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COURT OF APPEALS OF THE STATE OF WASHINGTON  
NO. 71523-2-1  
2014

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

GYORGY ZATLOKA,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS A. NORTH

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. A statement is not hearsay if it is not offered for the truth of the matter asserted. After a family friend confronted him about “finding out” about prior abuse, the defendant confessed to hitting his wife and claimed that domestic violence was acceptable in his culture. Did the trial court properly overrule the defendant’s hearsay objection to the friend’s reference to “finding out,” where it was only offered to give context to the ensuing confession?

2. A trial court is not required to provide a limiting instruction *sua sponte* where a defendant has failed to request one. Counsel did not ask for a limiting instruction for the family friend’s reference to “finding out” about the defendant’s abuse. Has the defendant failed to establish that the trial court abused its discretion in not giving a limiting instruction where none was requested?

3. To establish deficient performance in a claim of ineffective assistance of counsel, a defendant must establish the absence of a legitimate trial strategy or tactic. Trial counsel did not request a limiting instruction declaring that the reference to “finding out” about the abuse was not substantive evidence. Does counsel’s choice to avoid highlighting the defendant’s confession and to instead emphasize the family friend’s lack of credibility

reflect a legitimate trial strategy? Furthermore, where the evidence of the defendant's guilt was overwhelming, has he failed to establish resulting prejudice?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

Defendant Gyorgy Zatloka was charged by information with assault in the second degree – domestic violence. CP 7-8. The State also charged the aggravating factor of a history of domestic violence. CP 7-8. The State alleged that Zatloka assaulted his then-wife, Klara Zatloka,<sup>1</sup> causing a fracture in her hand. CP 4. A jury found Zatloka guilty as charged of assault in the second degree. CP 72-73. Zatloka waived his right to a jury trial for the aggravating factor only. CP 71; RP 778-79.<sup>2</sup> The trial court found him guilty of the aggravating factor. RP 801. The court sentenced Zatloka to an exceptional sentence of 18 months. CP 74-84.

**2. SUBSTANTIVE FACTS**

Defendant Gyorgy Zatloka (also known as "George") and his wife, Klara (nicknamed "Kootsie"), were married for 38 years.

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<sup>1</sup> Because the defendant and members of his family share the same last name, Klara and Greg Zatloka will be referred to by their first names. For the same reason, Larry Jorgensen's wife will also be referred to by her first name, Tina. No disrespect is intended.

<sup>2</sup> The verbatim report of proceedings consists of eight consecutively numbered volumes, which will be referred to as RP.

RP 516. They were born in Hungary and came to America almost 30 years ago, eventually settling in Kirkland. RP 321-23. They have two adult children, a son named Greg and a daughter named Georgina. RP 321. For most of their time in America, Klara supported the family as a tailor. RP 323. Zatloka stopped working soon after their arrival, choosing to spend his time wind-surfing and hang-gliding. RP 323-28, 335, 389, 401, 466-68, 532, 586-88.

Throughout their marriage, Zatloka physically and emotionally abused Klara, beginning when she was pregnant with their second child. RP 780-97. The trial court limited evidence of prior abuse against Klara to assaults within the last ten years. RP 20-85, 111-29. These included two main assaults in 2002 and 2005, continuous emotional abuse, and lesser episodes of violence such as pushing, headbutting, etc. RP 20-21, 49-50, 58-60, 74-76, 81, 118-20. The evidence was deemed admissible under ER 404(b) for the purpose of assessing Klara's credibility, why she may have delayed reporting the crime charged in this case, and Zatloka's motives. CP 52; RP 678.

Klara testified that in 2002, Zatloka assaulted her inside their van, slapping, kicking and hitting her until she was "black and blue all over [her] body." RP 324-36. Despite her fear, she did not

defend herself, as this would only incite more violence. RP 325-26, 386. When confronted by her friends Tina Jorgensen and Michaela Goessman-Anderson about the visible bruises all over her arms the next week in Chelan, Klara said she had hurt herself kayaking, overcome by shame and frightened that Zatlaka would beat her in retaliation if she disclosed the abuse. RP 327, 386.

Around Christmas in 2005, Zatlaka became angry at Klara and threw a pot of food at her. RP 329. He then hurled a large flashlight at her, missing her by inches and causing the large batteries inside to break free and hit her in the head; this split open her forehead and required several stitches in the emergency room. RP 329, 385. Out of shame and fear and because the defendant was standing right next to her, Klara told the medical staff that she had injured herself playing with the dog. RP 331-32. The injury left a permanent scar on her forehead, visible both in a photograph taken one month later and at trial. RP 330, 363; Ex. 1.<sup>3</sup>

Zatlaka abused Klara in other, less visible ways during the last ten years of their marriage. He pushed and headbutted her, only sometimes leaving marks. RP 384-85. He mocked her

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<sup>3</sup> Although Klara initially identified the date of the photograph as July 2006, she later corrected herself that it was January 2006, a fact corroborated by the testimony of Tina and Goessman-Anderson. RP 425-26, 441.

accent, told her she could never survive alone, and prevented her from speaking in public, telling people that she did not know what to say, then screaming at her in private for being stupid. RP 333-34. Klara testified that she believed Zatloka and lived in veritable isolation until she finally began making friends about 10-15 years ago. RP 334. These friends included Tina Jorgensen and Michaela Goessman-Anderson. RP 334. It was to these women, as well as her son Greg, that Klara eventually disclosed the true cause of her injuries from 2002 and 2005. RP 360, 386.

During the last two years of her marriage, Klara was diagnosed with breast cancer and underwent a double mastectomy. RP 391-92, 399, 537. She testified that this experience changed her, causing her to realize her own mortality. RP 391-92, 399.

On the night of June 26, 2013, Klara came home after work and confronted Zatloka about his lack of a job. RP 338. She testified that he became angry and yelled at her, "You stupid bitch. You screw up everything." RP 339. He grabbed her painfully by the arm and right hand, frightening her and causing her to fall to her knees, and dragged her 21 feet across the floor by her hand to the kitchen, where he then sprayed her with a hose for 30 seconds until she was soaking wet to her underwear. RP 338-44. Klara changed

clothes and walked out of the house into the night. RP 344.

Zatloka would not stop following her despite her entreaties to be left alone, so she eventually returned home until he fell asleep, then left again for a second walk. RP 345-46.

During that time, Klara told herself, "I have nowhere to go. I'm in a strange country, I don't speak the language, I won't make it by myself." RP 347. It was in this mindset that she finally came back and slept in their trailer in the driveway. RP 346-47. Zatloka left for a hang gliding trip from June 28-July 8. RP 348, 351. The day that he left, she photographed her injuries. RP 353-56; Ex. 2-7. Before Zatloka departed, Klara showed him her swollen, bruised hand and told him that she would tell the truth this time if anyone asked about it. RP 347-48.

Despite her pledge, she testified that she was still "scared from everything. Scared from him. Scared how I can make a living . . . he made me believe I cannot do without him." RP 349. When she finally went to the clinic on July 5 because of the continuing pain in her hand, she told her first doctor that she had fallen down. RP 348. After finding out that she had suffered a fracture, Klara finally disclosed the assault to her son Greg and moved in with him for a few weeks. RP 350-51, 359-60. On July 6, she reported the

assault to Kirkland Police Officer Christa Gilland, who took photos of Klara's injuries. RP 350, 357, 404-10; Ex. 8-11. Zatloka was arrested upon his return on July 8. RP 396, 534.

Dr. Heidi Shors, an orthopedic hand specialist, saw Klara on July 8 to follow up on her injuries. RP 478-80. Shors testified that the base of Klara's 5<sup>th</sup> metacarpal bone, the portion below the pinky but above the wrist, was fractured. RP 480-82. Shors described Klara as a little hesitant, embarrassed, and reluctant to tell her what had happened. RP 484. Klara finally disclosed that her husband had grabbed her hand on June 26, causing pain. RP 352, 487-89, 496. Shors testified that Klara's injuries were consistent with being grabbed and dragged by the hand 21 feet across the floor and around a corner. RP 512.

Klara's son, Greg Zatloka, described his father's superior education and command of the English language, and Zatloka's role in the marriage as the main liaison to the outside world. RP 466-68. Greg also testified to seeing a two-inch cut above Klara's left eye surrounded by visible yellow and blue bruising during Christmas 2005 and at her 50<sup>th</sup> birthday party. RP 469-70. His mother, he recalled, was "frightened. She didn't know what steps to take, how to resolve this situation. She was scared." RP 471.

On July 5, 2013, Greg received a frightened and concerning voicemail from his mother. RP 471. When he called her back, she seemed “frightened . . . [and] looking for direction.” RP 472. Klara arrived at Greg’s home the next evening with her hand in a splint and stayed for about three weeks. RP 473. During that time, she had difficulty using her hand and was “frightened . . . [and] very scared,” to the point where she checked the jail roster every time she stepped out of the house; Klara continued this practice even during the course of the trial. RP 473-75.

Michaela Goessman-Anderson, Klara’s close friend of 10 years, testified about the bruises she saw all over Klara’s arms in 2002 in Chelan, corresponding with the “kayaking” assault. RP 440. Klara looked as if she had been crying, with watery eyes, and appeared very quiet, remote, and depressed. RP 441. Goessman-Anderson observed that same demeanor and the “quite visible” stitches on Klara’s forehead at Klara’s birthday party in January 2006, despite an attempt to cover it with bangs. RP 441. Klara eventually told Goessman-Anderson how both of these injuries had happened. RP 441-42. Goessman-Anderson also reported seeing other blue marks on Klara’s arms over the past 10 years; Klara, although tearful, would not say what had caused them. RP 443-44.

Tina Jorgensen, Klara's other friend of 10-15 years, also testified about the bruising she saw on Klara's arms in 2002 in Chelan and Klara's withdrawn, nervous and tearful demeanor when confronted about her injuries. RP 422-24. The marks on Klara's arms and shoulders "didn't seem normal for her as she wasn't that athletic." RP 423. When Klara finally disclosed the cause of the bruises, she was ashamed and scared. RP 423-24. Klara similarly tried to avoid Tina's questions about the "quiet [sic] large" cut and stitches on her forehead at her 50<sup>th</sup> birthday party in January 2006, before eventually breaking down in tears and admitting what had happened: "[S]he was very afraid and crying and reluctant to do anything." RP 424-26. When Tina confronted Zatloka about the injury, he claimed that Klara had hit her head on a cupboard. RP 429.

Tina Jorgensen's husband, Larry Jorgensen, testified that he had known the Zatlukas for 10-15 years through their mutual hobby of hang gliding. RP 415. When asked about a conversation he had with Zatloka at Dog Mountain during that period of time, Jorgensen stated, "I had talked to [Klara] and found out that George was hitting her. So I took George aside, we were at the flying site, and I said –" RP 416. At this point, Jorgensen was interrupted by the

prosecutor and then defense counsel, who objected on hearsay grounds and was overruled. RP 416-17. The following exchange then occurred:

- Q. Mr. Jorgensen, you said you took Mr. Zatloka aside. Had you spent the day hang gliding?
- A. I can't remember exactly, but it was either we had just landed or we were getting ready to go up or whatever to fly, one or the other.
- Q. And what did you say to Mr. Zatloka at the time?
- A. I just -- I asked him to go for a walk with me and I took him out to an area away from people and I told him I had heard -- I had found out that he had been hitting Kootsie or Klara, and he admitted that he had. And I said, well, it's not acceptable to do that. And he said, well, and then he started telling me that in his country, in Hungary, it was acceptable or more acceptable to do that. And I said, in this country we don't do that and if you ever do it again then you have to tangle with me. So, basically, that's what I said. And we talked and he agreed not to ever do it again.

RP 417.

The Jorgensens and Goessman-Anderson described how Zatloka habitually "shushed" his wife when she tried to speak, answering for her when her friends asked her questions. RP 418, 426-28, 442-43. Jorgensen described how Klara "wasn't allowed to talk a lot . . . [Zatloka] was very controlling." RP 418. Tina recalled how Klara seemed quieter, less assured and seemed to be "walking on eggshells" when Zatloka was present. RP 426-28. When Klara disclosed the charged assault to Tina, Tina described

her as “very, very scared . . . like shaking scared. I could hardly understand her.” RP 429.

Zatloka testified at trial. He gave a completely opposing version of the charged incident. He claimed that Klara began drinking and chain-smoking as soon as she got home on June 26, and that after several hours she had consumed half a bottle of vodka.<sup>4</sup> RP 553-55, 558. He then raised the subject of breast implants to compensate for her mastectomy. RP 555.

Zatloka testified that Klara was “pretty drunk” and began spitting food at him angrily as she spoke. RP 556. He claimed that he tried to hide in the bathroom but she initially blocked and pushed him with her chest. RP 556. When he emerged later, she started “scream[ing] and cussing at me . . . kicking the furniture, bashing the counter, the refrigerator door, the top of the washing machine, the bedroom door, kicking the coolers . . . hitting her hand against the wall . . . until [the coolers] fall down and she was kicking [them] around the living room.” RP 557.

Zatloka then testified that he went to “chain up the cars” with a lock and key that only he carried, which he claimed he did regularly to keep her from driving away to get more vodka. RP 558.

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<sup>4</sup> Klara testified that neither of them drank any alcohol that night. RP 369.

He stated that she began hitting and biting him when he tried to take her beers away, kicked the recycling bin and sent objects flying, broke a plate, then tried to spit on and grab him with both fists, ultimately falling to her knees. RP 559-60. Zatluka claimed that he only "sprayed her for one or two seconds" with the hose at which point she became quiet and left the house. RP 561.

Zatluka described how Klara passed out on a bench in the park for 45 minutes while he watched over her, woke up to buy more cigarettes at the gas station, rolled down a hill through some bushes, smoked a cigarette, passed out for another 15-20 minutes, then went home to sleep in the master bedroom. RP 562-63. He testified that he slept that night, as always, in the living room on a foam pad so that he could hear her if she came out of the bedroom and tried to leave. RP 564, 667.

Zatluka also denied Jorgensen's version of the conversation at Dog Mountain, claiming that they were merely discussing differences in American and Hungarian child-rearing techniques and that Jorgensen never asked him about hitting Klara nor did Zatluka admit to doing so. RP 533. Zatluka claimed that windsurfing caused Klara's bruises in 2002 and that he also got "bruised up pretty bad." RP 543-45. He admitted that no one

inquired about his alleged injuries as they had with Klara.

RP 602-03..

Zatloka further insisted that Klara's stitches in 2006 were the result of an accident preceded by one of her rages after seeing Tina hug and kiss a friend on the mouth and becoming jealous that Zatloka might do the same with another woman; Zatloka claimed he had merely turned around and thrown a flashlight towards the floor in frustration while walking away, which somehow caused the batteries to fly upwards and hit her in the head. RP 545-47.

Zatloka also presented an entirely different picture of their marriage, claiming that Klara's "attitude just deteriorated" after her double mastectomy and portraying her as constantly drunk, smoking, and unstable. RP 537-42. In contrast, he claimed that he did not drink alcohol.<sup>5</sup> RP 553. He denied ever shoving or headbutting her. RP 548-49. He claimed that she raged against him for bringing her to America where doctors had taken her breasts for no reason, that she denied having cancer, and that he was "hiding the lot of time [sic] because she was fighting." RP 537-42. He also denied shushing Klara, claiming that she wanted him

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<sup>5</sup> When confronted about this issue, Zatloka admitted he used to drink but stopped because of a DUI conviction. RP 593.

to correct her and specifically asked him to stay by her side in public to do so. RP 549-50, 634-35.

Finally, he claimed that he was unable to work because he was afflicted with Grave's disease soon after coming to America, stating that "many of the times, I was completely incapacitated. I mean, I was laying on the floor."<sup>6</sup> RP 522-25. He next claimed that he had a brain tumor and that his body was "declining very fast." RP 525-26. Despite his claim of a serious medical condition, Zatloka could not remember the names of any of the doctors supposedly treating him. RP 614.

**C. ARGUMENT**

**1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING A NON-HEARSAY STATEMENT WITHOUT A LIMITING INSTRUCTION.**

Zatloka first contends that the court abused its discretion in overruling his objection to Larry Jorgensen's reference to "finding out" about the abuse without *sua sponte* giving a limiting instruction. This argument fails for several reasons. First, as Zatloka tacitly concedes, the statement was not offered for the truth

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<sup>6</sup> Zatloka was unable to square this "complete incapacitat[ion]" with previous testimony about his constant hang gliding and windsurfing, which he agreed was a "pretty rough sport" that caused him to get "bruised up pretty bad," especially when he surfed in the autumn when the storms were strongest. RP 334-35, 439, 532, 543-45, 586-90.

of the matter asserted. Second, the court has no obligation to give a limiting instruction absent a defendant's request, nor does the lack of an instruction "convert" a nonhearsay statement into hearsay. Third, any error was harmless.

**a.     Zatloka Tacitly Concedes That Larry Jorgensen's Reference To "F[inding] Out" About The Abuse Was Not Offered For The Truth Of The Matter Asserted.**

Zatloka initially appears to acknowledge that Jorgensen's reference to "finding out" about the abuse was validly admitted for a non-hearsay purpose and offered only to explain why Jorgensen confronted Zatloka, and to provide context for Zatloka's subsequent confession.<sup>7</sup> This point is well-taken.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Discretion is abused only where no reasonable person would take the position adopted by the trial court. State v. Posey, 161 Wn.2d 638, 648, 167 P.3d 560 (2007).

"Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence

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<sup>7</sup> Despite this implied concession, Zatloka ultimately argues the prejudicial effect of the statement.

to prove the truth of the matter asserted.” ER 801(c). A statement not offered to prove the truth of the matter asserted thus does not constitute hearsay. Under ER 801(d)(2)(i), a party’s own statement offered against that party is also not hearsay.

Zatloka acknowledges that the trial court presumably overruled his hearsay objection on the grounds that Jorgensen’s statement was not offered for the truth of the matter asserted, but only to provide context for Zatloka’s properly admitted confession. App. Br. 9-10. He correctly cites State v. Athan for the proposition that “[s]tatements not used to prove the truth of the matter asserted, but instead used to provide context to a defendant’s otherwise admissible statement, do not violate the Sixth Amendment.” 160 Wn.2d 354, 385, 158 P.3d 27 (2007). In Athan, a detective testified that he had confronted the defendant with a statement made by his brother implicating him in the crime, which the defendant denied; absent the context of his brother’s words, the defendant’s denial would have made no sense. Id. at 386.

Athan aligns with other cases generally distinguishing as non-hearsay those statements offered as background to explain why a witness did or said something, or as context for other properly admitted statements. See e.g., State v. James, 138 Wn.

App. 628, 639-40, 158 P.3d 102 (2007) (unnamed bystander's statement to a police officer that she heard six or seven shots and responded to a cry for help was not offered for the truth of the matter asserted, but to explain why the police were investigating that neighborhood); State v. Moses, 129 Wn. App. 718, 732, 119 P.3d 906 (2005) (victim's child's statement to social worker that his father kicked his mother was not offered for truth of the matter asserted but to explain why social worker contacted CPS).

The substance of the exchange between the two men demonstrates that Jorgensen's reference simply served as context for Zatloka's ensuing confession. Zatloka admitted to hitting his wife only after Jorgensen separated him from the hang-gliding group and confronted him. Zatloka then explained to Jorgensen why he felt the abuse was acceptable, agreeing to cease hitting Klara only after Jorgensen warned him to never do so again. All of these statements were admissible under ER 801(d)(2)(i), and would have made little sense without Jorgensen explaining why Zatloka was saying these things in the first place, i.e., that Jorgensen had confronted him about "finding out."

The manner in which the statement arose also indicates its nonhearsay purpose. The prosecutor's query did not call for

Jorgensen to recall the conversation with Klara, in which she accused Zatloka of abuse, but to invoke Zatloka's admissions. As in James, the form of the question immediately preceding the challenged statement did not "call for hearsay"; it requested Jorgensen to "recall a serious conversation that you had with Mr. Zatloka" and to "describe . . . where you were and what you were doing at the time of the conversation." RP 416; James, 138 Wn. App. at 639-40. Jorgensen's response about how the conversation started served as background for the actual evidence being offered: Zatloka's confession. It also shows that Jorgensen was merely trying to explain why he confronted Zatloka in the first place. Without reference to his "finding out" about the abuse, the initial confrontation would have made no sense.

**b. The Trial Court Did Not Err By Not Providing A Limiting Instruction Where The Defendant Did Not Request One.**

Although Zatloka ultimately seems to agree that Jorgensen's statement was not offered for the truth of the matter asserted, he nevertheless argues that the trial court abused its discretion by not issuing a limiting instruction *sua sponte*. Zatloka is incorrect. A trial court commits no error by not giving a limiting instruction where none has been requested.

Zatloka has not properly preserved this issue for appeal. It is well-established that a party who fails to request a limiting instruction generally “waives any argument on appeal that the trial court should have given the instruction.” State v. Stein, 140 Wn. App. 43, 70, 165 P.3d 16 (2007), review denied, 163 Wn.2d 1045 (2008); see also State v. Ortega, 134 Wn. App. 617, 625, 142 P.3d 175 (2006).

However, Zatloka’s claim also fails on the merits. ER 105 directs a trial court to give a limiting instruction “upon request.”<sup>8</sup> A trial court’s failure to provide a limiting instruction regarding alleged hearsay is not error where no instruction was requested. Athan, 160 Wn.2d. at 383. Put another way, a trial court has no affirmative duty to *sua sponte* provide a limiting instruction. State v. Russell, 171 Wn.2d 118, 123, 249 604 (2011).<sup>9</sup>

Zatloka nonetheless cites to several cases as support for his position: State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001),

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<sup>8</sup> ER 105 provides in full: “When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.”

<sup>9</sup> Although Russell specifically addressed limiting instructions for ER 404(b) evidence, the court’s holding encompassed the use of limiting instructions in all contexts, “consistent with over 40 years of Washington case law expressly addressing this issue,” and citing cases involving various types of evidence. Russell, 171 Wn.2d at 123-24.

State v. Donald, 68 Wn. App. 543, 844 P.2d 447 (1993), and State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990). These cases shed little light on the issue at hand, specifically whether a trial court has an *affirmative duty* to give a limiting instruction regarding alleged hearsay. As Zatloka concedes, Aaron holds only that a limiting instruction is mandatory *when requested*, as it was in that case. 57 Wn. App. at 281. Donald merely reiterates that holding and actually supports the State's earlier argument regarding waiver, noting that "[s]ince defense counsel failed to request a limiting instruction, the alleged error will not be reviewed." 68 Wn. App. at 547.

Demery indicates that the trial court *should* give a limiting instruction in the context of alleged hearsay, but does not mandate that one *must* be given. 144 Wn.2d at 761-62. Demery can also be distinguished on its facts. It involved a formal taped law enforcement interview including unredacted statements by police officers opining that the defendant was lying, a far cry from the fleeting reference made by Jorgensen, a citizen, about "finding out" about prior abuse. 144 Wn.2d at 756-57. Most importantly, Demery is silent on the critical question of whether defense counsel requested a limiting instruction at trial.

Zatloka's contention that the trial court erred by not giving a limiting instruction, despite the fact that he failed to ask for one, flies in the face of both longstanding jurisprudence and the language of ER 105, and should be rejected.

**c. The Lack Of A Limiting Instruction Does Not "Convert" A Non-hearsay Statement Into Hearsay.**

Zatloka finally asserts that Jorgensen's statement should be treated by this Court as hearsay because of the lack of a limiting instruction. This Court should reject this claim.

Zatloka relies solely on two cases for support. His reliance is misplaced. He first quotes Athan for the proposition that "[t]he fact that [a] statement may serve more than one purpose does not negate its use to prove the truth of the matter asserted." Athan, 160 Wn.2d at 386. But this simply states that the existence of a valid non-hearsay basis does not "save" a statement that a court has already determined was offered to prove the truth of the matter asserted. Based on the record and argument above, it is clear that Jorgensen's statement was *not* used to prove the fact of prior abuse; thus, the quoted language in Athan is inapplicable.

Zatloka next asserts that under Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP, "absent a request for a limiting

instruction, evidence admitted as relevant for one purpose is considered relevant for others.” App. Br. 11; 110 Wn. App. 412, 430, 40 P.3d 1206 (2002). But the issue there was whether the plaintiff had properly preserved a claim of error regarding amenability to suit in tort after failing to request a limiting instruction specifically preventing the jury from assigning tort liability. Id. at 427-30. Because of this failure, the plaintiff could not later claim error on appeal. Id. Because Zatloka likewise did not request a limiting instruction, he, too, has failed to preserve a claim of error regarding its omission. That act of omission does not automatically convert Jorgensen’s statement into hearsay or create reversible error.

**d. Any Error Was Harmless.**

Even if this Court finds that the trial court erred either in overruling Zatloka’s hearsay objection or by not giving a limiting instruction *sua sponte*, any alleged error is harmless. There was overwhelming evidence of Zatloka’s guilt absent the allegedly offending statement.

Evidence admitted in violation of a hearsay rule is not a constitutional error.<sup>10</sup> State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). A non-constitutional error is deemed not harmless if there is a reasonable probability that the outcome of the trial would have been materially affected had the error not occurred. Id.

Jorgensen's statement that he "found out" about the prior abuse was extremely fleeting. In comparison, there was substantial evidence of Zatloka's guilt through multiple witnesses and physical evidence, even absent the offending statement. The jury heard Klara describe in detail the assault in her home, including Zatloka's angry invectives, the way he grabbed her hand "just crazy hard and pulled me on the floor," the manner in which he dragged her by the hand 21 feet on her knees and around a corner, his act of soaking her with water as she lay on the floor, the subsequent pain in her wrist still present even months later at trial, his refusal to leave her

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<sup>10</sup> Although Zatloka makes a single brief allusion to the proposition that hearsay statements offend the Confrontation Clause, he does not further address the issue in his brief. Because he fails to cite a single case or reference a relevant part of the record to support this line of argument, this Court should refuse to consider this claim. See State v. Mills, 80 Wn. App. 231, 234, 907 P.2d 316 (1995) ("We will not consider contentions unsupported by argument or citation to authority in the appellate brief"). However, it is also well-established law that statements not offered for the truth of the matter asserted do not implicate the Confrontation Clause. See Crawford v. Washington, 541 U.S. 36, 59 n.9, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); State v. Moses, 129 Wn. App. at 732. Nor could the Confrontation Clause be implicated on these facts; the record indicates that the declarant from whom Larry Jorgensen learned about the prior abuse was either Larry's wife, Tina, or Klara Zatloka, whom he may have directly overheard during her conversation with Tina. Both Tina and Klara testified at trial.

alone when she departed the home that night, and her reluctance to return home. RP 338-47, 352, 393.

Numerous witnesses and physical evidence corroborated Klara's account. Photographs depicted her swollen hand, bruised knees and defeated demeanor following the incident. Dr. Shors described how Klara's fractured hand and her hesitant, embarrassed demeanor was consistent with her account of what had happened. Klara's son Greg attested to her deeply conflicted and frightened state, describing how she continued to check her phone every time she left the house to ensure that Zatloka was still in jail, even many months later during trial. Tina described how Klara was so frightened when talking about the charged incident that she was shaking and difficult to understand.

Ample evidence also existed to substantiate the ER 404(b) evidence even without Jorgensen's brief allusion to the prior abuse. The jury heard the evidence of prior abuse in greater detail from multiple sources. Indeed, Jorgensen's passing reference is minor compared to the full description of the two major beatings described by Klara and her account of constant pushing, shoving and headbutting over the past 10 years.

Klara's son Greg and her friends Tina and Goessman-Anderson further corroborated Klara's accounts of abuse, testifying to the stitches and bruising on her face after the "flashlight incident" in January 2006, her shame and fearfulness, and Zatloka's claim that Klara had run into a cabinet. A photograph illustrated the beginnings of a scar still visible years later in the courtroom. Tina and Goessman-Anderson also recalled the visible black and blue bruising all over Klara's arms and shoulders from the 2006 "kayaking" incident and Klara's accompanying distress, fear and depression. In the face of such overwhelming evidence of past abuse, Zatloka cannot credibly argue that, but for Jorgensen's brief mention of how he "found out" about Zatloka hitting Klara, the jury would not have come to the same conclusion.

Finally, Zatloka's account of the evening brought serious credibility issues to the fore. His description of his ex-wife as an irrational, stumbling drunk whose car needed to be chained up and who required a nightly sentinel outside her door to prevent her from running out to buy more vodka at night bore no resemblance to the woman described by all of the other witnesses. His account of Klara as a jealous, physically abusive and domineering presence was in fact directly refuted by his own son and the three friends

described by Zatloka himself as “family,” all of whom described Klara as meek, walking on eggshells, and constantly silenced by her husband. Zatloka’s version of the events of June 26 was both extreme and unbelievable. In light of his own arguably damaging testimony, the introduction of Jorgensen’s statement could not have had a material effect on the outcome of the case.

**2. THE DEFENDANT HAS FAILED TO MEET HIS BURDEN IN ESTABLISHING INEFFECTIVE ASSISTANCE OF COUNSEL.**

Zatloka argues alternatively that his counsel’s failure to request a limiting instruction resulted in ineffective assistance of counsel. His claim is meritless. Counsel’s choice to avoid a limiting instruction was a legitimate tactical decision. Moreover, Zatloka does not even attempt to explain how he was prejudiced by counsel’s performance.

Ineffective assistance of counsel claims are reviewed *de novo*. In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). To prevail on an ineffective assistance of counsel claim, the defendant must show that (1) his attorney’s conduct fell below an objective standard of reasonableness and (2) this resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d

222, 226, 743 P.2d 816 (1987). Prejudice exists where “there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different.” State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). If the defendant fails to demonstrate either prong, the inquiry ends. Id.

Courts presume that counsel has provided effective representation and are “highly deferential” when scrutinizing counsel's performance. Strickland, 466 U.S. at 689. If counsel's conduct can be characterized as legitimate trial strategy or tactics, then it cannot be the basis for an ineffective assistance of counsel claim. State v. Humphries, No. 88234-7, 2014 WL 5393861, at 13 (Oct. 23, 2014). The defendant must show the absence of legitimate strategic or tactical reasons to support the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

**a. Counsel’s Conduct Constituted Legitimate Trial Strategy And Was Thus Not Deficient.**

Zatloka attempts to show the absence of legitimate trial tactics by simply stating that his counsel had “nothing to lose” by requesting a limiting instruction. His claim fails because his attorney’s conduct was reasonable in light of the unwanted

attention an instruction would have drawn to his subsequent, damaging confession and the advantage gained by highlighting Jorgensen's lack of direct knowledge of the abuse as evidence of his lack of credibility as a whole.

Courts presume that counsel decided not to request a limiting instruction so as to avoid reemphasizing damaging evidence. Humphries, No. 88234-7, slip. op. at 13. This applies to requests made at the time that the evidence is introduced as well as at the close of evidence. Id. at 13-14. Such a presumption is appropriate in this case. Jorgensen's reference to what he "found out" immediately preceded Zatloka's confession to beating his wife, as well as his arguably insensitive rationalization of these assaults as culturally acceptable. The reference was thus inextricably tied to Zatloka's confession and seemingly cavalier attitude about domestic abuse.

At that point in Jorgensen's testimony, Klara had already testified about the two specific incidents of assault admitted under ER 404(b) and the continuous pattern of put-downs and pushing/shoving that she had suffered at Zatloka's hands over the past ten years. Counsel had a legitimate tactical desire to avoid highlighting the brief reference to "finding out" and Zatloka's

confession and incongruously casual attitude about the abuse by making a contemporaneous request for a limiting instruction.

Furthermore, as trial progressed, Klara's son Greg and friends Tina and Goessman-Anderson testified about Klara's visible bruising and injuries, her shattered demeanor, and her palpable fear and sorrow surrounding these events. A request for a written instruction at the close of evidence would have brought the jury's focus back to Zatloka's confession. Given the fleeting nature of Jorgensen's statements, it was a legitimate tactic to avoid drawing unwanted attention to them.

Zatloka also decries his counsel's failure to propose a limiting instruction without acknowledging his counsel's reliance on Jorgensen's admitted lack of direct knowledge of the abuse to challenge his credibility in closing argument. During cross-examination, Jorgenson acknowledged that Klara had not told him directly about the incidents of abuse, as he testified initially, but that he had heard it from a third party. RP 419-20. This third party was his wife, Tina, who later clarified on the stand that Jorgensen had been in the same room when Klara told Tina about the abuse and may have overheard it then as well. RP 433-34.

Zatloka's counsel later seized on this detail to argue that "[a]fter having seen nothing, having heard nothing directly from the victim, he went and confronted [Zatloka]." RP 732. By capitalizing on this break in the chain of direct knowledge, counsel was able to present Jorgensen as heedless for acting upon something he had not even witnessed or heard directly from Klara himself. Asking the jury to limit its consideration of how he "found out" about the abuse would have stripped defense of the opportunity to attack his credibility as a rational, objective witness and instead present him as an impulsive hothead who acted without thinking. RP 731.

This dovetailed with counsel's other tactic of attacking Jorgensen's credibility as a whole ("you have to wonder if it's credible that he had that conversation and that he was so concerned about his friend that he didn't bother to do anything to get her help"), ultimately presenting a theory that "it doesn't square . . . because that conversation [with Zatloka] never happened. That confrontation . . . never happened." RP 732. The attack on Jorgensen's credibility allowed counsel to springboard toward the greater goal of attacking the existence of Zatloka's confession, which was damaging evidence that was indisputably admissible.

This Court should presume that trial counsel provided effective representation in deciding not to request a limiting instruction.

**b. There Was No Prejudice.**

Even if the Court were to find that counsel provided deficient performance, it should nevertheless find that Zatloka has failed to demonstrate prejudice. To prevail, Zatloka must show that “but for counsel’s errors, the result of the trial would have been different.” Hendrickson, 129 Wn.2d at 78. Zatloka does not even attempt to meet this burden nor does he even address the prejudice prong, beyond an acknowledgment that he bears the burden to do so. App. Br. 13-14.

Washington courts have long refused to consider inadequately briefed issues that are unsupported by citations to the record, or legal authority. See e.g., State v. Mills, 80 Wn. App. 231, 234, 907 P.2d 316 (1995) (“We will not consider contentions unsupported by argument or citation to authority in the appellate brief.”). Having failed to explain how he suffered prejudice, Zatloka has failed to pursue this portion of an ineffective assistance claim. The Court should refuse to consider the issue of prejudice.

In any event, for the same reasons stated in the harmless error analysis above, any claim of prejudice would nonetheless fail. Even absent the fleeting reference to what Jorgensen “found out,” the remaining evidence in the record powerfully supported Zatloka’s guilt. Zatloka cannot show that, but for the lack of a limiting instruction, there was a reasonable probability that he would have been acquitted.

**D. CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to affirm Zatloka’s conviction.

DATED this 7 day of November, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to JENNIFER SWEIGERT, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. GYORGY ZATLOKA, Cause No. 71523-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name  
Done in Seattle, Washington

11-07-14  
Date