

62624-8

62624-8

HEK

NO. 62624-8

IN THE COURT OF APPEALS OF THE 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

REPLY BRIEF OF APPELLANT

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A. RESTATEMENT OF THE CASE

It is undisputed that, at the time of trial, Pam Gromus did not believe her husband of thirty-two years, Alan Gromus, had assaulted her. 2RP 165; 4RP 185-89; Brief of Respondent (BOR) at 8. Her testimony was crucial since there were no other eyewitnesses to the assault against her with a baseball bat. Traci Gromus, Pam and Alan's daughter who lived with them, was inside the house during the attack. 2RP 105-06. Renter Greg O'Connor was inside, as well, when Pam was struck with the bat. 6RP 11-12.

It was also undisputed that Alan had never committed any act of violence against Pam during the many years of their marriage. 1RP 194, 2RP 156-57, 5RP 156-57; 8RP 62-67; 9RP 200-02. The closest thing to a motive that the state could introduce was evidence that ten years earlier Pam had hidden from Alan the fact that she overspent on her credit cards. 2RP 156-57.

For a short time after the incident, Pam *did* believe that Alan must have hit her because she thought that they were the only two people outside. 2RP 27, 53-54. After a few weeks, however, she

recalled seeing a man in a hooded sweatshirt that night.¹ 4RP 185-87. Her testimony that she only inferred that Alan hit her was supported by her telling -- immediately after the incident -- her daughter Traci, the first officer at the scene, the paramedic who first treated her at the scene, and the emergency room doctor at Island Hospital where she was first taken by ambulance, that she did not see or know who hit her. 1RP 171; 2RP 140, 5RP 125, 140, 7RP 107-11, 114-15. The emergency room doctor testified that he did not know how much Pam could tell about what happened other than that she was hit unexpectedly, briefly lost consciousness, and did not see who hit her. 5RP 127-29.

The state, in its responding brief, emphasizes the testimony of Greg O'Connor and Traci, neither of whom saw anyone hit Pam with a bat. BOR 4-5. O'Connor, however, admitted that he began speculating about what was happening from the very outset, even before he was in a position to see

¹ The state indicates that Pam completed a crime victim's application in January 2008, "in which she wrote that her husband attacked her." BOR 15-16. This is incorrect. The crime victim's report was filled out while Pam was still in the hospital by Traci, 5RP 146-47, 181-82. The further information filled out later was a "list of providers I have seen to date." 3RP 103-05.

what was happening: he initially thought someone might be trapped under a truck, and then that Alan was trapped under his truck, that Alan needed help subduing a mental patient or that Alan was holding a bat to someone's neck. 6RP 17-25. O'Connor also remembered being up against a wood pile and fearful that he would be hit with a piece of wood, even though that wood pile had been burned before the incident. 5RP 204-06, 7RP 142, 164. It was the defense theory, supported by the testimony of the emergency room doctor, that O'Connor misinterpreted Alan's kneeling beside Pam after the attack as an attempt to strangle her with the bat. 5RP 127-29, 9RP 78. The doctor testified that he saw no redness or abrasion on her neck such as he would have expected if she had been strangled by someone placing a bat across her neck.² 5RP 127-29. In fact, it was only after talking with the police at the hospital and after being told that the renter

² With regard to the bruising on the neck, Dr. Khosla, the plastic surgeon, conceded that blood can migrate and all of Pam's injuries could have been caused by one blow, 2RP 158, 163; and Dr. Selove, forensic pathologist, testified that if it was not in the medical record that Pam had reported being strangled with a bat across her neck, he did not know if her bruises could be considered more consistent with striking or choking. 3RP 169. Dr. Selove agreed that blood can migrate. 3RP 170.

what was happening: he initially thought someone might be trapped under a truck, and then that Alan was trapped under his truck, that Alan needed help subduing a mental patient or that Alan was holding a bat to someone's neck. 6RP 17-25. O'Connor also remembered being up against a wood pile and fearful that he would be hit with a piece of wood, even though that wood pile had been burned before the incident. 5RP 204-06, 7RP 142, 164. It was the defense theory, supported by the testimony of the emergency room doctor, that O'Connor misinterpreted Alan's kneeling beside Pam after the attack as an attempt to strangle her with the bat. 5RP 127-29, 9RP 78. The doctor testified that he saw no redness or abrasion on her neck such as he would have expected if she had been strangled by someone placing a bat across her neck.² 5RP 127-29. In fact, it was only after talking with the police at the hospital and after being told that the renter

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saw Alan pressing a bat against her throat that Pam stated that Alan had tried to strangle her with the bat. 2RP 26-28, 46-51, 92.

