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NO. 63639-1

(King Co. Superior Court No. 08-1-11505-1)

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ERIK BLAIR WILLIAMS,

Appellant.

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AMENDED  
REPLY BRIEF

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ORIGINAL

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## I. INTRODUCTION

At trial, the state opposed defense counsel's attempt to impeach the state's key witness – alleged victim Ky Dewald – with James Dainard's testimony that Dewald made a prior inconsistent statement to him about who started the fight. Dainard would have testified that Dewald admitted to him that he, Dewald, started it all by hitting Blair Williams first. The state spends the bulk of its Response arguing that the trial court's exclusion of this testimony – the only neutral testimony that would have challenged Dewald's story – was either correct, or incorrect, but harmless. The state errs in all of its arguments.

First, the state claims that the proffered inconsistent statement was inadmissible because it was not inconsistent. The transcript shows that it was; more importantly, the state admitted that it was at trial. It should not be permitted to make the opposite argument now. Section II.

Next, the state claims that the proffered inconsistent statement was inadmissible because the state never recalled Ky Dewald to the stand to elicit the proper foundation after the judge ruled that the foundation had not been laid. At trial, however, the state argued that the defense was *not* permitted to recall that

witness at all. Once again, the state should not be permitted to make a contradictory argument now to gain a tactical advantage on this appeal. Section III.

Further, the state claims that the proffered inconsistent statement should not have been admitted because it was not true. Whether or not the prior inconsistent statement was true, however, was a subject for the jury to decide, not the prosecutor. Section IV.

The state then claims that the trial court did not abuse its discretion in excluding the proffered inconsistent statement because “Dainard had yet to be interviewed by police or the prosecutor, increasing the unfair surprise to the State.” The claim of surprise is, however, contradicted by the record – a matter explained in Section V.

The state next argues that there was no prejudice from exclusion of the inconsistent statement because Ky Dewald had already been impeached. The attempts to impeach his testimony, however, were failures; there was no convincing evidence presented that he had made prior statements that were completely inconsistent with his trial testimony on the key issue of who was the aggressor in this fight. Section VI.

Finally, with regard to the ineffective assistance of counsel claim for failing to properly elicit this impeachment evidence, the state asserts that trial counsel failed to recall Mr. Dewald for tactical reasons. The state, however, offers absolutely no record – or extra-record – support for that assertion. It relies instead on speculation, and that is impermissible. Section VII.

**II. THE STATE IS ESTOPPED TO ARGUE THAT THE PROFFERED INCONSISTENT STATEMENT WAS NOT REALLY INCONSISTENT**

The Response argues that the excluded Dainard statement was not really that inconsistent with alleged victim Ky Dewald's testimony, in an effort to diminish the prejudice caused to Mr. Williams by the trial court's decision to exclude that statement. Response, pp. 11-12. The state contends that the Opening Brief errs in characterizing Dainard's proffered testimony as a statement that alleged victim Dewald threw the first punch. Response, p. 12, & n.5. Instead, the Response contends, it was merely a statement that Dewald "initiat[ed] the melee." *Id.*, p. 12, n.5.

The state cites to three portions of the trial transcript in support of this claim that Dewald's prior admission to Dainard was not really inconsistent. It cites to VRP:340 (Response, p. 12); at that point, however, defense trial counsel explained that he would

call Dainard to testify that Dewald told him “that he did strike him – or struck Mr. Williams, excuse me. I shouldn’t use pronouns – first.” That statement is certainly inconsistent with Dewald’s trial testimony that Williams hit him first. The state also cites to 1 RP:11 (Response, p. 12). At that point, during pre-trial motions, defense trial counsel informed the court that Dainard would testify that Dewald “admitted initiating the fracas, the melee,” “hitting Mr. Williams first.” That is also inconsistent with Dewald’s trial testimony that Williams hit him first. Finally, the state cites to VRP:354-55 (Response, p. 12). Defense trial counsel simply sought to prove up the impeachment at that point. Thus, the state’s citations to the record actually prove that Dainard would have testified that Dewald told him that Dewald hit Williams first, not the other way around.

Perhaps for this reason, the state took the opposite position on this issue in the trial court. At that time, the state affirmatively acknowledged that the excluded Dainard statement was “inconsistent” with Dewald’s testimony. It stated: “I’m not denying that the statements are inconsistent.” VRP:465.

Thus, the transcript undermines the state’s contention on appeal that the prior Dewald statement was not inconsistent.

Further, the transcript shows that the state took the opposite position at trial from the one that it is advancing in this appeal on the issue of whether the prior, proffered, Dewald statement was inconsistent or not. The state should not be permitted to take two such opposite positions during the course of this single case in order to obtain a tactical advantage. The Washington Supreme Court has noted the problems that arise when the state takes inconsistent positions during the course of litigation in order to gain a tactical advantage. In *State v. Roberts*, 142 Wn.2d 471, 498, 14 P.3d 713 (2000), *amended* Feb. 2, 2001, for example, that Court was presented with an evidentiary issue arising under ER 804(b)(3) that hinged, in part, on whether the erroneously excluded statement was reliable. The Supreme Court noted that in the *State v. Roberts* case, on appeal, the state was asserting that the statement was unreliable, but in the connected case of the co-defendant, *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000), the state was claiming that the same statement was quite reliable. The Supreme Court criticized the state's practice of taking such inconsistent positions in a single case. In fact, when the state takes inconsistent positions over the course of litigation in a criminal case, due process

protections are also implicated.<sup>1</sup>

Thus, the state should not be permitted to argue that the prior Dewald statement was inadmissible because it was not even inconsistent.

**III. THE STATE IS ESTOPPED TO ARGUE THAT THE PROFFERED INCONSISTENT STATEMENT WAS INADMISSIBLE BECAUSE THE DEFENSE FAILED TO RECALL MR. DEWALD**

The Response also argues that the defense should have recalled Mr. Dewald to the stand, after the judge issued her order excluding the testimony impeaching him, as a first step towards laying the foundation for eliciting his prior inconsistent statement through Mr. Dainard. Response, pp. 12-13.

In the trial court, however, the state took a different position. It argued that Mr. Williams could *not* recall Mr. Dewald to the stand after neglecting to confront him with his prior inconsistent statement

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<sup>1</sup> *Thompson v. Calderon*, 120 F.3d 1045, 1058 (9th Cir. 1997) (*en banc*), *rev'd on other grounds*, 523 U.S. 538 (1998) (due process protection prevents prosecutor from arguing contradictory theories about which co-defendant was guilty of the murder at the co-defendants' two separate trials; "it is well established that when no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime"); *Smith v. Goose*, 205 F.3d 1045 (8th Cir.), *cert. denied*, 531 U.S. 985 (2000) (following Ninth Circuit in holding that due process protection prevented state from arguing two fundamentally inconsistent theories of codefendants' guilt at their separate trials).

the first time around. The state claimed that recalling Dewald for this purpose would be like calling a witness solely to impeach him, and that that is impermissible. VRP:353 (“So it’s – so it’s the State’s position that Mr. Dewald can’t be called in Mr. Earl’s – or Mr. William’s [sic] case in chief for the simple purpose of impeaching him.”).

As discussed above, the state should be estopped to take a totally inconsistent position now, on the question of whether defense trial counsel could have recalled Mr. Dewald to lay the foundation for introducing the Dainard impeachment.

In fact, at trial, the court adopted the state’s position on the ER 613 issue and seemed to adopt that state position in toto. It ruled that defense counsel could not elicit the prior inconsistent statement from Dainard because he had not laid the foundation for that when questioning Dewald. VRP:469. Since the state had also advanced the position that defense trial counsel could not recall Dewald to lay that foundation after he had already testified in the state’s case, it seemed that the trial court was adopting this position of the state’s also and thereby precluding defense counsel from taking the step that the state now asserts he should have taken.

**IV. THE STATE ERRS IN ARGUING THAT THE PROFFERED INCONSISTENT STATEMENT WAS INADMISSIBLE BECAUSE THE DEPUTY PROSECUTOR HELD THE OPINION THAT IT WAS NOT TRUE**

Further on this point, the state argues that the proffered inconsistent statement should not have been admitted because it was not true. Response, p. 12 (“While the alleged statement would be inconsistent if true, the prosecutor said that Dainard had repeatedly failed to appear for pretrial interviews, and she believed that no conversations between Dewald and Dainard ever happened.”).

Whether or not the prior inconsistent statement was true, however, was a subject for the jury to decide, not the prosecutor. The rule does not call for any preliminary reliability determination as a prerequisite to admissibility.

**V. THE STATE ERRS IN ARGUING THAT THE PROFFERED INCONSISTENT STATEMENT WAS INADMISSIBLE BECAUSE THE DEPUTY PROSECUTOR WAS TAKEN BY SURPRISE**

The state also argues that the trial court did not abuse its discretion in excluding the proffered inconsistent statement because “Dainard had yet to be interviewed by police or the prosecutor, increasing the unfair surprise to the State.” Response,

p. 14.

The claim of surprise is contradicted by the record, though. The state itself acknowledges that defense trial counsel raised the issue of the admissibility of this prior inconsistent statement in pretrial motions in limine before the trial started, at 1 RP 11. See Response, p. 12. If the state truly believed that there was some sort of discovery problem, the remedy was not to exclude necessary defense evidence; the remedy is to compel the defense to submit the witness to an interview or other similar sanction. See *generally* CrR 4.7(h)(7) (re sanctions).

**VI. THE STATE ERRS IN ARGUING THAT THE PROFFERED INCONSISTENT STATEMENT WAS IMMATERIAL BECAUSE KY DEWALD HAD ALREADY BEEN IMPEACHED**

Finally on this point, the state asserts that exclusion of the proffered inconsistent statement caused no harm because Ky Dewald had already been impeached. Response, pp. 15, 18.

This is incorrect. Mr. Dewald was never effectively impeached. Yet he was the key state witness in this credibility case. As discussed in the Opening Brief, Dewald claimed Williams started a fight with him and beat him; Williams claimed that he acted in self-defense, and that Dewald started the fight; and their

common friend Mr. Weaver saw some of the fighting but not who started it. There were no other witnesses to the fight. In this situation, credibility is key and impeachment – the vehicle for testing credibility – was critical. The error of excluding Mr. Dewald's prior inconsistent statement deprived the jury of hearing the one witness who could impeach Dewald's version of events on a material point, that is, on who started the fight.

The state barely mentions the key decision on this point which was decided in a very similar context, that is, *State v. Horton*, 116 Wn. App. 909, 68 P.3d 1145 (2003). As discussed in the Opening Brief, however, the appellate court in that case ruled that defense trial counsel was ineffective for failing to give the victim-witness a chance to explain his prior inconsistent statements as a first step towards laying the foundation for eliciting those inconsistent statements from a different witness. The appellate court in *Horton* ruled that this was deficient performance and that, given the critical issue of the alleged victim's credibility, the error harmed the defendant. The Court of Appeals reversed due to ineffective assistance of counsel in failing to elicit these prior inconsistent statements.

As explained in the Opening Brief, this failure constituted

deficient performance in *Horton*, then the same error in the same sort of credibility case certainly constituted deficient performance here.

The proffered Dainard testimony was certainly inconsistent enough with the Dewald testimony to qualify as a prior inconsistent statement under ER 613(b), and inconsistent on a critical point. The Dainard testimony placed Mr. Dewald in the role of aggressor in the fight; the Dewald testimony, on the contrary, placed Mr. Williams in the role of aggressor in the fight; and the only defense offered was self defense. Testimony that Dewald threw the first punch or hit would therefore have been inconsistent with his claim that Williams started it.

The state therefore errs in arguing that it did not matter whether defense trial counsel was ineffective in failing to confront and impeach Mr. Dewald, because Mr. Dewald had already been effectively impeached. In fact, he was not impeached on this critical point at all and his eyewitness testimony formed the basis for Mr. Williams' conviction.

**VII. THE STATE ASSERTS THAT TRIAL COUNSEL FAILED TO RECALL DEWALD FOR TACTICAL REASONS BUT OFFERS NO RECORD SUPPORT FOR THAT ASSERTION. IT CANNOT DEFEAT A CLAIM OF INEFFECTIVE ASSISTANCE WITH SUCH SPECULATION.**

With regard to the ineffective assistance of counsel claim, the state asserts that trial counsel failed to recall Mr. Dewald for tactical reasons. Response, p. 19, 20-22. The state, however, offers absolutely no record – or extra-record – support for that assertion.

The state cannot defeat a claim of ineffective assistance of counsel with speculation rather than evidence about counsel's motives. *Harris v. Reed*, 894 F.2d 871 (7th Cir. 1990) (trial counsel failed to call favorable witnesses; district court looked past evidence of failure to investigate and speculated about reason not to call them; reversed as clearly erroneous: "Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer.").

The state then cites to a number of decisions supposedly holding that trial counsel's decision to call or not call certain witnesses is strategic and insulated from review. Interestingly, the

state includes among these cases a citation to *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992). Response, p. 19.

The decision in that case, however, was overturned on habeas corpus because of an error in precisely that holding. In *Lord v. Wood*, 184 F.3d 1083 (9<sup>th</sup> Cir. 1999), *cert. denied*, 528 U.S. 1198 (2000), the Ninth Circuit explicitly ruled that when considering an ineffective assistance of counsel claim under the Sixth Amendment, the decision to call or not call certain witnesses is *not* insulated from review. Instead, defense trial counsel has an obligation to interview witnesses and call those with exculpatory information, and that the failure to do so does constitute ineffective assistance of counsel.

In fact, virtually all jurisdictions *agree* that the failure to call critical alibi witnesses or eyewitnesses, or any witnesses similarly necessary to prove an important fact bearing on guilt or innocence (like impeachment witness Mr. Dainard), will be scrutinized more closely – and performance will be found deficient – where trial counsel fails to do his homework about calling that witness.<sup>15</sup> Part

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<sup>15</sup> *E.g.*, *Griffin v. Warden*, 970 F.2d 1355, 1358 (4th Cir. 1992) (alibi witnesses); *Grooms v. Solem*, 923 F.2d 88, 90 (8th Cir. 1991) (alibi

of that homework is doing sufficient legal research to know how to satisfy the prerequisites to calling the witness to the stand. See *State v. Kylo*, 166 Wn.2d 856, 860, 215 P.3d 177 (2009).

Trial defense counsel failed to do his homework in Mr. Williams' case. The state' position to the contrary conflicts with this substantial body of authority, which finds its basis directly in *Strickland's*<sup>16</sup> holding that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable, professional judgments support the limitations on investigation." *Id.*, 466 U.S. at 690.

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witnesses); *Chambers v. Armontrout*, 907 F.2d 825, 829-32 (8th Cir.), *cert. denied*, 498 U.S. 950 (self-defense witness); *Lawrence v. Armontrout*, 900 F.2d 127, 129-30 (8th Cir. 1990) (alibi witnesses); *Blackburn v. Foltz*, 828 F.2d 1177, 1182-83 (6th Cir. 1987), *cert. denied*, 485 U.S. 970 (1988) (alibi witness); *Code v. Montgomery*, 799 F.2d 1481 (11th Cir. 1986) (alibi witness); *Nealy v. Cabana*, 764 F.2d 1173, 1177-78 (5th Cir. 1985) (alibi witness).

<sup>16</sup> *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

**VIII. CONCLUSION**

Mr. Williams' conviction should be reversed or, alternatively, his sentence should be vacated and the matter should be remanded for resentencing.

DATED this 4<sup>th</sup> day of January, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Sheryl Gordon McCloud", written over a horizontal line.

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## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 4<sup>th</sup> day of January, 2010, a copy of the APPELLANT'S AMENDED REPLY BRIEF was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

Emily Petersen, DPA, Appellate Division  
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\_\_\_\_\_  
Sheryl Gordon McCloud