

NO. 43295-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

STEVEN BURKE MCGRAW, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 11-1-01198-6

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

 1. Whether, even had the trial court erred in denying Defendant's motion to admit Johnson's written statement, that error would be harmless where there is no reasonable probability it affected the trial's outcome..... 1

 2. Whether the trial court properly denied Defendant's motion to admit Erin Johnson's written statement to police as substantive evidence at trial where Defendant failed to demonstrate minimal guarantees of truthfulness or that the statement was given following one of the legally permissible methods for determining probable cause. 1

B. STATEMENT OF THE CASE. 1

 1. Procedure 1

 2. Facts..... 4

C. ARGUMENT..... 11

 1. EVEN HAD THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO ADMIT JOHNSON'S WRITTEN STATEMENT, THAT ERR WOULD BE HARMLESS BECAUSE THERE IS NO REASONABLE PROBABILITY IT AFFECTED THE TRIAL'S OUTCOME. 11

 2. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO ADMIT ERIN JOHNSON'S WRITTEN STATEMENT TO POLICE AS SUBSTANTIVE EVIDENCE AT TRIAL BECAUSE DEFENDANT FAILED TO DEMONSTRATE MINIMAL GUARANTEES OF THRUTHFULNESS OR THAT THE STATEMENT WAS GIVEN FOLLOWING ONE OF THE LEGALLY PERMISSIBLE METHODS FOR DETERMINING PROBABLE CAUSE. 24

D. CONCLUSION. 28

Table of Authorities

State Cases

<i>State v. Aguirre</i> , 168 Wn.2d 350, 361, 229 P.3d 669 (2010).....	11
<i>State v. Alvarez-Abrego</i> , 154 Wn. App. 351, 366, 225 P.3d 396 (2010)	12
<i>State v. Clinkenbeard</i> , 130 Wn. App. 552, 569, 123 P.3d 872 (2005)	11, 12
<i>State v. Costich</i> , 152 Wn.2d 463, 477, 98 P.3d 795 (2004).....	11, 23
<i>State v. Jefferson</i> , 79 Wn.2d 345, 347, 485 P.2d 77 (1971).....	21
<i>State v. Nelson</i> , 74 Wn. App. 380, 389-90, 874 P.2d 170, <i>rev. den.</i> , 125 Wn.2d 1002, 886 P.2d 1134 (1994).....	13
<i>State v. Newbern</i> , 95 Wn. App. 277, 292, 975 P.2d 1041 (1999).....	12, 13
<i>State v. Nieto</i> , 119 Wn. App. 157, 161, 79 P.3d 473 (2003)	11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22
<i>State v. Pavlik</i> , 165 Wn. App. 645, 656, 268 P.3d 986 (2011)	24, 28
<i>State v. Smith</i> , 97 Wn.2d 856, 861, 651 P.2d 207 (1982).....	13, 21
<i>State v. Sua</i> , 115 Wn. App. 29, 47, 60 P.3d 1234 (2003)	13
<i>State v. Templeton</i> , 148 Wn.2d 193, 59 P.3d 632 (2002).....	24, 28
<i>State v. Thach</i> , 126 Wn. App. 297, 307, 106 P.3d 782, <i>rev. den. by</i> 155 Wn.2d 1005, 120 P.3d 578 (2005).....	12, 14, 16, 18, 19, 21, 22
<i>Sterling v. Radford</i> , 126 Wash. 372, 375, 218 P. 205 (1923).....	12

Federal and Other Jurisdiction

<i>United States v. Gravely</i> , 840 F.2d 1156, 1163 (4 th Cir. 1988).....	13
--	----

Statutes

RCW 9A.36.021(1)(g) 1
RCW 9A.72.085 13, 16, 17

Rules and Regulations

ER 403 28
ER 613 12
ER 801(d)(1)(i) 12, 16, 18
ER 801(d)(a)(i) 16, 17, 18
ER 802 12
ER 803(a)(5) 15
ER 803(a)(1) 15

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court properly denied Defendant's motion to admit Erin Johnson's written statement to police as substantive evidence at trial where Defendant failed to demonstrate minimal guarantees of truthfulness or that the statement was given following one of the legally permissible methods for determining probable cause.
2. Whether, even had the trial court erred in denying Defendant's motion to admit Johnson's written statement, that error would be harmless where there is no reasonable probability it affected the trial's outcome.