Further, the state dismisses the evidence that Alan, as well as Pam, suffered a head injury on the night of the incident. The state focused on whether Alan immediately sought medical attention while in jail. BOR 11. The evidence showed, however, that Alan had suffered an injury which resulted in a hematoma under his scalp; and, in the opinion of the defense expert, a concussion and post-trauma amnesia. 3RP 11-20, 26-27, 30-33, 38, 46. The state's own expert concluded that Alan was not malingering in his complaints of headaches and blurred vision. 3RP 72, 8RP 23-29. Moreover, Mr. Gromus testified that he told Det. Esskew of his headaches when Esskew came to photograph him shortly after his arrest, that he requested aspirin at booking, and that he made several other attempts to get medical attention before learning how to file a written request. 9RP 143-50. Detective Esskew confirmed that Mr. Gromus told him of injuries to the back and side of his head shortly after his arrest. 6RP 210, 7RP 52-56. A note from booking indicated that Mr. Gromus reported a recent

head injury from September 30, 2007, when he was hit with a bat. 10RP 98-99.

It is in light of these essential facts, and the facts pertaining to the lack of investigation in the case that the statement of facts presented in the state's brief should be evaluated.

It should be noted, as well, that contrary to the state's assertion that Mr. Gromus was sentenced to a term of 124 months, he received a sentence of 248 months, two consecutive terms of 124 months. CP 211-19.

B. ARGUMENT IN REPLY

1. THE INTRODUCTION, WHOLESAL, OF PRIOR ALLEGED INCONSISTENT STATEMENTS OF PAM GROMUS TOGETHER WITH THE PROSECUTOR'S ELICITING TESTIMONY AND PRESENTING ARGUMENT INVITING THE JURORS TO CONSIDER THE STATEMENTS AS SUBSTANTIVE EVIDENCE RATHER THAN MERELY AS IMPEACHMENT DENIED MR. GROMUS HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL.

a. The court should have limited the impeachment with prior inconsistent statements both in the number of statements and the number of witnesses.

Although Pam Gromus testified that she did not believe that her husband Alan assaulted her, she did not dispute that until she stopped taking pain medication several weeks after the incident and

recalled seeing a man in a gray sweatshirt, she thought Alan must have been the one to hit her because they were alone outside. 4RP 185-87. None of the alleged prior inconsistent statements which the state was allowed to introduce at trial contradicted the substance of this testimony. None provided the kind of description of the assault which suggested that Pam actually saw Alan hitting her; the alleged statements as presented at trial were primarily just assertions that Alan had committed the assault. See, e.g., 3RP 191; 200-04, 4RP 17, 35, 111-13. Much of the prior-inconsistent-statement testimony had nothing to do with Pam's statements at all, but was elicited to convince the jurors that she was in full command of her faculties when making the statements. See at 22-23. The prosecutor was also permitted to elicit statements about Alan's credit cards, wallet and money, and Pam's plan to take Alan for everything he had during divorce proceedings and other such collateral matters. 3RP 181, 200.

In its responding brief on appeal, the state has provided a number of quotations and citations to authority to support the general proposition that prior inconsistent statements may be admitted at trial, a proposition which is not in dispute on appeal. BOR at 25-27, 31-34. Appellant agrees that "[i]mpeachment evidence affects the witness's credibility but is not probative of the substantive facts encompassed by the evidence." BOR 26 (citing State v. Johnson, 40 Wn.App. 371, 377, 699 P.2d 221 (1985), and State v. Clinkenbeard, 130 Wn.App. 552, 570, 123 P.3d 872 (2005)). Appellant agrees that it is the fact that an inconsistent statement was made, not the substance of the statement that is the relevant impeachment. BOR 26 (citing 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) and State v. Newbern, 95 Wn.App. 277, 292, 975 P.2d 1041 (1999)).

Nowhere, however, does the state cite any authority that testimony about prior inconsistent statements should not be excluded where it is

cumulative or unfairly prejudicial; includes testimony which is collateral to any issue at trial -- such as Pam's alleged statement that she was going to take Alan for everything he had in a divorce proceeding -- or is aimed at establishing that the witness was telling the truth when making the inconsistent statement -- such as that Pam seemed normal and like herself. In fact, the state argues without citation to authority that the credibility of trial testimony is determined by comparing it to the credibility of the substance of the prior inconsistent statements:

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 she became certain after trial [sic] 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.

BOR 30-31.

