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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

NO. 38381-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

PM 2-2-09

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STATE OF WASHINGTON,

Respondent,

v.

KEVIN M. BREIMON,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Diane Woolard, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court improperly admitted extrinsic evidence of statements the complaining witness admitted and explained during her testimony.

2. Trial counsel's failure to object to improper impeachment evidence constituted ineffective assistance of counsel.

3. Cumulative error denied appellant a fair trial.

4. An error in the judgment and sentence must be corrected.

Issues pertaining to assignments of error

1. Appellant was charged with assault and harassment based on accusations by his ex-girlfriend. At trial, the complaining witness admitted making the accusations but explained she had lied to the sheriff's deputy. Nonetheless, the court permitted the deputy to repeat the witness's prior statements over defense objection. Where the court's erroneous evidentiary ruling unfairly prejudiced the defense by doubling the impact of the state's evidence as to the crucial issue at trial, is reversal required?

2. The state presented extrinsic evidence of a separate prior inconsistent statement by the witness without affording her an opportunity to deny or explain the statement. Where this evidence likely tipped the scales on the key issue in the case, did trial counsel's failure to object to

the improper impeachment evidence constitute ineffective assistance of counsel?

3. Did the cumulative effect of these errors deny appellant a fair trial?

4. A box is checked on the Judgment and Sentence indicating that appellant's convictions are based on a guilty plea. Where appellant was actually convicted based on jury verdicts, must the error in the Judgment and Sentence be corrected?

B. STATEMENT OF THE CASE

1. Procedural History

On July 10, 2008, the Clark County Prosecuting Attorney charged appellant Kevin Breimon with second degree assault and harassment (felony—death threats). CP 3-4, 5-6; RCW 9A.36.021(1)(a); RCW 9A.46.020(1)(a)(i) and (2)(b)(ii). The case proceeded to jury trial before The Honorable Diane Woolard, and the jury returned guilty verdicts. CP 72-74. The jury also found the assault was a domestic violence offense. CP 76. The court imposed standard range sentences, and Breimon filed this timely appeal. CP 85, 103.

2. Substantive Facts

On July 5, 2008, Sonia Johnson reported to police that on July 1, her ex-boyfriend, Kevin Breimon, had broken her finger. 1RP<sup>1</sup> 63,74. She also reported that on July 3, Breimon had threatened to kill her and her ex-husband. 1RP 75. Breimon was arrested and charged with second degree assault and felony harassment. 1RP 51; CP 5-6. Johnson saw a doctor two days later and again reported that her ex-boyfriend had broken her finger. 1RP 26, 35.

At trial, Johnson testified that she had actually broken her finger when she accidentally slammed it in a car door. 1RP 65. She said Breimon did not break her finger, nor did he threaten her or anyone else. 1RP 78, 80. Johnson admitted making the accusations on which the charges were based, but she explained that she had lied to the police because she needed to have Breimon removed from her apartment. 1RP 63-64. She was being evicted because she was not supposed to have another person living with her. 1RP 63. Johnson testified that she had been drinking heavily, and accusing Breimon of assault was the best solution she could come up with. 1RP 67, 77-78.

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<sup>1</sup> The Verbatim Report of Proceedings is contained in three volumes, designated as follows: 1RP—9/10/08; 2RP—9/11/08; 3RP—9/17/08.

Johnson testified that she gave an oral statement and a written statement, and that the written statement was made under the penalty of perjury. 1RP 64-65. She read her written statement into the record and testified that she made the same accusations in her oral statement to the deputy. 1RP 73-75. Johnson again explained that she had accidentally slammed her finger in the car door, but she lied to police because she wanted Breimon out of the house. 1RP 75.

In addition, Johnson said she saw a doctor because she was instructed to by the deputy, and she repeated the false allegations. 1RP 66. The doctor testified that Johnson's injury was consistent with her story, but it could have occurred in other ways, and that it was very common for people to slam their hands in doors. 1RP 36-37. A friend of Johnson's testified that she had been with Johnson when she injured her finger in the car. 1RP 89.

After Johnson admitted during her testimony that she had made the accusations against Breimon, the state called the deputy to whom Johnson had initially spoken. When the prosecutor asked the deputy about Johnson's statements, defense counsel objected that since Johnson already testified about her statements, there was no need for the deputy's testimony to impeach her. 1RP 99. Counsel also objected that the

statements were hearsay. 1RP 99. The court overruled the objections, and the deputy was permitted to repeat Johnson's accusations. 1RP 99-101.

The state also presented testimony from Amy Harlan, a domestic violence victims' advocate who had spoken to Johnson. 1RP 93. Harlan testified that Johnson told her that she had lied to police and that she had intentionally slammed her finger in her car door so that she would have a story to tell law enforcement. 1RP 94-95. Although Johnson was never questioned about this statement, defense counsel did not object to Harlan's testimony.

C. ARGUMENT

1. SINCE JOHNSON EXPLAINED HER PRIOR STATEMENTS IN HER TESTIMONY, THE DEPUTY'S TESTIMONY ABOUT THOSE STATEMENTS WAS INADMISSIBLE, AND THE COURT'S ERROR REQUIRES REVERSAL.