B. STATEMENT OF THE CASE.

1. Procedure

On March 21, 2011, Steven Burke McGraw, hereinafter referred to as the "defendant," was charged by information with second degree assault under RCW 9A.36.021(1)(g), for intentionally assaulting another by strangulation. CP 1. The assault was alleged to be a domestic violence incident against Erin Johnson, the defendant's ex-girlfriend and the mother of his child. CP 1-3.

The court called the case for trial on January 25, 2012, RP 3, and heard motions in limine. RP 6-21; CP 12-20. The parties selected a jury on January 31, 2012, RP 24, and gave opening statements. RP 36.

The State called Erin Abigail Johnson, RP 37-42, 103-29, and Lynne Berthiaume, RP 44-85.

However, on February 1, 2012, the defendant made a motion for a mistrial based on what he termed “a reasonable basis to be concerned that th[e] jury panel is going to be so unfairly tainted,” which the court granted. RP 139-44.

A second trial commenced on February 6, 2012. RP 155. The parties selected a jury that day, which the court swore in and instructed. RP 155-177.

The parties then gave opening statements. 171.

The State called Tacoma Police Officer Gary Roberts, RP 171-84, Dr. Rachelle Guinto, M.D., RP 188-227, and Erin Johnson, RP 228-316.

During his cross-examination of Ms. Johnson, the defense attorney questioned Johnson about a written statement she had prepared for police and then moved to admit that statement, marked as exhibit 16, as substantive evidence, RP 294, RP 303-04, 318-20, but that motion was denied. RP 317-18, 320-21. The defense attorney renewed the motion the following day, RP 325-30, but the motion was again denied. RP 330-31.

However, during cross-examination of a subsequent State's witness (Lynn Berthiaume), the defense attorney was allowed to have the witness read Johnson's statement into the record in its entirety. RP 411-12.

The defendant also sought to admit a portion of a police report as substantive evidence, but that motion was denied. RP 31-39. However, the defendant was subsequently allowed to have it read into the record by a witness. RP 422.

After Johnson, the State called Dr. Jorge Llera, M.D., RP 340-73, Lynn Berthiaume, RP 376-432, and Tacoma Police Detective Scott Newbold, RP 439-54. The State then rested. RP 454.

The defendant called Gayla McGraw, RP 454-68, Lydia Morris, RP 469-78, and Shawn Ward, RP 479-98. The defendant testified, as well. RP 591-628. The defense then rested. RP 629.

The parties discussed the proposed jury instructions, RP 631-41, 666, *see* CP 24-61, and the court read its instructions to the jury. RP 641-42. *See* CP 62-88.

The parties gave their closing arguments. RP 643-65 (State's closing); 668-91 (Defendant's closing); 691-98 (State's rebuttal).

The jury returned verdicts of guilty to the lesser-included offense of third degree assault. CP 91. *See* CP 89, 93. It also found that the defendant and Johnson were members of the same family or household. CP 92.

On March 9, 2012, the trial court sentenced the defendant, under the first-time offender alternative, to 60 days in confinement, with 30 of those days to be served on electronic home monitoring and the remaining 30 days converted to 240 hours of community service. CP 95-107.

On April 5, 2012, the defendant filed a timely notice of appeal. CP 110.

2. Facts

Erin Johnson met the defendant in school and dated him for several years thereafter. RP 230-32. She lived with him for about two and a half years and had a child with him. RP 232. They broke up in October, 2010. RP 234, 271.

On December 11, 2010, Johnson celebrated her birthday at the Unicorn Bar and Grill in Tacoma, where she consumed two beers. RP 234-35, RP 268-69.

The defendant called her as she was leaving the bar at about 1:00 the following morning, and invited her to his residence at 66th and Lawrence, in Pierce County, Washington. RP 234-35, 268-72. When she arrived at his residence, she found, the defendant, Shawn Ward, and Aaron Grebler in the home. RP 236, 273, 487. *See* RP 483, 599.

All were drinking alcohol and Johnson “took a shot of Pendleton’s [whiskey] with them.” RP 236, 484, 600. When asked if she drank to the point of intoxication, Johnson testified that she “was buzzed.” RP 236.

Ward testified that Johnson appeared intoxicated, RP 46, but also testified that he had consumed “[q]uite a few” drinks himself that he did not consider Johnson a friend. RP 486-92.

After the defendant’s friends left, Johnson and the defendant went to bed because it was late. RP 237. About five minutes after they laid down, the defendant got on top of her, put his hand on her throat and started squeezing. RP 237-38, 274. Johnson testified that the defendant squeezed her throat harder, until she could not breathe. RP 238. She tried to remove the defendant’s hand from her throat, and he released her. RP 238-39.

Johnson told the defendant, “You’re hurting me,” but the defendant did not say anything in response. RP 239. Instead, he grabbed her throat again and squeezed it harder. RP 239-40. Johnson again tried to get the defendant to stop, and the defendant again relented. RP 240.

The defendant then said, “I know you’re sleeping with Don.” RP 240. Johnson denied this, and assured the defendant that “everything was going to be okay.” RP 240.

However, the defendant started strangling Johnson a third time, “even harder than the last two times.” RP 240. Johnson could not breathe while the defendant was strangling her. RP 240. She tried to push him off of her with all her might, and kicked her feet to try to free herself, but could do neither. RP 240-41. The defendant used his right hand to strangle

Johnson and placed his left hand over her mouth and nose until she “passed out.” RP 240, 274-75.

When Johnson regained consciousness, she described the defendant as passed out next to her. RP 241, 279. Johnson started to get out of the bed when the defendant asked her what she was doing. RP 242. Johnson told him she was going to the restroom, and started to walk out, but she heard the defendant get up and ran into the defendant’s daughter’s room. RP 242, 282. His daughter was not there that night, so Johnson hid in her bed. RP 242-43, 282. Johnson testified that she hid rather than trying to leave through the front door because she did not think she could make it that far before the defendant grabbed her. RP 305.

The defendant began yelling, “Where are you?” RP 244, 282. Johnson then heard banging that sounded like taking “a sledgehammer to a wall,” and then silence. RP 244. Johnson waited and listened, and hearing nothing, opened the girl’s bedroom door slowly. RP 245. She did not see anyone. RP 245. She noticed that the back door was open, and assuming that the defendant had left through that door, headed for the front door. RP 245, 283. Once outside, she went to the next-door neighbor’s house, which was occupied by Shawn and Honey Dean, Shawn’s brother, and the defendant. RP 246-47.

Johnson told Ms. Dean what the defendant did to her, but Dean told Johnson get out of her house because she felt it was Johnson’s fault. RP 247.

Johnson left, and began to walk to her house, when she saw the defendant on the front porch of his own residence. RP 248. The defendant told her that he didn't want to live anymore. RP 248. Johnson noticed that the defendant's arm was bleeding badly, from his wrist to his elbow, and believed this was caused by the defendant breaking the window of the back door. RP 249. *See* RP 310. Johnson did not want the defendant's "death on [her] hands," and decided to stay with him for the remainder of the night. RP 250, 284-85.

The defendant's parents came to the residence in the morning, and Johnson left the defendant to them, telling them, "to watch over him, that he wasn't right in the head." RP 252, 285.

Gayla McGraw, the defendant's mother, testified that she saw nothing on Johnson's face or neck and that Johnson appeared "chipper." RP 456-61. However, McGraw also testified that she does not like Johnson, that she would not have believed Johnson had she told her about the assault. RP 463-64. McGraw testified that she loved her son and did not want him to get into trouble. RP 463-64.

A neighbor named Lydia also came over. RP 252-53. Johnson showed Lydia her neck and Lydia gave Johnson a hug. RP 252-53, 286. Johnson's neck was swollen, red, and had "abrasions on it, like welts." RP 253. Johnson testified that her neck hurt more on the left side. RP 253-54.

Lydia Morris testified that she did not see any swelling or injury to Johnson, 473-74, but indicated that she was no longer a friend of Johnson. RP 476-77.

Johnson went back to her residence and spent the day of December 12, 2010 talking to a friend about what happened. RP 255-56.

She woke up on the morning of December 13 with “excruciating pain” in her neck and head, and called the police. RP 257. Johnson testified that two officers arrived, including Officer Thompson and a female officer, who took photos of her neck, face, and lip, including bruising to her neck. RP 257-61, 288.

Johnson’s mother then took her to the emergency room of St. Joseph’s Medical Center, where Johnson was seen by a physician, and prescribed pain medication. RP 262-64, 300-01, 309.

Dr. Jorge Llera, an emergency room physician at St. Joseph’s, testified that Johnson was seen on December 13, 2010 for an alleged assault by strangulation. RP 352. Johnson told Dr. Llera that she was having a lot of pain in her neck, and a headache. RP 253-54. Dr. Llera ordered CT scans of the head and neck, and ultimately diagnosed Johnson with a cervical strain and a “closed head injury,” or concussion. RP 356-58. A cervical strain is an injury to the muscles and/or connective tissue of the neck. RP 396. Strangulation can result in cervical strain. RP 396. Dr. Llera prescribed Johnson pain medication. RP 359.

On December 15, 2010, Johnson saw Dr. Rachelle Guinto, M.D.,

because she continued to have neck pain. RP 199, 204-05, 265. Johnson told Guinto that the pain resulted from her ex-boyfriend, Steven, strangling her multiple times until she lost consciousness. RP 200. Dr. Guinto performed a physical examination, during which she found some swelling at the base of Johnson's neck. RP 201-02. Guinto testified that Johnson was definitely in pain. RP 202. Dr. Guinto prescribed Johnson 800 mg Ibuprofen, as an anti-inflammatory, and Vicodin, as a pain medication, and gave her the use of a neck brace. RP 202-03. Based on her education and experience, Dr. Guinto concluded that Johnson's symptoms were consistent with Johnson's description of the assault. RP 208.

Johnson testified that her neck pain finally subsided about two weeks after the incident. RP 267.

On December 13, 2010, Tacoma Police Officer Gary Roberts was dispatched to 6625 South Lawrence in Tacoma, Washington to attempt to contact the defendant. RP 176-79. He and Officer Thompson knocked on the residence door, but did not receive an answer. RP 178. They looked around the property, but could not locate the defendant. RP 178-79. Officer Thompson was on military leave at the time of the trial. RP 449-50.

Tacoma Police Department Detective Scott Newbold was subsequently able to contact both Johnson and the defendant. RP 444, 452-53.

The defendant testified that Johnson drank with him and his friends, and that she appeared to be intoxicated. RP 601-02. He denied assaulting Johnson, and testified that they engaged in sexual intercourse, but started arguing about their child afterwards. RP 603-04. The defendant testified that Johnson got up and left the house and that he went to the next door neighbor's house to look for her. RP 604-07. When he could not find her, he became frustrated, and pushed a kitchen chair forward. RP 607. He indicated that the chair "ended up going into [his] back window," breaking out the bottom side of that window. RP 606-08. The defendant testified that he then "finished the job" by putting his hand through the top piece of glass, breaking it as well. RP 608-09. The defendant testified on cross-examination that he was also "tired, drunk, and angry at Ms. Johnson." RP 623-24.

Lynn Berthiaume, a registered nurse with a master's in nursing, testified that strangulation, that is external pressure placed around the neck, can occlude, or pinch off, the carotid artery, jugular vein, and trachea, preventing a person from breathing, and ultimately causing him or her to lose consciousness. RP 377-86. Berthiaume reviewed Johnson's medical records, written statement, the 911 recording, photos of her injuries, and police reports. RP 396, 410-11, 421. She found that Johnson suffered "some bruising and patterned injuries" to the left side of her neck, which was consistent with manual strangulation, when the thumb and fingers come in contact with the... neck when compressing the neck." RP

399-400. Moreover, the injuries to Johnson's neck appeared consistent with multiple strangulation attempts. RP 401-02. Berthiaume also observed petechial hemorrhaging on Johnson that was also consistent with strangulation. RP 402-03.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO ADMIT ERIN JOHNSON'S WRITTEN STATEMENT TO POLICE AS SUBSTANTIVE EVIDENCE AT TRIAL BECAUSE DEFENDANT FAILED TO DEMONSTRATE MINIMAL GUARANTEES OF THRUTHFULNESS OR THAT THE STATEMENT WAS GIVEN FOLLOWING ONE OF THE LEGALLY PERMISSIBLE METHODS FOR DETERMINING PROBABLE CAUSE.