This argument, as well as the arguments made by the prosecutor at trial, are contrary to the requirement that evidence of prior inconsistent statements "may not be used to argue that . . . the facts contained in the prior statements are substantively true," State v. Burke, 163 Wn.2d 204, 219, 181 P.3d 1 (2008), nor may the state use prior inconsistent statements "as a guise for submitting to the jury substantive evidence which would otherwise be inadmissible hearsay." State v. Clinkenbeard, 130 Wn.App. 552, 569-70, 123 P.3d 872 (2005).

The state's arguments are contrary to the rule that matters are collateral and inadmissible if they could not have been "brought into evidence for a purpose independent of the contradiction." State v. Dickinson, 48 Wn.App. 457, 468, 740 P.2d 312 (1987). Moreover, under ER 403, even relevant

evidence which is cumulative or unfairly prejudicial can be excluded.

The state also argued in its responding brief that testimony to prove Pam Gromus was in command of her faculties when making the alleged prior inconsistent statements was "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." BOR at 35. This argument is not only unsupported by relevant authority, it is not logical. Such arguments, not supported by cogent logic and authority, should not be reviewed on appeal. State v. Lord, 117 Wn.2d 829, 853, 822 P.2d 177 (1991), review denied, 506 U.S. 856, 113 S.Ct. 164 (1992). Pam's state of mind at the time of the incident does not make it any more or less likely that she made the statement; her then state of mind is relevant only to the argument that what she said in her statement was reliable. Obviously if the alleged statement was that she was an alien from another planet, the state would not be arguing that the fact that she

was in a normal, clear state of mind was relevant to proof that she made the statement. The testimony was elicited to show that Pam's prior statements were true and that was how the jurors undoubtedly used it.

The jurors repeatedly heard that Pam Gromus made statements accusing her husband of assaulting her, and statements implying that her accusations must be true because she expressed fear and animosity toward him and was in a normal state of mind when she made these statements. It was a virtual certainty that because of the volume, extent, and repetitiveness of the statements the jurors considered the statements as substantive evidence -- that they determined Pam's trial testimony was not to be believed because she was telling the truth when she made the earlier statements. The trial court erred in not limiting the scope of the statements or granting a mistrial when the statements went beyond that permitted by ER 613. Mr. Gromus's conviction should be reversed and his case remanded.

- b. The prosecutor's misconduct in questioning witnesses and in opening statement and closing argument assured that the jurors would consider the alleged prior inconsistent statements as substantive evidence of Mr. Gromus's guilt.

"Credibility" is not a magic word. If, as it was in this case, the state's argument is that trial testimony is not "credible" because the witness was telling the truth in prior statements incriminating the accused, made before trial, then this is improper impeachment with prior inconsistent statements under Burke and Clinkenbeard and State v. Fisher, 165 Wn.2d 727, 202 P.3d 937, 948 (2009).

Nevertheless, the state's responses on the issue of the prosecutor's misconduct in arguing the relevance of the alleged prior inconsistent statements are that: (a) the trial prosecutor's argument in opening statement was proper because "the prosecutor prefaced and concluded the references to prior statements by explaining that the statements were relevant to credibility," BOR

34; and (b) the prosecutor's closing argument was not akin to the misconduct in State v. Fleming, 83 Wn.App. 209, 213, 921 P.2d 1076 (1996), where the prosecutor argued that in order to acquit, the jury had to find the state's witnesses were either lying or mistaken. BOR 35. These responding arguments are essentially that if the prosecutor uses the word "credibility," the prosecutor can argue that the substance of the prior statements was true and therefore the trial testimony must not be true, *i.e.*, credible.

Here, the prosecutor used the word "credibility" to mean that Pam Gromus's denial of knowing who hit her was not credible because she told people after the incident that Alan had hit her. In opening statement, the prosecutor told the jurors that they would have to weigh the credibility of the witnesses to her alleged prior statements as well as her credibility. This is *akin* to the misconduct in Fleming of telling jurors that they would have to find the state's witnesses and Pam's earlier statements not credible in order

to find the defendant not guilty. The prosecutor told the jurors in opening that they were going to hear, and have to decide the credibility of the testimony of Pam's co-workers and her principal because Pam told them that Alan had attacked her and now said, "That's not what I recall happening anymore." 2RP 51-53.

