/27/08 RP 185. But, Pam explained that after a while, she did not believe that he had laid a hand on her because he was a loving man and couldn't imagine that all of a sudden he would lay a hand on her. 6/27/08 RP 185-6. Pam claimed that she believed that the person who she had seen in the gray sweatshirt at her house was the person she had seen at Daniel McClaren's apartment. 6/27/08 RP 185-7, 189. Pam said she decided to bail her husband out jail after her memories returned. 6/27/08 RP 191-2.

Pam did not want the prosecutor's office to prosecute. 6/30/08 RP 7.

Traci Gromus, Pam and Alan's daughter, testified that Alan had been drinking Mike's Hard Lemonade at dinner around 6 o'clock. 6/25/09 RP 93, 100-1. Pam Gromus had gone out to run errands and called Traci to ask what type of liquor Alan had wanted her to purchase. 6/25/09 RP 102. Traci had heard the ice crusher used to make drinks running earlier two times. 6/25/09 RP 102-3, 7/1/08 RP 175. Traci was unable to find Alan to find out what kind of liquor he wanted. 6/25/09 RP 104-5. Pam returned about 15 minutes later. 6/25/09 RP 105. The next thing Traci heard was a weird thump. 6/25/09 RP 105-6. About 5 minutes later, Pam came inside calling for Traci. 6/25/09 RP 106-7. Traci saw that Pam's face was swollen. 6/25/09 RP 108. Pam told Traci that Traci's father had hit Pam with a baseball bat. 6/25/09 RP 109. Traci called 911 and stayed on the line for about 15 minutes. 6/25/09 RP 109-10. Traci locked the front door, the

sliding glass door and went in the bedroom and locked the door. 6/25/09 RP 110. Pam called 911 as well. 6/25/09 RP 112. Alan unlocked a door to get into the house and tried to unlock the bedroom door. 6/25/09 RP 111, 117. Traci recalled Pam stating that Alan had been drinking too much. 6/25/09 RP 113. Traci also said that Pam's first statement was that her father had hit her with a baseball bat. 6/30/08 RP 193-4. At the hospital Traci heard Pam say her father had hit her and she was 100 percent sure. 6/30/08 RP 201-2. Traci gave a written statement in which she had stated that Pam was showing Alan the bug guard when she was hit with a bat. 6/25/09 RP 114. Traci also wrote Pam said the neighbor tried to stop Alan. 6/25/09 RP 114. Traci found vomit on Alan's green chair. 7/1/08 RP 174-5. A wastebasket by the chair had a half dozen empty hard lemonade bottles. 7/1/08 RP 175, 183.

Traci testified about her handling of her mother's medications after the incident. 6/30/08 RP 150-4. Traci also testified that her mother had liked to shop and had hidden credit cards from Alan Gromus about ten years before. 6/30/08 RP 156. Traci also testified that Alan and Pam had been thinking about divorce in the last year or two. 6/30/08 RP 157.

Alan Gromus testified he had been watching the Seahawks game drinking mango juice with rum in it when Pam came home and made dinner. 7/7/08 RP 53-4. Alan had a hard lemonade with dinner, and another mango juice with rum after dinner. 7/7/08 RP 56. Pam went to get more rum

because Alan thought he would be at risk for a DUI if he drove. 7/7/08 RP 57. After she returned, Alan claimed that he had followed his wife outside to see about a piece of bug guard broken off of her truck. 7/7/08 RP 67-9. He claimed that he stopped to move an ice chest and then saw his wife lying on the ground. 7/7/08 RP 71-2. He bent over his wife and saw the lower body of a person with a baseball bat in his hands. 7/7/08 RP 71-2. Gromus testified the person then struck him in the side of the head above the ear knocking him into the wall. 7/7/08 RP 72, 7/8/08 RP 35-6. Gromus claimed that the person turned back to Pam who was lying on the ground and he lunged at the person. 7/7/08 RP 73-4. Gromus claimed he pushed the person away and was able to disarm him of the bat. 7/7/08 RP 74-5, 77. Gromus then chased the person away. 7/7/08 RP 75. Gromus testified that after he turned back to his wife, he saw a person standing four to five feet away and believed someone came to attack him so he struck that person with the bat. 7/7/08 RP 82-3. Gromus swung the bat to keep the man away striking him. 7/7/08 RP 84-5. Gromus chased him to his house tackling him. 7/7/08 RP 86-7. Gromus claimed that after struggling with the man, he realized the man was Greg O'Connor a renter of his. 7/7/08 RP 87-91.

Gromus claimed he needed medical attention after he was released from custody for the injury that he claimed occurred when he was struck in the head with a bat. 7/7/08 RP 130-3.

On cross-examination, Gromus testified he did not seek medical attention at the jail about a complaint of headaches until ten days after the incident. 7/7/08 RP 140-6. Gromus testified he told an officer that he thought the bat could be his. 7/7/08 RP 161.

ii. Officers and medical personnel having contact with victims, witness and defendant on date of incident.

Officers and medical personnel made a number of observations. A number of statements were gathered which were not objected to.

Deputy Stubben was the first officer who arrived at the scene. 6/24/08 RP 160, 162-3. Stubben found Pam and Traci Gromus barricaded inside a bedroom. 6/24/08 RP 168-9. Stubben saw Pam with swelling on the side of her face the size of a softball and she was bleeding from her mouth. 6/24/08 RP 169. Stubben asked Pam who injured her and she replied she didn't see who did it to her. 6/24/08 RP 171. Stubben testified without objection that Traci Gromus said that Pam had told her that her father had done it to her. 6/24/08 RP 172. At the hospital Traci told Stubben Pam had gone out to show Alan a piece of a bug screen that had broken off the truck and when she bent over, Alan hit her in the head. 6/24/08 RP 177, 198. Traci Gromus told Deputy Stubben that her father had been drinking rum that evening which was not his alcohol of choice. 6/24/08 RP 196.

Deputy Stafford arrived about fifteen minutes after the call, 6/24/08

RP 1, 6-7, 110-1. Stafford saw that Gromus had stumbled or staggered, and inquired if Gromus had been drinking. 6/24/08 RP 111. Gromus said he had been drinking rum mixed with fruit juice. 6/24/08 RP 112. Gromus told Stafford that he was outside with his wife, and some man came up with a baseball bat and attacked his wife. 6/24/08 RP 113. Gromus went on to tell Stafford that after the assault, a neighbor came out and attacked him allowing the other attacker to flee and get away. 6/24/08 RP 113, 149. After being advised of his rights, Gromus said that he was on top of his wife trying to see if she was okay when his neighbor attacked him. 6/24/08 RP 117-8, 148-9. After Stafford told Gromus that was a different story, Gromus said he thought the neighbor was the attacker. 6/24/08 RP 118-9. Gromus said he thought the bat used was from his home. 6/24/08 RP 119. Gromus told Stafford, he thought he gouged the attacker's eye or eyes with his thumb. 6/24/08 RP 121. At the jail, Stafford saw that Gromus had a bite injury to his hand. 6/24/08 RP126. Jailers asked that Gromus be taken to the hospital for a fit for jail, but Gromus refused. 6/24/08 RP 126-7. Gromus also refused photography of his hands. 6/24/08 RP 127.

