

COURT OF APPEALS  
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STATE OF WASHINGTON  
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NO. 41596-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

KENNETH ALAN GRAHAM,

Appellant.

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

The Honorable Edmund Murphy

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REPLY BRIEF OF APPELLANT

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VALERIE MARUSHIGE  
Attorney for Appellant

23619 55<sup>th</sup> Place South  
Kent, Washington 98032  
(253) 520-2637

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A. ARGUMENT IN REPLY

REVERSAL OF GRAHAM'S CONVICTIONS FOR FELONY HARASSMENT, INTIMIDATING A WITNESS, AND TAMPERING A WITNESS IS REQUIRED BECAUSE GRAHAM WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENSE COUNSEL'S PERFORMANCE WAS DEFICIENT AND GRAHAM WAS PREJUDICED BY THE CUMULATIVE EFFECT OF COUNSEL'S DEFICIENT PERFORMANCE.

Mistakenly relying on State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998), the State argues that defense counsel was not ineffective "for electing not to object" to the prosecutor's use of impeachment testimony during closing argument because "an objection is unlikely to have been sustained. Brief of Respondent at 10-11. The test described in Saunders, which applies "where the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence" has no relevance here where defense counsel failed to object to the prosecutor's improper use of impeachment testimony as substantive evidence. Contrary to the State's assertion that the prosecutor merely "reminded the jury that the victim had given a statement to Deputy Simmelink that was inconsistent with his testimony," the record substantiates that the prosecutor repeatedly used Simmelink's testimony as substantive evidence. The prosecutor directed the jury's attention to the substance of her testimony, "Then all that stuff he told

Deputy Simmelink. Remember Deputy Simmelink? She told all the details that Jason Sullenger had told her.” RP 311. The prosecutor emphasized that Simmelink had nothing to gain and was only doing her job when “[s]he called Jason Sullenger” and “wrote down what he said.” RP 320. Importantly, the prosecutor who has a duty to ensure a fair trial did not explain to the jury that Simmelink’s testimony was admitted as impeachment evidence for the limited purpose of assessing credibility and not proof of the substantive facts encompassed in her testimony.

Consequently, defense counsel was clearly ineffective for failing to request a limiting instruction where the record reveals no reasons of tactics or strategy for neglecting to request an instruction critical to the defense. The State evidently recognizes that defense counsel’s conduct constitutes ineffective assistance because it provides no argument justifying defense counsel’s failure to request an instruction limiting Simmelink’s testimony. Brief of Respondent at 12-14.

The State does argue that defense counsel was not ineffective for deciding not to request an instruction limiting evidence of prior bad acts because there is a legitimate trial strategy which supports his decision. The State argues that “[d]efense counsel may have wished to avoid reminding the jury of the witnesses’ and defendant’s prior misconduct.” Brief of Respondent at 13-14. The record belies the State’s argument.

Defense counsel shrugged off requesting an instruction to limit evidence of Joseph McGurran's criminal history "based upon the fact we just had a couple of theft thirds. . . ." RP 284-85. Consequently, the State brought to the jury's attention that McGurran, the key witness for the defense, was convicted of third degree theft and shoplifting, which are crimes of dishonesty. RP 247. To Graham's detriment, as a result of defense counsel's failure to request an instruction, the jury was not told that it may consider evidence of McGurran's past crimes only for the purpose of determining credibility and for no other purpose.

Defense counsel objected to admission of a tape of a 911 operator talking to Sullenger after the incident with Graham, arguing that Sullenger accuses Graham of prior bad acts which are more prejudicial than probative. RP 25-26, 110-13. Given that defense counsel recognized the highly prejudicial effect the tape would have on the jury, there is no tactical or strategic reason for failing to request a limiting instruction especially when the State played the tape twice for the jury. Throughout the tape, which was barely admissible under the abuse of discretion standard, the jury heard Sullenger say that Graham was going to kill him, that Graham pulled a gun on him before, and that someone told on Graham a couple of years ago for conspiracy to manufacture methamphetamine and he ended up in the river. Ex. 5. As a dire

consequence of defense counsel's failure to request a limiting instruction, the jury was not told that evidence of Graham's prior bad acts has been admitted for the limited purpose of determining whether Sullenger was in reasonable fear of Graham and it must not consider the evidence for any other purpose.