Over defense objection, the court below admitted Johnson's statements to the deputy as prior inconsistent statements to impeach her testimony. 1RP 99. A witness's prior inconsistent statement may be admissible for impeachment, to allow the trier of fact to compare the witness's prior statement with his or her testimony, in order to ascertain the witness's credibility. ER 613(b); State v. Spencer, 111 Wn. App. 401, 409, 45 P.3d 209 (2002), review denied, 148 Wn.2d 1009, 62 P.3d 889

(2003). Under ER 613(b)<sup>2</sup>, extrinsic evidence of a witness's prior inconsistent statement is not admissible unless the witness is first given an opportunity to admit or to deny the inconsistency and to explain it. State v. Babich, 68 Wn. App. 438, 443, 842 P.2d 1053, review denied, 121 Wn.2d 1015 (1993).

If the witness admits making the prior inconsistent statement, however, extrinsic evidence of the statement is not allowed. State v. Dixon, 159 Wn.2d 65, 76, 147 P.3d 991 (2006); Babich, 68 Wn. App. at 443. For example, in Dixon, the defense asked the complaining witness on cross examination whether she had told a counselor that she was not sure if the alleged events occurred or if it was just a dream. The witness admitted making the statement, although she added that she knew it was not a dream. Dixon, 159 Wn.2d at 72. The defense then sought to call the counselor to testify about the statement, but the trial court excluded that testimony. The Supreme Court affirmed, holding that since the witness admitted making the prior statement, the counselor's testimony could not

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<sup>2</sup> ER 613(b) provides:

*Extrinsic evidence of prior inconsistent statement of witness* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

be deemed evidence of a prior inconsistent statement. Dixon, 159 Wn.2d at 76-77.

The same is true here. Not only did the state confront Johnson with her prior statements, but Johnson admitted making them. She read her written statement to the jury and testified that her oral statements to the deputy were the same. 1RP 73-75. Johnson also explained why she had made those statements and why they differed from her testimony at trial. 1RP 75. Because Johnson admitted making the prior statements, the deputy's testimony was not properly admitted as extrinsic evidence of prior inconsistent statements. See Dixon, 159 Wn.2d at 76-77.

Although evidentiary rulings lie within the trial court's discretion, the court abuses its discretion when its ruling is based on untenable grounds. State v. Crowder, 103 Wn. App. 20, 25-26, 11 P.3d 828 (2000). A decision is based on untenable grounds if it rests on facts unsupported in the record or is reached by applying the wrong legal standard. Dixon, 159 Wn.2d at 76. Here, the state explained that it was offering the deputy's testimony to impeach Johnson, because he had not had a chance to testify to her statements. 1RP 99. Under Washington law, the deputy's testimony would be admissible only if Johnson denied making the statements. See Babich, 68 Wn. App. at 443. Since she did not, the court

clearly applied the wrong legal standard regarding extrinsic evidence of prior statements, and its ruling was an abuse of discretion.

The trial court's erroneous evidentiary ruling requires reversal if, within reasonable probabilities, the outcome of the trial would have been different had the error not occurred. See State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Such is the case here.

The issue in this case was whether the jury believed the accusations Johnson made in her written statement or her testimony that she accidentally injured her finger and then lied to the deputy. Allowing the deputy to repeat Johnson's accusations unfairly created the impression that the deputy was vouching for the credibility of those statements. This was especially prejudicial because law enforcement officers are imbued by jurors with a "special aura of reliability." See State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001). The deputy's testimony was simply a reiteration of the heart of the state's case. The court permitted the state to double the impact of that evidence by allowing it to be repeated through the mouth of another witness. This was prejudicial and reversible error. See State v. Pendleton, 8 Wn. App. 573, 575-76, 509 P.2d 179 (police officer's testimony was merely reiteration of substance of another witness's testimony; as such it was prejudicial and reversible error), review denied, 82 Wn.2d 1007 (1973).

2. COUNSEL’S FAILURE TO OBJECT TO IMPROPER IMPEACHMENT EVIDENCE DENIED BREIMON EFFECTIVE REPRESENTATION.

Both the federal and state constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. Amend, VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his attorney’s conduct “(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney’s conduct.” State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993). In this case, defense counsel’s failure to object to improper impeachment evidence presented by the state constituted ineffective assistance of counsel.

Following Johnson’s testimony that she had accidentally slammed her finger in her car door, the state called a domestic violence victim’s advocate to testify that Johnson had told her she intentionally slammed her finger in the door. 1RP 94-95. The state had never asked Johnson about this alleged statement, however.

Under ER 613(b), extrinsic evidence of a prior inconsistent statement is not admissible absent the proper foundation:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require.

ER 613(b). While the rule does not establish a mandatory procedure, the party seeking to introduce extrinsic evidence must allow the witness the opportunity to explain or deny the statement. State v. Johnson, 90 Wn. App. 54, 70, 950 P.2d 981 (1998). If this is not done while the witness is testifying, the proponent of the evidence must ensure the witness's availability so that the statement can be addressed after the extrinsic evidence is presented. State v. Horton, 116 Wn. App. 909, 915, 68 P.3d 1145 (2003).

In Horton, the defense sought to impeach the complaining witness with evidence that she had made statements inconsistent with her testimony on two prior occasions. Because defense counsel had neither questioned the witness about these inconsistent statements on cross examination nor requested that she remain in attendance after her testimony, the trial court properly excluded extrinsic evidence of the prior statements. Horton, 116 Wn. App. at 916. This Court held that counsel's failure to comply with ER 613(b) constituted ineffective assistance of counsel. Horton, 116 Wn. App. at 924.

Here, it was the state that sought to impeach its witness with extrinsic evidence of a prior statement. Under the rule, such impeachment would be permissible only if the state gave Johnson an opportunity to explain or deny the statement, either by calling her attention to it during her testimony or by arranging for her to remain in attendance after testifying. As in Horton, the state did neither. The prosecutor did not ask Johnson about the statement during her testimony, and he excused her from further attendance at the conclusion of her testimony. 1RP 86. Extrinsic evidence of her statement was thus inadmissible under ER 613(b).

There was no potential benefit to the defense from failing to hold the state to the standards set forth in ER 613(b). Allowing the jury to hear the inadmissible evidence was unnecessarily harmful to the defense, and no sound trial strategy could account for counsel's failure to object. Counsel's performance fell below an objective standard of reasonableness.

Moreover, counsel's deficient performance prejudiced Breimon's case. Breimon "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Rather, only a reasonable probability of such prejudice is required. Strickland, 466 U.S. at 693; Thomas, 109

Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. Strickland, 466 U.S. at 694; Thomas, 109 Wn.2d at 226.

The question for the jury in this case was which version of Johnson's story was more credible: her trial testimony that she lied in order to have Breimon removed from her apartment, or her accusations of assault and harassment. Johnson explained at trial that she had lied because she was under a lot of stress due to the pending eviction and she was not thinking clearly because she was drinking heavily. The state argued that the jury should reject Johnson's trial testimony as the lie, however, and instead believe her initial accusations. Because defense counsel failed to object to the state's improper impeachment, the prosecutor was able to argue in closing that Johnson had made inconsistent statements about smashing her finger in the door, while all her statements accusing Breimon of assault were consistent. 1RP 131-32. In a case that came down to choosing which of Johnson's statements to believe, the improperly admitted impeachment evidence likely tipped the scales for the jury and resulted in Breimon's convictions. Breimon received ineffective assistance of counsel, and his convictions must be reversed.

3. CUMULATIVE ERROR DENIED BREIMON A FAIR TRIAL.

Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may nonetheless find that the errors combined together denied the defendant a fair trial State v. Coe, 101 Wn.2d 772, 789, 685 P.2d 668 (1984). The doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998).

In Johnson, the trial court improperly admitted the evidence of the defendant's prior conviction and prior self defense claim, refused to allow the defense to impeach a prosecution witness with a prior inconsistent statement, and improperly admitted evidence of a defense witness's probation violation. While the Court of Appeals held that none of these errors alone mandated reversal, the cumulative effect of these errors resulted in a fundamentally unfair trial. Johnson, 90 Wn. App. at 74.

In this case, the trial court erroneously overruled defense counsel's objection to extrinsic evidence of Johnson's prior statements and permitted the deputy to reiterate the heart of the state's case, doubling the impact of that evidence. In addition, defense counsel's failure to object resulted in improper admission of impeachment evidence that was

significantly damaging to the defense. Although Breimon contends that each of these errors on its own engendered sufficient prejudice to merit reversal, he also argues that the errors together created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdict. Reversal of his convictions is therefore required.

4. AN ERROR IN THE JUDGMENT AND SENTENCE  
NEEDS TO BE CORRECTED.

On the first page of the Judgment and Sentence, a box is checked indicating that Breimon is guilty of the charged offenses based on a guilty plea. CP 80. This is clearly an error, since Breimon was convicted after a jury trial based on the jury's verdicts. CP 72-74. A sentence must be "definite and certain." State v. Jones, 93 Wn. App. 14, 17, 968 P.2d 2 (1998) (citing Grant v. Smith, 24 Wn.2d 839, 840, 167 P.2d 123 (1946)). As currently written, the Judgment and Sentence form is inconsistent with the record in this case. The Judgment and Sentence must be corrected to remedy this error.

D. CONCLUSION

Breimon was denied a fair trial by the court's erroneous evidentiary ruling, ineffective assistance of counsel, and the cumulative effects of these errors. His convictions must therefore be reversed. In addition, an error in the Judgment and Sentence must be corrected.

DATED this 2<sup>nd</sup> day of February, 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Catherine E. Glinski", written over a horizontal line.

CATHERINE E. GLINSKI

WSBA No. 20260

Attorney for Appellant

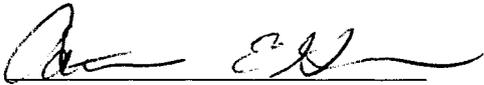
Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Kevin M. Breimon*, Cause No. 38381-1-II directed to:

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



Catherine E. Glinski  
Done in Port Orchard, WA  
February 2, 2009

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