Deputy Kyle Wiggins contacted the second victim, Greg O'Connor. 6/25/09 RP 18, 20-1. O'Connor was in his apartment and had to get around by walking on his knees. 6/25/09 RP 22. O'Connor's left ankle was bent in a location where there was not a joint. 6/25/09 RP 25. O'Connor told

Wiggins that Alan Gromus tried to strangle Pam with a baseball bat. 6/25/09 RP 44. O'Connor said that Alan pursed him with a baseball bat and swung at O'Connor multiple times striking him in the shoulders. 6/25/09 RP 47-8. O'Connor told Wiggins that his ankle was broken in a fall. 6/25/09 RP 49. Wiggins retrieved the baseball bat used from O'Connor's apartment. 6/25/09 RP 23, 49-50.

Pam Gromus told Wiggins that she was outside in the driveway with her husband at the time of the assault, trying to show him some damage to her vehicle. 6/25/09 RP 27. When she bent down, she felt a heavy impact to the back of her head. 6/25/09 RP 27. Pam told Wiggins that she believed Alan was the one who struck her because he was the only one outside with her. 6/25/09 RP 27. Pam said she believed she was struck between 10 and 12 times. 6/25/09 RP 27. Pam remembered a feeling as if someone were holding something against her throat. 6/25/09 RP 27-8. Pam heard the neighbor come up and say Alan's name and she was able to get away. 6/25/09 RP 28.

Sergeant Keith Brown spoke with Alan Gromus shortly after he arrived. 6/25/09 RP 65-9. Alan told Brown that a subject came and beat his wife with a baseball bat, that he got between them and that the neighbor had come outside and he and the neighbor fought with the attacker who ran away. 6/25/09 RP 70. Brown was aware that Alan's story differed from

what his wife had reported, so he advised Gromus of his rights and took a further statement. 6/25/09 RP 70-1. Gromus claimed he had been talking with his wife when the attack occurred. 6/25/09 RP 72. He stated that he wrestled with the person and got the bat away, and that was when the neighbor attacked him. 6/25/09 RP 72. Brown recalled a slight odor of intoxicants coming from Alan Gromus. 6/25/09 RP 73. Brown also talked to O'Connor who told him he heard a commotion and went outside to find Alan Gromus fighting with his wife and when he first saw Alan, he was standing over his wife choking her with the bat. 6/25/09 RP 74.

Brown talked to Pam Gromus at the hospital. 6/25/09 RP 76-7. Pam told Brown they were talking and she bent over to pick up a piece of the car when she was beat with a baseball bat. 6/25/09 RP 77. Pam recalled Alan had choked her with the bat. 6/25/09 RP 77.

Qben Oliver was a paramedic who had contact with Pam Gromus. 7/2/08 RP 107-9. Oliver questioned Pam to help assess her condition. 7/2/08 RP 110. Pam told him said she did not know who hit her but that she had been struck many times with a bat. 7/2/08 RP 110-1.

Dr. Robert Apter testified about his treatment of Pam Gromus at Island Hospital on the night of the incident. 6/30/08 RP 104, 107. In addition to severe facial injuries, Dr. Apter was concerned about Pam's airway because of neck swelling. 6/30/08 RP 108. Despite severe facial

injuries, the CAT scan of the brain and cervical spine were normal. 6/30/08 RP 112. Pam was coherent. 6/30/08 RP 125.

Dr. Apter also treated Greg O'Connor. 6/30/08 RP 115. Greg O'Connor had suffered from a fracture and dislocation of his ankle and an abrasion on his back. 6/30/08 RP 116, 121.

Dr. Austin Hayes testified about treating Pam Gromus at Harborview Medical Center on October 1, 2007. 6/26/08 RP 120-1. He began by getting a history from her. 6/26/08 RP 122. He testified Pam told him that her husband who rarely drank, was drinking that night and out of the blue hit her with a baseball bat. 6/26/08 RP 122. Pam described that she had been struck 8 to 10 times in the face, neck and body. 6/26/08 RP 122. She also said after she was struck, the bat was placed on her neck and she was choked. 6/26/08 RP 123. She said a neighbor had come out to break it up and Alan turned the bat on him assaulting him. 6/26/08 RP 123. Pam told Dr. Hayes that she had pain in her neck in the right front part of her neck. 6/26/08 RP 124. That portion of Pam's neck was tender to touch. 6/26/08 RP 133. Pam denied loss of consciousness. 6/26/08 RP 125. Pam was in pain, but lucid and able to answer questions. 6/26/08 RP 131.

iii. Testimony regarding statements of Pam Gromus after incident.

After the incident, Pam had completed a crime victim's application

in January of 2008, in which she wrote her husband had attacked her. 6/26/08 RP 102-3. Pam claimed she did not recall having a conversation with Principal David Anderson, of the Mount Vernon High School the day after the incident. 6/26/08 RP 107. Pam Gromus was asked a series of questions about whether she recalled statements she gave to the principal. 6/26/08 RP 107-9. She denied making the statements. 6/26/08 RP 107-9. Pam was asked if she recalled a phone conversation with Krista Paulson the day after. 6/26/08 RP 213. She testified she didn't recall making the phone call to Paulson or the content of the conversation. 6/26/08 RP 213-7.

Pam Gromus was questioned about whether she recalled having a conversation with Jo McDonald at her home on October 1, 2007. 6/26/08 RP 181. Pam remembered Jo and three other women coming to her house. 6/26/08 RP 181. Pam denied making statements to McDonald. 6/26/08 RP 181- 3. Pam Gromus said she recalled Anita Robertson coming to her house the day after the incident. 6/26/08 RP 209. However, Pam denied any of the content of the conversation. 6/26/08 RP 209-13. Pam asked if she recalled Janice Lint coming to her residence and Pam said that she did. 6/26/08 RP 217. However, Pam did not recall telling Lint that Alan had beaten her, that a neighbor had tried to come to her aid or that Pam had said she had to keep shoving the door shut and locking it to keep Alan out. 6/26/08 RP 217-8. Pam recalled Kathy Dean coming to her house the day after the incident.

6/27/08 RP 40. However, Pam said that she could not recall the substance of the conversation that she had with Dean. 6/27/08 RP 41-2.

Pam claimed not to recall having a conversation with Detective Esskew of the Sheriff's Office the day after the incident. 6/30/08 RP 30-5. Pam recalled going to the Sheriff's Office a week after the incident and talk to Detective Sheahan-Lee. 6/27/08 RP 67. Pam said she could not recall the conversation with Detective Sheahan-Lee. 6/27/08 RP 68-84. Pam denied telling Sheahan-Lee that Alan acted differently and violently when he was drinking rum. 6/27/08 RP 73.

Pam also said that she did not recall a conversation with David Anderson about two weeks after the incident. 6/26/08 RP 184-5.

David Anderson testified about the phone conversation that he had with Pam Gromus on October 1, 2007. 6/26/08 RP 197, 199-200. David Anderson testified Pam had made the statements she denied making during her testimony. 6/26/08 RP 200-2. Anderson recounted the conversation with Pam about two weeks later. 6/26/08 RP 202-4.

Krista Paulson testified about a phone call with Pam the morning after the incident. 6/27/08 RP 15-6. Pam started off the call by stating that Alan tried to kill her. 6/27/08 RP 17. Paulson went on to recount the statements that Pam denied making. 6/27/08 R17-22. Paulson said that Pam sounded like she knew Pam to sound. 6/27/08 RP 22. Pam stated that she

was very angry, would divorce him and press charges. 6/27/08 RP 22-3.

Jo McDonald knew Pam and Alan Gromus. 6/26/08 RP 186-7. McDonald went to Pam's residence with three other school employees, Anita Robertson, Janice Lint and Kathy Dean. 6/26/08 RP 188-9. McDonald testified Pam had said that Al had hit her with a baseball bat. 6/26/08 RP 191. Pam appeared lucid and regular to McDonald. 6/26/08 RP 191. McDonald also recounted the other statements that Pam denied making. 6/26/08 RP 192-3.

Anita Robertson testified about statements that Pam made. 7/2/08 RP 5-7. Robertson said Pam was calm and did not act any differently than she did at school. 7/2/08 RP 9. Robertson recounted the statements Pam denied making. 7/2/08 RP 10-11.

Janice Lint went to see Pam at her home the day after the incident. 6/27/08 RP 31-2. Lint said Pam understood the conversation and was clear-headed and totally cognizant of what had happened. 6/27/08 RP 34. Pam acting the same as she normally would. 6/27/08 RP 34-5. Lint went on to recount the statements that Pam denied making about being beaten by her husband, the neighbor coming to help and that Traci and Pam had to keep shoving the door closed and locking it to keep Alan out. 6/27/08 RP 35.

Kathy Dean testified as to a phone call that she had with Pam Gromus about 7:00 a.m. the day after the incident. 6/27/08 RP 110-1. Dean

also testified as to the conversation that she had with Pam at her residence later. 6/27/08 RP 111. Dean provided the substance of the statements that Pam had denied making. 6/27/08 RP 111-3. Pam seemed very coherent and did not have any problem understanding questions. 6/27/08 RP 114.

Detective Terry Esskew testified to the statements that Pam denied making. 7/1/08 RP 215-8. Detective Jennifer Sheahan-Lee also testified as to her involvement in the investigation. 7/2/08 RP 138, 141-2. Sheahan-Lee testified about Pam Gromus coming to her to provide information about a tenant that Pam had evicted because her children were questioning her about whether a third person was involved. 7/2/08 RP 144. Detective Sheahan-Lee recounted the conversation that Pam did not recall having. 7/2/08 RP 144-54. Sheahan-Lee also testified about being present when Traci Gromus and Detective Esskew had a conversation. 7/2/08 RP 155.

iv. Other officer investigation.

Detective Kay Walker testified about her examination of the bat involved. 6/30/08 RP 86-97. She noted that there were no useable fingerprint ridges to be found on the bat. 6/30/08 RP 93-4.

Detective Terry Esskew testified about being the lead investigator on the Gromus case. 7/1/08 RP 202, 205. Esskew obtained a search warrant for Gromus's blood and photograph Mr. Gromus's injuries. 7/1/08 RP 207. The only injuries that Esskew noted were injuries to Gromus's hands. 7/1/08 RP

201. Gromus had indicated toward his head during the photographs, but Esskew did not see any injuries in the area. 7/1/08 RP 210-1. The lab work showed that the blood drawn more than 15 hours after the incident did not contain any alcohol. 7/1/08 RP 211-2. Esskew also took photographs of Mrs. Gromus that same day. 7/1/08 RP 213-4. Gromus did not say he had any injuries to the lower part of his body, so Esskew did not photograph that area. 7/2/08 RP 64-5. Esskew recalled seeing vomit on the chair and inside the bucket where the hard lemonade bottles were. 7/1/08 RP 218-20. Traci Gromus told Esskew the vomit was from her father. 7/2/08 RP 16.

Esskew located and interviewed Daniel McClaren after the request of Pam or Traci Gromus. 7/2/08 RP 36-7, 41, 100-1. Esskew interviewed McClaren. 7/2/08 RP 39.

v. Expert testimony regarding injuries and memory.

Dr. Rohit Khosla was the plastic surgeon who treated Pam Gromus at Harborview. 6/25/09 RP 119-23. Pam Gromus told the doctors on her initial visit that she was assaulted by her husband and that she was hit in the head with a bat on multiple occasions. 6/25/09 RP 124-5. Dr. Khosla determined that Pam had a complex fracture of her cheekbone. 6/25/09 RP 127. The injuries could have been caused by a single blow. 6/25/09 RP 163. Pam needed surgery to fix the injuries. 6/25/09 RP 134. At the time of trial, Pam still needed surgery to get the bones exactly where they were before.

6/25/09 RP 142. Pam had vision problems that persisted after surgery.

6/25/09 RP 144.

Dr. Daniel Selove is a forensic pathologist who was contacted to review the injuries sustained by Pam Gromus. 6/26/08 RP 140, 144. He reviewed the reports of her treatment. 6/26/08 RP 144. Selove determined that the injuries were consistent with being struck with a hard rounded object. 6/26/08 RP 147-8. Pam's injury to her neck was consistent with being choked. 6/26/08 RP 148-9. Selove also described that Pam had a fracture of a protrusion of the bone on the outside of her left ankle. 6/26/08 RP 151. Selove was also able to present an opinion as to the angle at which Pam was facing when she was struck. 6/26/08 RP 155-6.

Dr. Fredrick Braun is a board-certified psychiatrist and neurologist. 7/3/08 RP 5-7. Dr. Braun examined Alan Gromus the month before the trial. 7/3/08 RP 10. Gromus said he had a history of left side headaches and left arm pain, but that they had resolved. 7/3/08 RP 12, 45. Dr. Braun reviewed the medical records. 7/3/08 RP 12-13. The initial CT scan did not note a hematoma, a small collection of blood under the skin but over the bone of the skull not involving the brain. 7/3/08 RP 13-4. Upon further review, the hematoma was noted. 7/3/08 RP 14. The MRI conducted a week later showed the hematoma had resolved. 7/3/08 RP 17, 21. Dr. Braun opined that it was possible, but not probable that Gromus had received a concussion

from the incident. 7/3/08 RP 23-4.

Gromus called Dr. Donald Slack to testify about his evaluation of Gromus on October 16, 2007. 7/7/08 RP 114-6. Slack ordered a CT scan which did not show any intracranial hemorrhage or abnormality. 7/7/08 RP 118-9. The CT scan did note a 12 millimeter hematoma on the scalp. 7/7/08 RP 119. The hematoma was not visible to the eye. 7/7/08 RP 120.

Gromus called neuropsychologist Dr. Ted Judd. 6/26/08 RP 7. Dr. Judd evaluated the defendant on November 20, 2007, and reviewed reports from an emergency room evaluation of Gromus on October 16, 2007. 6/26/08 RP 12-13. Through Dr. Judd, defense admitted statements of Gromus about the events of the assault on September 30, 2007, for the purpose of his evaluation. 6/26/08 RP 16-18. Gromus claimed to Dr. Judd that he had a memory of events up until the time that he claimed he was assaulted with a baseball bat, following which his memory was fuzzy. 6/26/08 RP 17-8, 49-50. Dr. Judd said that 25 years before Gromus had been in a car accident after drinking and quit drinking alcohol until a few years before the incident. 6/26/08 RP 22. He claimed to have a couple of drinks on the day he was arrested. 6/26/08 RP 22-3. Dr. Judd reported that Gromus's son had indicated there was no history of domestic violence between Gromus and his wife. 6/26/08 RP 25. Dr. Judd opined that Gromus had suffered a mild concussion. 6/26/08 RP 30. Dr. Judd acknowledged that

Alan Gromus's MRI scan was normal. 6/26/08 RP 57.