The State argues further that Graham cannot demonstrate prejudice because the "evidence presented at trial overwhelmingly supports the jury's convictions." Brief of Respondent at 14-15. To the contrary, the record substantiates that the evidence raised reasonable doubt as to whether Graham made a threat to kill thereby placing Sullenger and Bowers in reasonable fear, whether he used force in an attempt to influence Sullenger's testimony, and whether he attempted to induce Sullenger to testify falsely or withhold testimony.

Sullenger acknowledged that his written statement to police stated that Graham threatened to kill him and his family but he could not recall Graham making such a threat. He explained that by the time the police arrived at the bar and asked for his statement, he had been drinking, "I normally don't drink. When I went into the bar, I had two shots of Jager, and I got a double Captain and Coke because I wanted to calm down." RP 61-62. Sullenger recognized that on the 911 tape he told the operator that Graham could kill him but he did not mean "literally kill me, but maybe

hurt me.” RP 119. Sullenger did not feel that Graham was threatening him about testifying, “It was more or less tell the truth,” and “you need to go there and tell them what you did.” RP 72- 73. Graham implied that he should “keep an eye over his shoulder,” but never used the word “snitch.” RP 127-30. Sullenger recalled that his wife was talking to Graham while bringing him food and Graham said think about his family, but Graham did not point to his wife’s pregnant stomach. RP 73-74. Tyson Bower testified that Graham threatened to “kill” or hurt him but admitted that in his written statement to police, he did not state that Graham “threatened to kill” him. RP 196, 203-04, 208-09.

The State’s argument that “questions from a jury cannot be used to impeach their verdict” and “matters of witness credibility and conflicting testimony are left to the trier of fact” misses the point. Brief of Respondent at 15-16. It is evident that the reason why the jury asked to review the evidence further is because it had reasonable doubt as to the sufficiency of the evidence. CP 151 (Jury’s request to review Sullenger’s written statement, the 911 recording, Deputy Cowan’s report, Deputy Simmerlink’s report, and Bowers’ written statement). In light of the jury’s inquiry and the trial testimony which was fraught with contradictions, there is a reasonable probability that the outcome of the charges of felony harassment, intimidating a witness, and witness tampering would have

been different but for defense counsel's failure to request required limiting instructions and failure to object to the State's improper use of impeachment testimony to shore up its case. Graham was clearly prejudiced by counsel's errors because the court instructed the jury that "In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition." CP 76. Consequently, the jury considered all the evidence without instructions limiting the purpose of impeachment testimony and evidence of prior bad acts. A jury is presumed to have followed the court's instructions. State v. Gamble, 168 Wn.2d 161, 178, 225 P.3d 973 (2010).

The State argues that "[a]n appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake" and defense counsel was "far from being ineffective." Brief of Respondent at 9, 16-18. The record dispels the State's argument. Under the cumulative error doctrine, a defendant may be entitled to a new trial where errors cumulatively produced a trial that was fundamentally unfair. In re Personal Restraint Petition of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). The record substantiates that counsel's performance was deficient and Graham was prejudiced and denied a fair trial by the cumulative effect of counsel's errors where defense counsel 1) failed to request a limiting

instruction for impeachment testimony; 2) failed to object to the State's improper use of impeachment testimony as substantive evidence during closing argument; 3) failed to request an instruction limiting the purpose of evidence of Graham's prior bad acts; and 4) failed to request an instruction limiting the purpose of evidence of McGurran's prior bad acts. An examination of the whole record leads to the conclusion that Graham did not receive effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 284, 751 P.2d 1165 (1988).

Reversal is required because Graham was denied his constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 808 L. Ed. 2d 674 (1984).

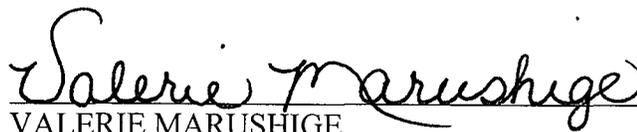
B. CONCLUSION

“The purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial.” State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). For the reasons stated here and in appellant’s opening brief, this Court should reverse Mr. Graham’s convictions for felony harassment, intimidating a witness, and tampering with a witness.

In the event that this Court affirms the convictions, Mr. Graham requests that the Court not impose costs. RAP 14.2.

DATED this 26<sup>th</sup> day of October, 2011.

Respectfully submitted,

  
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VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Kenneth Alan Graham

**DECLARATION OF SERVICE**

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Thomas Roberts, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

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

DATED this 26<sup>th</sup> day of October 2011, in Kent, Washington.

*Valerie Marushige*

VALERIE MARUSHIGE  
Attorney at Law  
WSBA No. 25851

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STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY