

NO. 38422-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM ROBERT BAILEY,,

Appellant.

STATE OF WASHINGTON
BY _____
DEPUTY ATTORNEY GENERAL
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CLERK OF COURT

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

The Honorable Robert L. Harris, Judge

BRIEF OF APPELLANT

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P.M. 4-20-2009

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PROCEDURAL HISTORY AND TRIAL TESTIMONY

I. PROCEDURAL HISTORY.

A jury found William Bailey guilty of assault in the second degree by strangulation and unlawful imprisonment

as charged in an amended information. CP 3-4, 30, 31. Mr. Bailey was sentenced and filed this timely appeal. CP 33-43, 44-45.

Attorney Edward Dunkerly represented Mr. Bailey at all stages of the trial court proceedings. Clark County Deputy Prosecutor Camara Banfield represented the State.

II. TRIAL TESTIMONY

A. The incident as told by Rachel Bailey.

Rachel and William Bailey had been married for two years. RP 52. One afternoon in January 2007, Mrs. Bailey returned home after work crew. RP¹ 53, 101. She was doing work crew as part of a sentence for assaulting Mr. Bailey. RP 173. The couple argued about Mrs. Bailey wanting to spend time with "somebody new" that she met at work crew. RP 52-53. Mr. Bailey was jealous and did not want her to spend time with "somebody new." RP 52-53.

¹ "RP" refers collectively to the two bound volumes of verbatim prepared for this case. The pages are consecutively numbered.

Mrs. Bailey left the house to cool off and smoke a cigarette. RP 52-53. She walked down the street. RP 52-53. Mr. Bailey followed her outside and yelled, "Call the police, call the police." RP 54-55. She told him to stop yelling. RP 55. Mr. Bailey grabbed Mrs. Bailey around the throat. RP 55. She could not breathe. RP 55. Her vision dimmed. RP 55. She felt as if she were blacking out. RP 55.

Mr. Bailey hit Mrs. Bailey. RP 55. She stumbled. RP 55. Mr. Bailey grabbed her by her jacket collar and dragged her back to their house. RP 55-56. She fell. RP 56. Mr. Bailey kicked her in the back with his steel-toed shoe. RP 56. The kick hurt. RP 56. Mr. Bailey twisted Mrs. Bailey's wrist "wrong." RP 56.

Once inside the house, Mr. Bailey pulled Mrs. Bailey toward their bedroom. RP 56. Mrs. Bailey grabbed the bedroom door frame with both hands on one side of the door. RP 56-57. Mr. Bailey shut the door on her wrist. RP 56. Mrs. Bailey felt that her wrist was broken. RP 57. Mr. Bailey put Mrs. Bailey on the bed. RP 58. She tried to

kick him off of her. RP 58. Mr. Bailey punched her shins.
RP 58.

Mrs. Bailey told Mr. Bailey that she wanted to leave.
RP 60. Mr. Bailey got off of her, left the bedroom, and
shut the door behind him and locked it. RP 60. Mrs.
Bailey tried to get out through the bedroom window but
her father-in-law, Robert Bailey, stood outside of the
window and prevented her from getting out. RP 61. She
tried to leave the bedroom by the door but the door would
not move. RP 61. She stayed in the bedroom and cried
for "maybe" an hour and a half. RP 61.

After everyone had calmed down, she simply walked
out of the bedroom and sat down on the couch. RP 62.
Mr. Bailey was there, sitting in his recliner. After everyone
went to sleep, she "ran away from the house to stay with a
friend." RP 63, 101.

B. ER 404(b) testimony admitted without objection.

Several days later, Mrs. Bailey was heard from again.² This time, she called her father, Arthur Hooper. RP 42-43. She was crying and needed a place to stay. RP 43, 44, 92. During the prosecutor's questioning of Mr. Hooper, the following exchange occurred:

Q: [H]ad Ms. Bailey ever tried to leave the defendant prior to this occasion?

A: Yes, many times.

Q: *Did you - - were there other occasions where you witnessed your daughter with injuries?*

A: *I've seen bruises off and on when she's come over to the house and said that they were received from Bailey. Most of it was from him kicking her while in bed.*

Q: Okay.

A: And -

Q: I'll stop - I'll stop you there. Did - did you ever confront the defendant with the nature of the relationship he was having with your daughter?

A: We tried to.

² The record is unclear if this was the next day or several days later.

Q: Okay. And did you ever try to help your daughter out of this relationship?

A: Yes, we –

MR. DUNKERLY: Objection, relevance.

MS. BANFIELD: I think it's relevant.

THE COURT: Overruled.

Q: Did – did I'm sorry?

A: Yes, we tried to get her into a shelter. In fact, we had one set up for her. But because of her childhood she didn't want to go into a shelter -
-

Q: Okay.

A: -- --because she was in one with her mother.

Q: Okay. So there were prior occasions when you tried to help her out of the - -

A: Yes.

Q: -- relationship.
And she continued to go back into –

A: Yes.

Q: -- this relationship.

(Emphasis added) RP 48-49.

C. Rachel Bailey talks to the police.

On the same day as she arrived at her father's house, Mrs. Bailey called Vancouver Police Sergeant David Henderson wanting to talk to him about a fire earlier that evening at the Bailey home. RP 47, 92. Mr. Hooper took his daughter to the police station mid-morning where she spoke with Detective Henderson. RP 47, 93. During the conversation, Detective Henderson saw what he believed to be some old bruising on Mrs. Bailey's wrist. RP 93. Mrs. Bailey told him how she received the injury.³ RP 94. He had another police officer take pictures of the wrist. RP 93. That officer, Officer Ross, also photographed some bruising on Mrs. Bailey's back. RP 93-94.

D. William Bailey's statements.

Later that day, Detective Henderson spoke with Mr. Bailey⁴ at an Oregon motel where he had gone after the house fire. RP 95-96. Mr. Bailey recalled that a few days

³ Sergeant Henderson did not relate on the record what Mrs. Bailey told him about how she received the injury. That retelling, of course, would be hearsay.

⁴ Mr. Bailey did not testify at the trial. His statements to Detective Henderson were the subject of a CrR 3.5 hearing held the day of trial.

earlier, his wife had gotten out of control and that he dragged her into the house while he was yelling for the police. RP 97. Mr. Bailey denied assaulting his wife. RP 98. He said that she had intentionally slammed her wrist into the wall to get him in trouble and that she must have thrown herself on the ground to get the back injury. RP 99. Detective Henderson turned the domestic violence aspect of Mrs. Bailey's reporting over to Detective Carole Boswell. RP 100.

E. Vouching, hearsay, and foundationless expert testimony from Detective Boswell.

Detective Boswell is with the Vancouver police domestic violence unit. RP 109. She interviewed Mrs. Bailey and photographed her injuries. RP 110-11. During the prosecutor's examination of Detective Boswell, the following exchange took place:

Q: I have what's been marked Plaintiff's Identification 1. Can you identify that picture for me.

A: That is a picture of Rachel's right wrist and arm, with a scrape, laceration on her – about the middle of her forearm.

Q: *Okay. And did she indicate to you how she received that scrape?*

A: *Yes, she said this – this occurred during the assault. She wasn't exactly sure at what point she sustained that injury.*

. . . .

Q: Plaintiff's identification No. 2. What's that a picture - - well, I'm actually going to hold that aside.
Plaintiff's identification No. 3. What's that a picture of?

A: *That a closer picture of Rachel's – the inside , if you will, of Rachel's right wrist, showing a reddened area.*

Q: *And did she indicate how she had received that injury?*

A: *Yes, she did*

MR. DUNKERLY: Objection, hearsay.

MS. BANFIELD: Okay.

THE COURT: (Pause.) The question again.

MS. BANFIELD: Did – well, it didn't call for hearsay yet.

Q: But did – did – did she indicate –

MR. DUNKERLY: But it will.

Q: *Did she indicate how she received the injury?*

A: Yes.

Q: *Okay. And was it part of the altercations?*

A: Yes.

MR. DUNKERLY: Objection, Your Honor, it's hearsay.

THE COURT: All right, I'll permit that.

.....

Q: *Okay. And is that – is that what you – what you were trying to capture with your camera, was that consistent with what she said occurred?*

A: Yes.

Q: *Okay, the injury was consistent with what she had said occurred?*

A: Yes.

Q: Okay. I have what's marked – sorry, I started going backwards, back and forth. No 8, Plaintiff's identification 8. What's that a picture of?

A: That's a picture of a scrape or laceration on Rachel's back.

Q: Okay. And does it look the same if not similar as the day that you took it?

A: Yes.

Q: *And did she indicate that that had happened during the altercation?*

A: Yes.

...

Q: Okay. And what were you trying to capture there?

A: Three noticeable bruises on the front of her shin.

Q: *Okay. And did she indicate how she received the bruises?*

A: *She did.*

MR. DUNKERLY: Objection again, hearsay.

THE COURT: She can answer that.

Q: *I think you did, yeah, your answer was yes?*

A: Yes.

Q: *Okay. And that was received during the altercation?*

A: Yes.

...

Q: *And all of these injuries that you tried to capture, did the - were - was - were they consistent with the - what Ms. Bailey had explained happened?*

MR. DUNKERLY: Objection, sufficiency of foundation.

THE COURT: Excuse me?

MR. DUNKERLY: Sufficiency of the foundation. This requires some sort of expertise that the officer may be lacking.

THE COURT: You may answer.

THE WITNESS: *Yes, they were consistent with what she reported.*

Q: Yes.

RP 111-19.

ARGUMENT

I. DEFENSE COUNSEL'S FAILURE TO OBJECT TO TESTIMONY WHICH WAS BOTH HEARSAY AND PROPENSITY EVIDENCE AND HIS FURTHER FAILURE TO PROPOSE A LIMITING INSTRUCTION TO BLUNT THE DAMAGING TESTIMONY, DENIED WILLIAM BAILEY CONSTITUTIONALLY GUARANTEED COUNSEL.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result."

Strickland v. Washington, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme court set a two-part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the defendant must then go on to show that counsel's conduct caused prejudice. Strickland, 466 U.S. at 687. The test for prejudice is "whether there is a reasonable probability that, but for counsel's professional errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Church v. Kinchelse, 767 F.2d 639, 643 (9th Cir. 1985) (citing Strickland, 466 U.S. at 649.)) In essence, the standard under the Washington Constitution is identical. State v. Cobb, 22 Wn. App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a

reasonably prudent attorney); State v. Johnson, 29 Wn. App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In Mr. Bailey's case, trial counsel Dunkerly's representation fell below that of a reasonable prudent attorney when he failed to object to Arthur Hooper's testimony that his daughter, Rachel Bailey, had previously been assaulted by her husband, William Bailey, on numerous occasions. Mr. Hooper's testimony was not only hearsay but also objectionable propensity evidence. Trial counsel Dunkerly aggravated his error by failing to request a limiting jury instruction telling the jury that they could not consider the alleged prior assaults by Mr. Bailey on Mrs. Bailey as evidence that Mr. Bailey had a propensity to assault his wife.

(a) The State presented inflammatory and inadmissible hearsay and propensity evidence through witness Arthur Hooper.

As its first witness, the State called Arthur Hooper, Rachel Bailey's father. The prosecutor and Mr. Hooper engaged in the following exchange:

Q: [H]ad Ms. Bailey ever tried to leave the defendant prior to this occasion?

A: Yes, many times.

Q: *Did you - - were there other occasions where you witnessed your daughter with injuries?*

A: *I've seen bruises off and on when she's come over to the house and said that they were received from Bailey. Most of it was from him kicking her while in bed.*

Q: Okay.

A: And -

Q: I'll stop - I'll stop you there. Did - did you ever confront the defendant with the nature of the relationship he was having with your daughter?

A: We tried to.

Q: Okay. And did you ever try to help your daughter out of this relationship?

A: Yes, we -

MR. DUNKERLY: Objection, relevance.

MS. BANFIELD: I think it's relevant.

THE COURT: Overruled.

Q: Did - did I'm sorry?

A: Yes, we tried to get her into a shelter. In fact, we had one set up for her . But because of her childhood she didn't want to go into a shelter -
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Q: Okay.

A: -- --because she was in one with her mother.

Q: Okay. So there were prior occasions when you tried to help her out of the - -

A: Yes.

Q: -- relationship.
And she continued to go back into -

A: Yes.

Q: -- this relationship.

(Emphasis added) RP 48-49.

As noted, trial attorney Dunkerly did not object to this rank hearsay and inflammatory propensity evidence.

(b) The evidence about prior assaults was hearsay and should not have been admitted.

Hearsay, simply defined, is a statement made by an out-of-court declarant offered in court for the truth of the

matter asserted. ER 801 (c)⁵. Hearsay is not admissible except as provided by the rules of evidence, a court rule, or a statute. ER 802.⁶ The following statement made by Arthur Hooper but attributed to his daughter Rachel Bailey, an out-of-court declarant, is hearsay.

Q: Did you - - were there other occasions when you witnessed your daughter with injuries?

A: I've seen bruises off an on *when she's come over to the house and said that they were received from Bailey*. Most of it was from him kicking her while in bed.

RP 48.

None of the exceptions to the rule against hearsay was offered at trial and no exception is applicable. Simply put, if a witness testifies on the basis of his own observation, that testimony is not hearsay. State v. Powell, 126 Wn.2d 244, 265, 893 P.2d 615 (1995). But here it

⁵ ER 801(c), Hearsay defined. (c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

⁶ ER 802, Hearsay Rule. Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.

was clear from Mr. Hooper's testimony that he did not personally observe Mr. Bailey hit Mrs. Bailey. Instead, the basis for his testimony was based exclusively on statements made out of court by Mrs. Bailey. Moreover, the statements were offered for the proof of the matter asserted, namely, that Mr. Bailey had been violent toward Mrs. Bailey on previous occasions. As Mr. Hooper's testimony was hearsay, it was inadmissible.

(c) The prior assault history only came into evidence as evidence of Mr. Bailey's propensity to assault his wife.

ER 404(b)⁷ prohibits evidence of prior acts to prove the defendant's propensity to commit the charged crime. State v. Cook, 131 Wn. App. 845, 849, 129 P.3d 834 (2006). Evidence of prior acts may be admitted for other limited purposes, including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of

⁷ ER 404(b), Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

mistake or accident.” See ER 404(b). The permitted purposes listed in ER 404(b) “are not exclusive.” Cook, 131 Wn.App. at 849 (citing State v. Kidd, 36 Wn.App 503, 505, 674 P.2d 674 (1983)). ER 404(b) “was intended not to define the set of permissible purposes for which bad-acts evidence may be admitted but rather to define the *one impermissible* purpose for such evidence.” Cook, 131 Wn.App. at 849. The range of relevancy outside the ban is “almost infinite.” Cook, 131 Wn.App. at 849.

The test for admitting prior acts under ER 404(b) is whether the evidence serves a legitimate purpose, is relevant to prove an element of the crime charged, and, on balance, the probative value of the evidence outweighs its prejudicial effect. Cook, 131 Wn.App. at 850. See also State v. DeVries, 149 Wn.2d 842, 848, 72 P.3d 748 (2003). Evidence is relevant if it has a tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable

than it would be without the evidence. See ER 401⁸. Appellate courts review a trial court's decision to admit 404(b) evidence for abuse of discretion. Cook, 131 Wn. App. 850.

Here, because trial counsel failed to object to the evidence, the State was not put to the test of having to justify its admissibility. Without any effort to challenge the admission of the evidence, or limit the jury's consideration of it, the prior assault testimony came into evidence for the single reason for which it is not admissible - to prove that Mr. Bailey had a propensity to assault Mrs. Bailey.

(d) Once the prior assaults were admitted, it was further error not to request a limiting instruction.

In Cook, an alleged domestic violence victim recanted at trial her allegation that during an argument at home the father of her child had kicked her hand, breaking

⁸ ER 401, "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

her finger. The trial court had admitted evidence of prior domestic abuse with a limiting instruction directing the jury to consider the evidence “for the limited purpose of assessing the *credibility* of [the alleged victim].” Cook, 131 Wn.App at 849. (emphasis added). The Cook court held that the “trial court had discretion to admit evidence of [the defendant's] prior domestic abuse against [the alleged victim] under ER 404(b), provided that the court gave an adequate limiting instruction.” Cook, 131 Wn.App. at 853. The Cook court reversed and remanded for a new trial because the limiting instruction was inadequate. Cook, 131 Wn.App. at 854. The jury instruction limited use of the evidence of the defendant's prior assaults on his girlfriend to a general assessment the girlfriend's credibility. In so doing, it did not adequately apprise the jury that such evidence could be used only to assess the girlfriend's state of mind at the time of recantation which was why the evidence was admitted. As such, the instruction did not adequately ensure that the jury would

not convict based on defendant's propensity to commit the charged assault.

Mr. Bailey's case is stronger than Cook. Mr. Bailey did not have the benefit of any limiting instructions. Mr. Bailey's jury was left with the assumption that if Mr. Bailey had done this before, he must have done it again.

(e) The inappropriate testimony and the lack of an instruction limiting its use caused Mr. Bailey prejudice.

The inadmissible hearsay statements of Arthur Hooper alleging prior instances of assault by Mr. Bailey should not have been admitted because it was both hearsay and propensity evidence. The case boiled down to credibility. Mrs. Bailey said Mr. Bailey assaulted her. Mr. Bailey denied any assault and, inferentially, any unlawful restraint of Mrs. Bailey in the bedroom. Likely, the improper evidence tipped the balance of the evidence against Mr. Bailey. After all, if Mr. Bailey assaulted his wife in the past, he probably did that and more in the instant case. As such, it was prejudicial error for trial counsel Dunkerly to both challenge the admission of the

hearsay propensity evidence and limit the jury's consideration of it through a limiting instruction.

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED INTO EVIDENCE DETECTIVE BOSWELL'S VOUCHING FOR MRS. BAILEY'S CREDIBILITY.

Under both Washington Constitution , Article 1, § 22 and United States Constitution, Sixth Amendment, a defendant is entitled to have his case decided upon the evidence introduced at trial, not upon the opinions of attorneys, the courts, or the witnesses concerning the credibility of witness, the evidence, or the guilt of the defendant. State v. Casteneda-Perez, 61 Wn. App. 354, 360, 810 P.2d 74 (1991). Thus, it is improper for the prosecutor to elicit evidence of any person's personal opinion about a witness's credibility. State v Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

For example, in State v. Jerrels, 83 Wn.App. 503, 925 P.2d 209 (1996), the defendant was convicted of rape of a child and child molestation after a trial in which the trial court permitted the State to ask the defendant's wife

whether or not she believed that her children were telling the truth. The defendant appealed his convictions arguing that this line of questioning denied him his right to a fair trial. In addressing this argument, this Court first noted that it was error for the trial court to allow a witness to comment on the credibility of another witness. The court stated:

A prosecutor commits misconduct when his or her cross examination seeks to compel a witness' opinion as to whether another witness is telling the truth. Such questioning invades the jury's province and is unfair and misleading. The questions asked of Mrs. Jerrels were clearly improper because the prosecutor inquired whether she believed the children were telling the truth; thus, misconduct occurred. In another sexual abuse case, we held recently that reversible error occurred when pediatrician was allowed to testify that, based on the child's statements, she believed that child had been abused.

Jerrels, 83 Wn. App. at 507-08 (citations omitted)

(a) **Detective Boswell vouched for Rachael Bailey's credibility as a witness in response to the State's questions.**

As this Court states: "A prosecutor commits misconduct when his or her cross examination seeks to compel a witness' opinion as to whether another witness is

telling the truth". Jerrels, 83 Wn. App. at 507-08. Thus, it was error in Jerrels for the prosecutor to ask the defendant's wife whether or not she believed her children. In the same manner, it was error in Mr. Bailey's case for the prosecutor to ask Detective Boswell over and over again to testify that Rachel Bailey's statements about how she received certain injuries was consistent with what Detective Boswell saw in the photos of the injuries. These opinions on Mrs. Bailey's veracity occurred repeatedly during the prosecutor's direct examination of Detective Boswell as follows:

During the prosecutor's examination of Detective Boswell, the following exchange took place:

I have what's been marked Plaintiff's Identification 1.
Can you identify that picture for me.

A: That is a picture of Rachel's right wrist and arm, with a scrape, laceration on her – about the middle of her forearm.

Q: *Okay. And did she indicate to you how she received that scrape?*

A: *Yes, she said this – this occurred during the assault. She wasn't exactly sure at what point she sustained that injury.*

.....

Q: Plaintiff's identification No. 2. What's that a picture - - well, I'm actually going to hold that aside.

Plaintiff's identification No. 3. What's that a picture of?

A: *That's a closer picture of Rachel's - the inside if you will, of Rachel's right wrist, showing a reddened area.*

Q: *And did she indicate how she had received that injury?*

A: *Yes, she did*

MR. DUNKERLY: Objection, hearsay.

MS. BANFIELD: Okay.

THE COURT: (Pause.) The question again.

MS. BANFIELD: Did - well, it didn't call for hearsay yet.

Q: But did - did - did she indicate -

MR. DUNKERLY: But it will.

Q: *Did she indicate how she received the injury?*

A: *Yes.*

Q: *Okay. And was it part of the altercation?*

A: *Yes.*

MR. DUNKERLY: Objection, Your Honor, it's hearsay.

THE COURT: All right, I'll permit that.

....

Q: *Okay. And is that – is that what you – what you were trying to capture with your camera, was that consistent with what she said occurred?*

A: Yes.

Q: *Okay, the injury was consistent with what she had said occurred?*

A: Yes.

Q: Okay. I have what's marked – sorry, I started going backwards, back and forth. No 8, Plaintiff's identification 8. What's that a picture of?

A: That's a picture of a scrape or laceration on Rachel's back.

Q: Okay. And does it look the same if not similar as they day that you took it?

A: Yes.

Q: *And did she indicate that that had happened during the altercation?*

A: Yes.

...

Q: Okay. And what were you trying to capture there?

A: Three noticeable bruises on the front of her shin.

Q: *Okay. And did she indicate how she received the bruises?*

A: *She did.*

MR. DUNKERLY: Objection again, hearsay.

THE COURT: She can answer that.

Q: *I think you did, yeah, your answer was yes?*

A: Yes.

Q: *Okay. And that was received during the altercation?*

A: Yes.

...

Q: *And all of these injuries that you tried to capture, did the - were - was - were they consistent with the - what Ms. Bailey had explained happened?*

MR. DUNKERLY: Objection, sufficiency of foundation.

THE COURT: Excuse me?

MR. DUNKERLY: Sufficiency of the foundation. This requires some sort of expertise that the officer may be lacking.

THE COURT: You may answer.

THE WITNESS: *Yes, they were consistent with what she reported.*

Q: Yes.

RP 111-19.

(b) Detective Boswell's statements, in addition to being comments on Rachel Bailey's veracity, were inadmissible hearsay.

As noted in Issue I(b), Arthur Hooper's testimony about out of court statements made by Mrs. Bailey were hearsay. In the same fashion, the statements Detective Boswell attributes to Rachel Bailey in the above section (a), are also hearsay. And being hearsay, they are no more admissible than the hearsay statements made to Arthur Hooper. The statements should not have been admitted.

III. WERE THIS COURT TO CONCLUDE THAT TRIAL COUNSEL FAILED TO ADEQUATELY OBJECT TO THE PROSECUTOR'S MISCONDUCT OR DETECTIVE BOSWELL'S VOUCHING TESTIMONY, THEN COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE.

As discussed under Issue I, trial counsel's failure to object to otherwise inadmissible evidence can form the

basis for an ineffective assistance of counsel claim. If this Court were to find that Mr. Dunkerly did not adequately object to the evidence complained about in Issue 2, Mr. Bailey asks that this Court find his counsel ineffective. That Mr. Bailey incurred prejudice is clear. This was a she-said, he-said case. It was devastating to Mr. Bailey's case for the jury to be told over and over again how credible Mrs. Bailey's hearsay statements to Detective Boswell were because they were corroborated by what Detective Boswell knew from looking at the photos of Mrs. Bailey's injuries.

IV. CUMULATIVE ERROR DEPRIVED WILLIAM BAILEY A FAIR TRIAL.

Where multiple errors occurred at the trial level, a defendant may be entitled to a new trial if cumulative errors cause a trial to be fundamentally unfair. In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835, clarified, 123 Wn.2d 737, 780 P.2d 964, cert. denied, 513 U.S. 849, 115 S.Ct. 146 (1994).

Reviewing courts apply the cumulative error doctrine when several errors occurred at the trial court level but

none alone warrant reversal. State v. Hodges, 118 Wn. App. 668, 673, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1031 (2004). Instead, it is the combined errors which effectively deny the defendant a fair trial. Hodges, at 673-74. Where the defendant cannot show prejudicial error occurred, cumulative error cannot be said to have deprived the defendant a fair trial. State v. Stevens, 58 Wn. App. 478, 498, 794 P.2d 38, review denied, 115 Wn.2d 1025 (1990).

As applied to Mr. Bailey's case, although this Court could find that a single error alone did not deprive Mr. Bailey a fair trial necessitating reversal, the cumulative error of the issues noted above did deprive him of a fair trial. Thus, Mr. Bailey's convictions should be reversed.

CONCLUSION

Mr. Bailey's two convictions should be reversed and his case remanded to the trial court for further action.

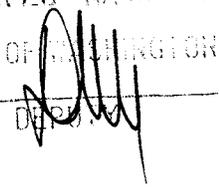
Respectfully submitted this 20th day of April, 2009



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Attorney for Appellant

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 

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

STATE OF WASHINGTON,)	No. 38422-1-II
)	
Respondent,)	
)	CERTIFICATE OF MAILING
vs.)	
)	
WILLIAM ROBERT BAILEY,)	
)	
Appellant.)	
)	
)	
)	

I, Lisa E. Tabbut, certify and declare:

That on the 20th day of April 2009, I deposited into the mails of the United States Postal Service, a properly stamped and addressed envelope, containing the Brief of Appellant and Certificate of Mailing (prosecutor and Court of Appeals only) addressed to the following parties:

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Tacoma, WA 98402-4454

CERTIFICATE OF MAILING - 1 -

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

Dated this 20th day of April 2009, in Longview, Washington.



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