Gromus also called a second neuropsychologist Dr. Allan Fitz. 7/8/08 RP 63. Dr. Fitz testified about evaluation of Pam Gromus on January 17, 2008. 7/8/08 RP 65. Dr. Fitz opined Pam had a brain injury that resulted in cognitive difficulties and affected memories. 7/8/08 RP 71-2. Fitz suggested that the brain injury could result in different details to different persons regarding the event. 7/8/08 RP 72. Fitz also testified about memory in general. 7/8/08 RP 73-81. Fitz testified that outside pressures some times play into what people remember. 7/8/08 RP 92.

vi. Other witnesses called by Gromus.

Gromus called a friend, George Wood, to testify that Gromus batted left-handed in softball. 6/24/08 RP 155-8. Gromus called Susan Munch a former foster-daughter of the Gromuses to testify that she had not observed any domestic violence between Pam and Alan Gromus. 7/3/08 RP 62-5. Gromus called a friend, Robert Raudebaugh, to testify Gromus was left-handed. 7/3/08 RP 68-72. Gromus called Nora Pacheco to testify that Gromus was left-handed. 7/7/08 RP 166-8. Gromus called Roxanne Gardner who rented from the Gromuses to testify that Pam Gromus seemed confused on October 2, 2007, during a phone call. 7/7/08 RP 170-3. Gardner also testified she observed pill bottles in Pam's bedroom and that Pam's demeanor changed four to five weeks after the incident. 7/7/08 RP

175-6. Gromus called Laura Wright who was a friend of Traci Gromus. 7/7/08 RP 187-8. Wright testified about Traci giving Pam pain medications. 7/7/08 RP 190-1. Wright also testified Pam had been weaning herself of medications, her mind was clear and she knew that Alan did not hit her. 7/7/08 RP 192. Steven DeWispelaere testified about being friends with Pam and Alan Gromus for 25 years. 7/7/08 RP 200-1. DeWispelaere said he had never observed an indication of domestic violence. 7/7/08 RP 202.

Chief Gary Shand of the Skagit County Jail was called by defense to testify that Gromus had reported that he was struck by a baseball bat four days after he was incarcerated and that defense had sought to arrange an CT scan of Gromus when he was incarcerated. 7/8/08 RP 95-6, 99-100.

Gromus called Daniel McClaren to testify about renting property from Gromus and what occurred when he left the apartment. 7/8/08 RP 121-2. McClaren said he was on good terms with the Gromuses when he left. 7/8/08 RP 122. He said they helped him clean up the apartment and that he got a good deal of his deposit back. 7/8/08 RP 122.

IV. ARGUMENT

- 1. The trial court did not err in admitting and the State did not use as substantive evidence inconsistent statements of a victim who testified as to an event and statements made.**

Gromus claims that admission of prior inconsistent statements of Pam Gromus with the prosecutor's argument invited the jury to consider the

statements as substantive evidence, rather than impeachment. Opening Brief of Appellant at page 22.²

The State contends that Pam Gromus made a decision at some point to believe that her husband had not assaulted her, testified to that fact and suggested another person was responsible for the assault. Thus, her prior inconsistent statements were properly admitted to impeach her credibility by the trial court. The trial court properly granted the request of Gromus to present limiting instructions making the purpose of the statements clear to the jury. Finally, the State's argument specifically addressed that the prior statements pertained to credibility and were not argued to be substantive evidence.

i. Case law pertaining to admission of inconsistent statements.

First, it should be noted that we will not disturb a trial court's rulings on a motion in limine or the admissibility of evidence absent an abuse of the court's discretion. Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 283, 840 P.2d 860 (1992); State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990); Fenimore, 87 Wn.2d at 91-92, 549 P.2d 483. When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists. Davis v. Globe Mach. Mfg. Co., 102 Wn.2d 68, 77, 684 P.2d 692 (1984).

² Gromus states a number of times the State called ten witnesses to try to discredit Pam. Gromus with prior inconsistent statements. Opening Brief of Appellant at page 6. A review of the jury instruction shows that of the ten witnesses who testified regarding prior inconsistent or consistent statements of Pam Gromus, two of those, Roxanne Gardner and Lauren Wright, were actually called by defense. CP 143, 7/7/08 RP 170, 187.

State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

A witness may be impeached with a prior out-of-court statement of a material fact that is inconsistent with his testimony in court, even if such a statement would otherwise be inadmissible as hearsay. State v. Dickenson, 48 Wn. App. 457, 466, 740 P.2d 312 (1987). Impeachment evidence affects the witness's credibility but is not probative of the substantive facts encompassed by the evidence. State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985).

State v. Clinkenbeard, 130 Wn. App. 552, 569-570, 123 P.3d 872 (2005).

In general, a witness's prior statement is admissible for impeachment purposes if it is inconsistent with the witness's trial testimony. See State v. Lavaris, 106 Wn.2d 340, 344, 721 P.2d 515 (1986); 5A Karl B. Tegland, Washington Practice, Evidence § 256, at 306 (3d ed.1989) (*citing* Pilon v. Lindley, 100 Wn. 340, 170 P. 1022 (1918) and Sterling v. Radford, 126 Wn. 372, 218 P. 205 (1923)).

State v. Newbern, 95 Wn. App. 277, 292, 975 P.2d 1041 (1999).

But her memory about making the prior statement is not at issue; rather, we focus on her trial testimony. Tegland § 256, at 310 (*citing* Kuhn v. United States, 24 F.2d 910 (9th Cir.1928), *reversed in part and rehearing denied* 26 F.2d 463 (1928), *cert. denied*, 278 U.S. 605, 49 S.Ct. 11, 73 L.Ed. 533 (1928)). **This is because the purpose of using prior inconsistent testimony to impeach is to allow an adverse party to show that the witness tells different stories at different times.** 1 John William Strong, *McCormick on Evidence* § 34, at 114 (4th ed.1992). From this, the jury may disbelieve the witness's trial testimony. Tegland, § 255, at 300.

If a witness does not testify at trial about the incident, whether from lack of memory or another reason, there is no testimony to impeach. Tegland, § 256, at 310. See Kuhn, 24 F.2d at 913 (improper to impeach witness

who fails to give testimony). But conversely, **even if a witness cannot remember making a prior inconsistent statement, if the witness testifies at trial to an inconsistent story, the need for the jury to know that this witness may be unreliable remains compelling.** See generally Hancock, 109 Wn.2d at 765, 748 P.2d 611.

State v. Newbern, 95 Wn. App. 277, 293, 975 P.2d 1041 (1999).

The limiting instruction by the trial court based upon Washington Pattern Instruction 5.30, provided the jury with explicit instruction as to the use of testimony of Pam Gromus.

We presume that juries follow all instructions given. Degroot v. Berkley Constr., Inc., 83 Wn. App. 125, 131, 920 P.2d 619 (1996) (citing State v. Lord, 117 Wn.2d 829, 861, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992)).

State v. Stein, 144 Wash.2d 236, 247, 27 P.3d 184 (2001).

ii. Motions, instructions and evidence at trial regarding statements of Pam Gromus.

On the first day of trial, the trial court evaluated admission of testimony about Pam Gromus's statements. 6/24/08 RP 8-17. The trial court determined that her statements would be important to impeach her present claim that her husband did not attack her. 6/24/08 RP 16-7. Defense indicated that it would request a limiting instruction noting that the statements would be used solely for impeachment before each witness would testify regarding Pam Gromus's statements.

During opening statements, the prosecutor noted that Pam Gromus

made inconsistent statements about what occurred. 6/24/08 RP 51. The prosecutor specifically noted that the statements that she gives to others are to be considered in determining her credibility. 6/24/08 RP 52-3.

Defense moved for mistrial after opening statement claiming that the prosecutor did not specify which of Pam Gromus's statements were impeachment. 6/24/08 RP 99-100. The prosecutor and the judge both noted that the prosecutor had said the issue regarding Pam Gromus's statements pertained to her credibility. 6/24/08 RP 100-1. The trial court denied the motion. 6/24/08 RP 101. The defense sought the limiting instruction. 6/24/08 RP 102. Both defense and the state agreed some of the statements would be admissible as excited utterances. 6/24/08 RP 102-3. The trial court read the limiting instruction for both counsel.³ 6/24/08 RP 103-4. The trial restated the instruction on the record outside the presence of the jury during the testimony of Pam. 6/26/08 RP 113-4. When Pam returned to the

³ The transcript reads:

Before this evidence regarding prior statements of Pam Gromus is allowed, the Court advises you that you may consider her statements and/or her prior statements and/or answers only for the limited purpose of assessing the credibility of the person who made the statements, Pam Gromus.

The answers or evidence may not be considered by you as substantive evidence what she said actually took place, what she said in her prior statements actually took place.

You must not consider the evidence or answers for any other purpose, other than to assess the credibility of Pam Gromus.

6/24/08 RP 103-4.

stand, the trial court read the instruction.⁴ The court re-read the instruction to the jury about using Pam Gromus's statements for a second time the next day.⁵

The State asked Pam questions about her statements and call eight witnesses to testify regarding prior statements of Pam. The statements the trial court admitted both impeached Pam as to the fact the statements were made and also showed she had knowledge in the past about additional facts that she diverged from her trial testimony. Those statements are detailed in the Statement of Fact, section III, 2, iii, of this brief.

⁴ The first time the court provided the instruction to the jury it read:

Evidence of prior statements of Pam Gromus is being elicited at this time. Mr. Weyrich's questions right before lunch and commencing again now regard alleged prior statements made by Pam Gromus to a number of other people. You the jury are instructed that you may consider her prior statements or answers only for the limited purpose of assessing the credibility of Pam Gromus.

The evidence or answers by Pam Gromus may not be considered by you as substantive evidence, that what she said in her prior statements actually took place. You must not consider her statements or answers for any other purpose, other than to assess the credibility of Pam Gromus.

6/26/08 RP 180-1.

⁵ The second time the court provided the instruction it read:

To refresh your memory, ladies gentlemen of the jury, I want to read you an instruction at this time. It's the same one I read to you yesterday.

Evidence of prior statements of Pam Gromus are being elicited at this time. Mr. Weyrich's questions now, with these witnesses that he's calling, regard alleged prior statements made to Pam Gromus to a number of persons. You are instructed that you may consider Pam Gromus' prior statement or answers only for the limited purpose of assessing the credibility of Pam Gromus. The evidence or answers may not be considered by you as substantive evidence, that what they said in the prior statements actually took place. You must not consider statements or answers for any other purpose, other than to access the credibility of Pam Gromus.

After the noon recess, Gromus made a motion for mistrial based upon the claim of error in the admission of Pam Gromus's inconsistent statements. 6/27/08 RP 104. The trial court denied the motion noting that the statements were interesting, but also noted that they helped both parties. 6/27/08 RP 105, 107. The trial court read the instruction for a third time later the same day.⁶ The trial court also reminded the jury of the limiting instruction prior to testimony of Detective Esskew regarding statements. 7/1/08 RP 216.

On July 2, 2008, Gromus renewed the motion to dismiss based upon admission of impeaching statements of Mrs. Gromus. 7/2/08 RP 157. The trial court denied the motion. 7/2/08 RP 157. The trial court provided that instruction to the jury CP 143.

iii. The trial court did not abuse its discretion in admitting testimony of prior statements of Pam Gromus and the State did not use them as substantive evidence.

The defense case was based upon the defendant's claim that he did not commit the offenses supported by the statements of Pam Gromus that

6/27/08 RP 30.

⁶ The third time the court provided the instruction it read:

Anyway, Mr. Weyrich is going to call another witness who is going to testify as to prior statements regarding Pam Gromus. I just want to remind you again, for the third time, that you may consider these prior statements of Mrs. Gromus only for the purpose of assessing her credibility. You can not consider these prior statements of Mrs. Gromus as to proof of the matters asserted or what actually happened. You can only consider the prior statements as to her credibility.

she became certain after trial that her husband had not committed the offenses and claimed that she recalled a person in a gray sweatshirt nearby prior to the assault. In contrast, the statements made by Pam Gromus in the days after the offense contradicted her firm belief developed later that her husband had not assaulted her. They also showed that Pam Gromus had more knowledge of the events about what occurred immediately after the incident, than she recalled at the time of trial nine months later.

The admission of the prior statements of Pam Gromus was properly admitted to impeach her testimony.

In State v. Newbern, 95 Wn. App. 277, 293, 975 P.2d 1041 (1999), the defendant was charged with attempted murder in the first degree and prior statements of the victim inconsistent with the trial testimony of the victim about the events which the victim had testified to were admitted.

The court noted:

To be admissible for impeachment purposes, a witness's in-court testimony need not directly contradict the witness's prior statement. Tegland § 256, at 307. We determine inconsistency using the following test:

[I]nconsistency is to be determined, not by individual words or phrases alone, but 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?

Sterling, 126 Wn. at 375, 218 P. 205 (*quoting* 2 Wigmore on Evidence, § 1040, p. 1208) (emphasis in original); State v. Dickenson, 48 Wn. App. 457, 466-67, 740 P.2d 312 (1987); Teglund § 256, at 307. The federal courts apply a similar standard:

To be received as a prior inconsistent statement, the contradiction need not be in plain terms. It is enough if the 'proffered testimony, taken as a whole, either by what it says or by what it omits to say' affords some indication that the fact was different from the testimony of the witness whom it sought to contradict.

United States v. Gravely, 840 F.2d 1156, 1163 (4th Cir.1988) (*quoting* United States v. Barrett, 539 F.2d 244, 254 (1st Cir.1976)); *see also* United States v. McCrady, 774 F.2d 868, 873 (8th Cir.1985); United States v. Dennis, 625 F.2d 782, 795 (8th Cir.1980); United States v. Morgan, 555 F.2d 238, 242 (9th Cir.1977).

The emphasis in this liberal approach is on aiding the finder of fact in evaluating the credibility of the witness's testimony. *McCormick on Evidence* § 34, at 116. Courts and commentators have both acknowledged that the jury is better able to determine the value and weight to give a witness's trial testimony if it knows that the witness expressed contrary views while the event was still fresh in the witness's memory and before the passage of time created opportunities for outside influence to distort the statement. *McCormick on Evidence* § 34, at 116; Judson v. Fielding, 227 A.D. 430, 237 N.Y.S. 348, 352 (1929) (quoted in *McCormick on Evidence* § 34, at 116 n. 21).

State v. Newbern, 95 Wn. App. 277, 294-5, 975 P.2d 1041 (1999) (emphasis added). The court in Newbern noted that the defense would have been entitled to a limiting instruction but in that case, none was sought. State v. Newbern, 95 Wn. App. at 295. However, in the present case, a limiting instruction was sought further assuring that the jury was

properly using the prior inconsistent statements of Pam Gromus for the proper purpose.

In the case of State v. Clinkenbeard, involving a case of sexual misconduct with a minor, the State admitted statements that the alleged victim made to others that she had sexual intercourse with the defendant. State v. Clinkenbeard, 130 Wn. App. 552, 569, 123 P.3d 872 (2005). This was the only evidence establishing sexual intercourse. Id at 570. The State then argued that the statements were proof of sexual intercourse. Id at 570-1. Since the State used the statements as substantive evidence and this was the only evidence of intercourse, admission of the evidence was prejudicial.

In contrast in the present case, the prior inconsistent statements were not used as substantive evidence. The instructions to the jury expressly provided that the statements were not substantive evidence.

Gromus tries to claim that because of the number of impeachment witnesses, and the nature of the argument by the State, that transformed the evidence into substantive evidence. Gromus also claims that the admission of the statements was as to a collateral matter. Appellant's Opening Brief at page 25. The State contends that Pam's statements were made at the time of her description of the event and thus showed "inconsistent beliefs." To support the claims Gromus cites to the opening statement, where the State made reference to the prior inconsistent statements of Pam Gromus.

Opening Brief of Appellant at page 17, 26-7. In fact, when reviewing the transcript it shows that the prosecutor prefaced and concluded the references to the prior statements by explaining that the statements were relevant to credibility. 6/24/08 RP 99, 101.

The jury's role involves weighing the credibility of all the witnesses. CP 117, Instruction No. 1 (Washington Pattern Instruction 1.02). As such the prosecutor's opening statement and closing argument where the State is asking the jury to evaluate the credibility of all the witnesses, including Pam Gromus, is proper. In addition, the impeachment evidence of Pam Gromus was significant and thereby severely undercut her credibility. Thus, closing argument pointing that out was proper. 7/11/08 RP Closing 8, 10-11, 13.

Gromus also argues that claimed misconduct was "akin" to the misconduct in State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). However, in Fleming, the prosecutor argued that a jury must find that certain witnesses lied in order to acquit a defendant.

Ladies and gentlemen of the jury, for you to find the defendants, Derek Lee and Dwight Fleming, not guilty of the crime of rape in the second degree, with which each of them have been charged, based on the unequivocal testimony of [D.S.] as to what occurred to her back in her bedroom that night, you would have to find either that [D.S.] has lied about what occurred in that bedroom or that she was confused; essentially that she fantasized what occurred back in that bedroom.
Verbatim Report of Proceedings at 668 (emphasis ours).

This court has repeatedly held that it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken. State v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74 (“it is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying”), *rev. denied*, 118 Wn.2d 1007, 822 P.2d 287 (1991); State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214, *rev. denied* 127 Wn.2d 1010, 902 P.2d 163 (1995); State v. Barrow, 60 Wn. App. 869, 874-75, 809 P.2d 209, *rev. denied* 118 Wn.2d 1007, 822 P.2d 288 (1991).

State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). The argument in the present case was not akin to Fleming.

Gromus also notes that in addition to the State asking the witnesses regarding the prior inconsistent statement, the State asked for details showing that Gromus “was in full command of her faculties at the time she made them.” Opening Brief of Appellant at page 18, 27-8. This type of questioning is relevant to establish that Mrs. Gromus did in fact make the statements, had an awareness of the circumstances and had the ability to recall the statements.

2. The trial court did not improperly comment on the evidence by presenting the limiting instruction requested by defense regarding evaluation of the prior statements of Pam Gromus.

Gromus claims that the trial court improperly commented on the evidence by presenting an instruction regarding the use of testimony of ten witnesses regarding the prior statements of Pam Gromus. Opening Brief of

Appellant at pages 30-2. However, Gromus requested the limiting instruction from the court repeatedly during trial and requested a modified version of the same instruction in the instructions requested by defense. Furthermore, because the instruction told the jury how to properly consider the testimony, the instruction was not an improper comment on the evidence.

i. Case law pertaining to instructions.

This court has declared that “ ‘[a] party may not request a [] [jury] instruction and later complain on appeal that the requested information was given.’ ” State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) (emphasis in original) (*quoting State v. Boyer*, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979)).

State v. Vander Houwen, 163 Wn.2d 25, 36-37, 177 P.3d 93 (2008).

Each side in a case is entitled to instructions embodying its theory of the case if the evidence supports the theory. State v. Benn, 120 Wn.2d 631, 654, 845 P.2d 289, *cert. denied*, 510 U.S. 944 (1993). But any instruction must correctly state the relevant law. Benn, 120 Wn.2d at 654.

When evidence is admissible both as impeachment and as substantive evidence, the trial court acts within its discretion when it refuses to give an instruction that informs the jury it may only use the evidence as impeachment evidence. State v. Gakin, 24 Wn. App. 681, 687, 603 P.2d 380 (1979), *rev. denied*, 93 Wn.2d 1011 (1980).

An impermissible comment on the evidence is one “which conveys to the jury a judge's personal attitudes towards the

merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question.” State v. Swan, 114 Wn.2d 613, 657, 790 P.2d 610 (1990). A statement by the court will constitute an improper comment on the evidence only if the jury is able to infer that the trial judge personally believes or disbelieves the evidence relative to a disputed issue. State v. Louie, 68 Wn.2d 304, 314, 413 P.2d 7 (1966).

State v. Moses, 129 Wn. App. 718, 733, 119 P.3d 906 (2005).

ii. Trial court’s decision regarding instruction.

The State believes this Court should start with reviewing the facts presented in the prior argument section, regarding the trial court’s use of the limiting instruction during trial. See footnotes 4-6.

In addition, on July 8, 2008, the parties discussed the final jury instructions. 7/8/08 Supp RP 5-21. The parties discussed the instruction about use of testimony about statements of Pam Gromus for impeachment which defense proposed based upon Washington Pattern Instruction 5.30. CP 113, 114, 7/8/08 Supp RP 14. The trial court believed the instruction proposed by defense was the one that had been read to the jury throughout. 7/8/08 Supp RP 14. In fact, it was a modified version of it.

The defense proposed version of Washington Pattern Instruction 5.30 reads:

Evidence has been introduced in this case on the subject of statements made by Pamela Gromus to a number of individuals which she testified she did not make or does not recall making.

This evidence has been introduced for the limited purpose of impeaching the credibility of Pamela Gromus.

You must not consider this evidence as substantive evidence of what actually did, or did not, take place, or for any other purpose.

CP 113, 114.

The prosecutor pointed out that some of the statements of Mrs. Gromus were not used for impeachment, but were substantive evidence and admissible on bases such as excited utterance. 7/8/08 Supp RP 15-6. Defense acknowledged the issue. 7/8/08 Supp RP 16-7. The trial court crafted the remedy by listing the witnesses who were testified as to statements of Mrs. Gromus for impeachment. 7/8/08 Supp RP 17. Defense agreed. 7/8/08 Supp RP 17.

Thus, the trial court used essentially the same instruction that had been used during the trial with the names of the witnesses added. It read:

Evidence has been introduced in this case on the subject of prior statements made by Pam Gromus to a number of individuals.

The jury is instructed that it may consider her prior statements or answers to:

- | | |
|-------------------|-------------------------|
| 1. Dave Anderson | 6. Anita Roberson |
| 2. Kathy Dean | 7. Terry Esskew |
| 3. Jo McDonald | 8. Jennifer Sheahan-Lee |
| 4. Janice Lint | 9. Roxanne Gardner |
| 5. Krista Paulson | 10. Lauren Wright |

Only for the limited purpose of assessing the credibility of Pam Gromus.

Those answers may not be considered by you as substantive evidence that what she said in those prior statements actually took place.

You must not consider those statements or answers as for any purpose other than to assess the credibility of Pam Gromus.

CP 143.

In addition, the clerk's minutes indicate that neither party objected to the final instructions presented to the jury. CP ____, (Sub. No. 82.100, Court Reporter Notes Filed 6/23/08, Supp. Designation of Clerk's Papers pending.

iii. Where defense sought the limiting instruction throughout trial, and agreed to the limiting instruction changes, the defendant invited error and in addition, the instruction was not a misstatement of the law.

The State contends that in the present case, Gromus invited error by requesting a limiting instruction from the trial court, repeatedly requesting the instruction during the trial, and agreeing to modifications for the court's final instructions to the jury.

Gromus also failed to object to the proposed instruction prior to being presented to the jury.

Gromus also claims that the instruction improperly commented on the evidence because "the instruction clearly conveyed that the judge believed that the statements were made and vouched for them as critical to Pam Gromus's credibility. Opening Brief of Appellant at page 31. The instruction does not in fact state that there were statements made to those ten other individuals. The instruction does not convey the trial judge's personal

belief as to the merits or allow the jury to infer the judge's personal attitude as to whether testimony be believed.

In addition, this instruction should not be considered in a vacuum without reviewing the other instructions. The jury was also properly instructed that their role is to weigh the credibility of all the witnesses. CP 117, Instruction No. 1 (Washington Pattern Instruction 1.02). In the present case, instruction 26, when read with the other instructions properly informed the jury that the prior statements of Pam Gromus to the ten witnesses noted, were only to be used in assessing her credibility.

3. The defendant should not be permitted to raise for the first time on appeal claims regarding opinion testimony as to guilt of the defendant where the defendant raised the claim to impeach law enforcement and attack the quality of the investigation.

Gromus's defense was based in part upon a claim that law enforcement had failed to investigate someone that the defendant claimed had a possible motive. In impeaching the officer, defense sought to show that he tried to convince the defendant's daughter that the defendant committed the offense rather than pursuing other leads. In response, the State sought admission of the list used to talk to the daughter. Defense went on to specifically ask the officer as to his opinion as to guilt of the defendant.

i. Case law pertaining to admission of opinions as to guilt.

Appellate courts consider the trial court's admission or rejection

of testimony for an abuse of discretion. State v. Ortiz, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992).

A trial court has considerable discretion when admitting or excluding evidence. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). Witness opinion testimony is typically limited because it invades the jury's exclusive province. Demery, 144 Wn.2d at 759.

A claim of improper admission of opinion evidence still must be a manifest error where the issue is raised for the first time on appeal.

Appellate courts will not approve a party's failure to object at trial that could identify error which the trial court might correct (through striking the testimony and/or curative jury instruction). Scott, 110 Wn.2d at 685, 757 P.2d 492. **Failure to object deprives the trial court of this opportunity to prevent or cure the error. The decision not to object is often tactical.** If raised on appeal only after losing at trial, a retrial may be required with substantial consequences. State v. Madison, 53 Wn. App. 754, 762-63, 770 P.2d 662 (1989).

“Manifest” in RAP 2.5(a)(3) requires a showing of actual prejudice. Walsh, 143 Wn.2d at 8, 17 P.3d 591; McFarland, 127 Wn.2d at 333-34, 899 P.2d 1251. “‘Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.’ ” WWJ Corp., 138 Wn.2d at 603, 980 P.2d 1257 (quoting Lynn, 67 Wn. App. at 345, 835 P.2d 251).

State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007) (emphasis added).

ii. Evidence at trial regarding list of reasons given to Traci Gromus and discussion with Tom Gromus.

During opening statement, Gromus highlighted to the jury that the lead detective had argued with Gromus's daughter in order to convince her to change her mind. 6/24/08 RP 92. Counsel went on to argue that the detective also failed to investigate what defense claimed was a potential suspect to the assault. 6/24/08 RP 92. Defense also blamed the detective for not turning over a report that would have showed that the other person was lying. 6/24/08 RP 93-5.

During cross-examination of Pam, it was defense that first questioned Pam about her written statement claiming that Detective Esskew had used coercive tactics to try to get Traci to change her story about what happened the night of the incident. 6/30/08 RP 43.

On questioning by the State later that day, Traci Gromus testified that she had called Detective Esskew to find out if he was "going to start looking for this other guy." 6/30/08 RP 165. Traci believed she had made Esskew mad. 6/30/08 RP 165. She met Esskew and he provided her a list of reasons why they felt Alan was the one who had attacked Pam. 6/30/08 RP 166. The list was mentioned but the substance was not discussed at that point.

On cross-examination by defense, Traci said that Detective Esskew had assembled a list of items to convince Traci that her father had assaulted

her mother. 6/30/08 RP 213. Traci told defense counsel that Esskew was yelling at her for a couple of minutes. 6/30/08 RP 214.

Following that, the State moved to admit the list and defense stated it was relevant and specifically stated they did not object.

Q. This the list that they were talking about that had a bunch of reasons; is that correct?

A. Correct.

MR. WEYRICH: Move the admission of 69.

THE COURT: Any objection?

MR. VOLLUZ: Well, your Honor, it contains a lot of personal feelings of Deputy Esskew, but I think those are all probably relevant by this point. So no objection.

7/1/08 RP 178.

After the list was admitted, defense cross-examined Traci Gromus at length about the list. 7/1/08 RP 186-94.

The next day during testimony, the State had Esskew explain why he had told Gromus's son Tom, why they were not pursuing any other suspects. 7/2/08 RP 26-9. Esskew also described that another detective had created the list. 7/2/08 RP 29-30. Esskew said that he read the list to Traci and she did not dispute what was on the list. 7/2/08 RP 30. Esskew later testified that his voice was not raised during the conversation. 7/2/08 RP 32.

Gromus's counsel questioned Esskew at length about his decision not to follow up on the report that someone else attacked Pam. 7/2/08 RP 85-90. Defense counsel specifically asked Esskew about his belief that Alan

had committed the offense. 7/2/08 RP 91.

Q. So you were trying to convert her to your point of view, correct?

A. No conversion was necessary. I was showing her the facts that we had at that time or the reasons that we knew it was Alan versus a third person.

Q. Oh, you knew it was Alan?

A. I still believe it was Alan.

Q. You know it was Alan?

A. There is no doubt in my mind, sir.

Q. None at all?

A. None whatsoever.

Q. Based on your investigation?

A. Based on the investigation and the witness statements, yes, sir.

7/2/08 RP 91-2.

iii. The defendant placed the opinion of Detective Esskew about the guilt before the jury.

From opening statement, Gromus showed that part of the defense was that there was another suspect and that law enforcement failed to follow the leads on that other suspect. The Opening Brief of Appellant notes that the defense impeached the lead detective, and sought to discredit him in other ways. Opening Brief of Appellant at page 14.