In closing, the prosecutor discussed prepared slides with summaries of prior statements by witnesses, together with summaries of testimony that Pam was "very coherent, not on pain medication, no trouble understanding her, not confused, understood things, voice was articulate, sounded completely normal, Pam appeared strangely normal, understood questions and gave appropriate answers." CP 160-72. In discussing these statements, the prosecutor emphasized how the statements "they're all consistent" -- "what you don't want to do is you don't want to fall into the idea that because there is one little inconsistency here . . . that should eliminate that So we've got, six people that came in from the high

school. You all listened. What did they say? They all said kind of the same things in general." The prosecutor continued on this theme of the statements and how lucid Pam was when she made them and concluded, "Pam Gromus decided at some point in time her memory got revived, that she did not believe Alan Gromus did it anymore." RP(closing) 7-11. In this way, the prosecutor undercut entirely the legitimate purpose of the impeachment, using it instead "as a guise for submitting to the jury substantive evidence which would otherwise be inadmissible hearsay." Clinkenbeard, 130 Wn.App. at 569-70. Either the prosecutor was admitting that the alleged prior statements were actually consistent with Pam's trial testimony that she initially inferred that Alan was her attacker, or arguing the substance of the prior statements that she believed he did it and then did not believe it any more.

This use of the evidence in a manner other than the purpose it was admitted for was misconduct that denied Mr. Gromus a fair trial as guaranteed

by the Sixth Amendment and should result in reversal of his convictions.

2. THE COURT'S INSTRUCTION NO. 26 WAS A COMMENT ON THE EVIDENCE IN VIOLATION OF ARTICLE IV, SECTION 16 OF THE WASHINGTON CONSTITUTION AND NOT HARMLESS.

Although defense counsel requested an instruction limiting the use of the alleged prior inconsistent statements to impeachment and proposed a limiting instruction, CP 113, 114, the court did not give the proposed instruction and instead gave an instruction which told the jurors that they could consider "her prior statements or answers" only on the issue of her credibility. CP 143. This effectively removed from the jury's consideration the question of whether the statements were actually made.

The proposed instruction told the jury only that evidence on the subject of prior statements made by Pam Gromus "which she testified that she did not make or does not recall making" had been introduced and that such evidence was "introduced for the limited purpose of impeaching the

credibility of Pamela Gromus." CP 112, 114. The court's instruction omitted that the statements were denied or not recalled by Pam and replaced a statement of the purpose for which the evidence was introduced with a declaration that the jury might consider her prior statements or answers only for the limited purpose of assessing her credibility.

The state, in its responding brief, does not address the differences in these instructions or the difference between proposing an instruction and not objecting to an instruction. The court's instruction, however, is a comment on the evidence, where the proposed instruction was not. Moreover, instructions which were not objected to, rather than proposed by the defense, may be challenged for the first time on appeal if they represent a manifest constitutional error. State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004).

Here the instruction conveyed that the judge believed the statements were made by Pam Gromus and vouched for them as critical to her credibility. This resolved the issue of whether the impeachment

witnesses were credible as well. The instruction violated article IV, §16, and the record does not affirmatively show that no prejudice could have resulted from it. Mr. Gromus's convictions should be reversed.

3. THE OPINION TESTIMONY AS TO GUILT BY THE INVESTIGATING DETECTIVES DENIED MR. GROMUS HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO A TRIAL BEFORE A FAIR AND IMPARTIAL JURY.

The state, in its responding brief, asserts that the state properly elicited opinion testimony from Detectives Esskew and Sheahan-Lee that they believed during the investigation and at the time of trial that Mr. Gromus was guilty. According to the state, this was proper because the defense sought to discredit the investigation and the failure of the detectives to consider other possible suspects to the crime. BOR at 40-45. Detectives Esskew's and Sheahan-Lee's personal beliefs in Mr. Gromus's guilt, however, were not relevant to or an excuse for the failure to investigate other possible suspects. If that were a justification for failure to investigate, police

would simply stop investigating after they first identified a viable suspect no matter what new evidence might come to their attention.

The defense impeached Detective Esskew with his failure to forward to the prosecutor information favorable to the defense. RP(6/19/08) 4-7, 9; 6RP 203, 7RP 47-48. The defense also impeached Esskew with a false statement on a search warrant application and his coercive tactics in trying to get Traci to agree that her father committed the crime. 5RP 43; 7RP 59-60.

The state elicited from Esskew that he told Tom Gromus he did not believe a third person was involved in the incident and that he provided Traci with a list of reasons why he and Sheahan-Lee believed her father was guilty. 7RP 26-27, 30. This was improper opinion testimony as to guilt and not an explanation for failing to contact a person Pam Gromus believed might have knowledge about her assailant. It was constitutional error, for all of the reasons set out in appellant's opening brief at

38-42. Mr. Gromus's convictions should be reversed because of the error in admitting this testimony.

4. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION FOR MISTRIAL AFTER THE STATE VIOLATED A MOTION IN LIMINE.

The state, in its responding brief, asserts that the trial prosecutor did not violate a motion in limine because the trial court reserved for trial its ruling on the defense request to prohibit the state from mentioning a ten-year-old incident in which Pam Gromus ran up a large amount on her credit cards. BOR at 46. The state omits, however, the crucial fact that the trial court ruled prior to trial that the state could not elicit this evidence without first seeking permission to do so outside the presence of the jury. 3RP 55, 58. During the argument on the motion for mistrial after the evidence was elicited, the prosecutor argued only that it was not a "flagrant violation," implicitly conceding that it was a violation of the court's pretrial ruling. 3RP 59-60.

By depriving the defense of the opportunity to argue that the evidence was not relevant and certainly substantially more prejudicial than probative, the state precluded the possibility that the trial court would have excluded it. Now the only rationale the state can find to justify the admission of the evidence is that the fact that the Gromuses had discussed divorce ten years earlier was relevant to the issue of "evaluating the doctor's opinion as to the cause of Gromus's concussion." BOR at 48. Given that it is completely far-fetched to suppose that this fact would be critical to the expert's opinion, the court may well have excluded the evidence after proper argument. This is particularly true in light of the fact that there were no allegations of domestic violence throughout the marriage, as well as physical evidence that Mr. Gromus had indeed sustained an injury.

The danger is that, in searching for a motive, the jury might have relied on this stale information. It was unfairly prejudicial. The

defense took care to try to assure that the evidence would not be admitted without the court considering argument from both sides, and the state chose to override this right and the defense planning. This was error and unfair to Mr. Gromus.

5. CUMULATIVE ERROR DENIED MR. GROMUS A FAIR TRIAL.

In this case, the trial errors combined to deprive Mr. Gromus of a fair trial. The wholesale admission of prior inconsistent statements and the examination of witnesses and argument by the prosecution inviting the jurors to weigh the credibility of the alleged inconsistent statements against the credibility of Pam Gromus's trial testimony virtually guaranteed that the jurors would consider the prior statements as substantive evidence. A great deal of the testimony, included in the slide presentation during closing argument, reflected the impeaching witnesses' opinions that Pam was her normal self, aware of her surroundings and accurately answering questions at the time her prior alleged statements were made. This improper

use of alleged prior statements, which comprised a significant amount of the testimony during trial, together with the opinion testimony as to guilt by the investigating detectives and the violation of the motion in limine, cumulatively, as well as individually, denied Mr. Gromus a fair trial.

Because of the cumulative error, Mr. Gromus should be given a new trial during which these errors do not occur.

6. THE COURT ERRED IN ENTERING JUDGMENT AND SENTENCE FOR BOTH ASSAULT IN THE FIRST DEGREE, AS CHARGED AGAINST MR. GROMUS, AND A DEADLY WEAPON ENHANCEMENT.

As noted in the Opening Brief of Appellant, pages 45-47, and in the Brief of Respondent at 50, the Washington Supreme Court has granted review on this issue in two cases for which the state provides an argument date of October 29, 2009. The decisions in those cases should determine the outcome of the issue in Mr. Gromus's case as well.

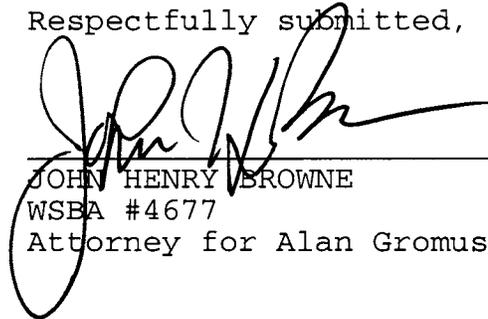
E. CONCLUSION

For all of the reasons set out above and the Opening Brief of Appellant, Mr. Gromus respectfully

submits that his convictions should be reversed and remanded for retrial and the deadly weapon enhancement dismissed.

DATED this 14 day of September, 2009.

Respectfully submitted,



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HEK

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON

No. 62624-8-I

Plaintiff,

v.

DECLARATION OF SERVICE

ALAN T. GROMUS,

Defendant.

I certify under penalty of perjury under the laws of the State of
Washington that I sent a copy of the "Reply Brief of Appellant" to:

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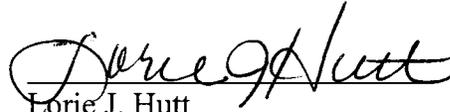
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DECLARATION OF SERVICE - 1

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DATED at Seattle, Washington, this 15th day of September, 2009.

A handwritten signature in black ink, appearing to read "Lorie J. Hutt". The signature is written in a cursive style with a large initial "L".

Lorie J. Hutt

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