Furthermore, the list of reasons that was admitted without objection was provided to Traci Gromus and was being offered for that purpose. It was the defense that specifically asked the lead detective his opinion as to guilt. That was done immediately after he was questioned about why he did not pursue other investigative leads. Thus, the defense is actually the party

that put the detective's opinion before the jury for a tactical reason.

In State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007), the Supreme Court noted that counsel for both defendants chose not to object to testimony for tactical reasons. Similarly in the present case, defense seeks to challenge the evidence that they conceded was relevant and then sought to exploit by directly questioning the detective as to his opinion.

The defendant should not be permitted to raise this claim for the first time on appeal.

4. The inquiry by the prosecutor into the basis for the expert's opinion was not a violation of a motion in limine meriting mistrial.

Gromus claims that the State improperly admitted information obtained from the defense expert witness who examined the victim, in violation of a motion in limine. Reviewing the record shows that the trial court reserved ruling on that motion in limine at trial.

Furthermore, Gromus cannot show that the trial court's subsequent holding that it would have permitted the testimony was an abuse of discretion.

i. Case law pertaining admission of evidence.

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

abuse of the court's discretion.” State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

The Evidence Rules do not alter the common law view that a wide latitude should be permitted in the cross-examination of an expert, but that the trial court has discretion to determine the exact scope of the examination. Consistent with prerule cases, Rule 705 allows the cross-examiner to probe the knowledge and qualifications of the witness, as well as the basis for the witness's opinion.

5B Karl B. Tegland, Washington Practice, Evidence § 705.7, at 296 (5th ed (2007), *citing* State v. Furman, 122 Wn.2d 440, 858 P.2d 1093 (1993).

ii. Record at trial court regarding motion in limine.

The Order on Motions in Limine indicates that the trial court had reserved for trial a decision on “allegations that Pam Gromus, the alleged victim, had some years ago run up large amounts on credit cards and hidden this information from Alan Gromus.” CP 42.

At trial Dr. Judd, who had examined Alan Gromus reported that Gromus’s son had related Mr. Gormus’s version of the event and also stated there was no history of domestic violence between Gromus and his wife. 6/26/08 RP 25. Defense had Dr. Judd provide an expert medical opinion that Mr. Gromus had mild traumatic brain injury and post concussional disorder. 6/25/08 RP 44. After defense had placed the impression that there was a lack of marital problems, the State asked Dr. Judd if Gromus’s son had

reported to Dr. Judd that Alan and Pam Gromus had talked about divorcing a number of years before. 6/26/08 RP 55. The son described to Dr. Judd that Alan found out that he could not get credit because Pam had been spending more money than she should have and did not tell Alan. 6/26/08 RP 55.

The defense moved to dismiss for violation of the motions in limine. 6/26/08 RP 58-59. The trial court noted it had reserved ruling on the defense motion in limine and noted as follows:

At this point I don't think we technically have a violation of the Motion in Limine in that all of these subject matters that were related to by the doctor went to his history which was the basis of his opinion.

If you would like, Mr. Volluz, I can give the jury cautionary instruction that was all of these matters, Mr. Gromus' version of the alleged incident, the credit issue, and everything as recited by the doctor only goes to the doctor's formation of an evaluation based on history and is not substantive evidence and is not proof of the matters asserted.

6/26/08 RP 63. Defense declined the trial court's request to provide a limiting instruction to the jury. 6/26/08 RP 63.

iii. The trial court had not excluded the examination of the basis of the expert opinion in the motion in limine.

The State contends contrary to Gromus's assertion that the trial court had not entered a ruling on the motion in limine. The trial court noted that it had reserved ruling and did not consider the admission of the evidence for evaluation of the expert's opinion to be error.

Here the expert was provided an opinion that Gromus was suffering

from a concussion from having been struck by the bat. As a result of this opinion, the doctor was excluding the possibility that Gromus was malingering. The State contends that whether the defendant and his wife had marital problems sufficient for them to discuss divorce would be significant in evaluating the doctor's opinion as to the cause of Gromus's concussion. In addition, here the defense declined the request for a limiting instruction.

5. There was no error meriting new trial.

Cumulative error applies when several errors occurred at the trial court level but none alone is sufficient to warrant reversal. Only where the combined errors effectively denied the defendant a fair trial, the cumulative error requires reversal. State v. Hodges, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). But where there was no "prejudicial error, there can be no cumulative error that deprived the defendant of a fair trial." State v. Saunders, 120 Wn. App. 800, 826, 86 P.3d 1194 (2004). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified by* 123 Wn.2d 737, 870 P.2d 964 (1994).

As explained above, the State contends that there were no errors, much less cumulative error meriting reversal. If for some reason this Court believes error did occur, the case would be more appropriately

evaluated as harmless error given the theory of defense presented.

An “ ‘error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.’ ”

State v. Hagler, 150 Wn. App. 196, 203, 208 P.3d 32 (2009), *citing* State v. Bourgeois, 133 Wn. 2d 389, 403, 945 P.2d 1120 (1997) (*quoting* State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

6. The trial court properly imposed a sentence for Assault in the First Degree with a Deadly Weapon and a Deadly Weapon Enhancement.

Gromus claims that the trial court improperly imposed a sentence on the charge of Assault in the First Degree with a Deadly Weapon and a Deadly Weapon Enhancement claiming that such sentence violates double jeopardy. Opening Brief of Appellant at page 37. Gromus was sentenced to a standard range sentence on Assault in the First Degree to a standard range sentence of 100 months plus 24 months for the Deadly Weapon enhancement. CP 212-3, 215.

Numerous Washington cases have held that sentencing enhancements do not violate the double jeopardy clause when the enhancement constitutes an element of the underlying offense. *See* State v. Kelley, 146 Wn. App. 370, 374-75, 189 P.3d 853 (2008), *rev. granted*, 165 Wn.2d 1027, 203 P.3d 379 (2009); State v. Tessema, 139 Wn. App. 483, 493, 162 P.3d 420 (2007), *rev. denied*, 163 Wn.2d 1018, 180 P.3d

1292 (2008); State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 *rev. denied*, 163 Wn.2d 1053 (2008); State v. Caldwell, 47 Wn. App. 317, 319, 734 P.2d 542, *rev. denied*, 108 Wash.2d 1018 (1987); State v. Pentland, 43 Wn. App. 808, 811, 719 P.2d 605, *rev. denied*, 106 Wn.2d 1016 (1986).

Although this issue of law appears to be well settled at the Court of Appeals, the Washington State Supreme Court has yet to weigh in on the issue other than denying review on most cases up to this point. However as Gromus notes in State v. Kelley, and in State v. Aguirre, 146 Wn. App. 1048, *rev. granted* 165 Wn.2d 1036 (2009), the Supreme Court accepted review and include the issue of the claim of double jeopardy where the enhancement is reflected in the elements of the offense. These cases are set for oral argument on October 29, 2009.

V. CONCLUSION

For the foregoing reasons, Gromus's appeal must be denied and his sentence affirmed.

DATED this 14th day of August, 2009.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: 

ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: John Henry Browne, addressed as 821 - 2nd Avenue, Suite 2100, Seattle, WA 98104 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 16th day of August, 2009.


KAREN R. WALLACE, DECLARANT

2009 AUG 17 AM 11:23
STATE OF WASHINGTON