If properly preserved for appeal, a trial court's decision regarding the admissibility of evidence will only be reversed for a manifest abuse of discretion. *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010); *State v. Nieto*, 119 Wn. App. 157, 161, 79 P.3d 473 (2003). However, such a decision may be affirmed on any ground the record adequately supports even if the trial court did not consider that ground. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

"A witness may be impeached with a prior out-of-court statement of a material fact that is inconsistent with his testimony in court, even if such a statement would otherwise be inadmissible as hearsay." *State v. Clinkenbeard*, 130 Wn. App. 552, 569, 123 P.3d 872 (2005); *State v.*

Newbern, 95 Wn. App. 277, 292, 975 P.2d 1041 (1999); ER 613.

“Impeachment evidence affects the witness’s credibility but is not probative of the substantive facts encompassed by the evidence.”

Clickenbeard, 130 Wn. App. at 569.

Although “[h]earsay evidence is not admissible unless it fits under a recognized exception to the hearsay rule,” *State v. Alvarez-Abrego*, 154 Wn. App. 351, 366, 225 P.3d 396 (2010), ER 802, “[u]nder ER 801(d)(1)(i), a prior inconsistent statement is not hearsay and may be admitted as substantive evidence if: (1) the declarant testified at trial and was subject to cross-examination; (2) the statement was inconsistent with the declarant’s testimony; (3) it was given under oath subject to penalty of perjury; and (4) it was provided at ‘a trial, hearing, or other proceeding, or in a deposition.’” *State v. Nieto*, 119 Wn. App. 157, 161, 79 P.3d 473 (2003); *State v. Thach*, 126 Wn. App. 297, 307, 106 P.3d 782, *rev. den. by* 155 Wn.2d 1005, 120 P.3d 578 (2005).

“The proponent of the statement’s admissibility bears the burden of proving each of these elements.” *Nieto*, 119 Wn. App. at 161.

Inconsistency is determined “not by individual words or phrases alone, but the whole impression or effect of what has been said or done.” *State v. Newbern*, 95 Wn. App. 277, 294, 975 P.2d 1041 (1999) (*quoting Sterling v. Radford*, 126 Wash. 372, 375, 218 P. 205 (1923)). “It is enough if the proffered testimony, taken as a whole, either by what it says or what it omits to say affords some indication that the fact was different

from the testimony of the witness whom it sought to contradict.”

Newbern, 95 Wn. App. at 294 (quoting *United States v. Gravely*, 840 F.2d 1156, 1163 (4th Cir. 1988)).

“An unsworn written statement will satisfy the oath requirement if it is signed and contains language such as, ‘I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct[.]’” *Nieto*, 119 Wn. App. at 161 (citing RCW 9A.72.085; *State v. Nelson*, 74 Wn. App. 380, 389-90, 874 P.2d 170, *rev. den.*, 125 Wn.2d 1002, 886 P.2d 1134 (1994); *State v. Sua*, 115 Wn. App. 29, 47, 60 P.3d 1234 (2003)).

“To determine whether the interview was an ‘other proceeding,’ the court must analyze the facts of the case and the purposes of the hearsay rule.” *State v. Nieto*, 119 Wn. App. at 162. “The rule [that the statement be provided at a trial, hearing, or other proceeding, or in a deposition] is designed to remove doubt about the circumstances under which the prior statement was made and provide *minimal guarantees of truthfulness*.” *Nieto*, 119 Wn. App. at 162 (emphasis added). Thus, “[i]n determining whether [a prior inconsistent statement] should be admitted, reliability is the key.” *Nieto*, 119 Wn. App. at 164 (quoting *State v. Smith*, 97 Wn.2d 856, 861, 651 P.2d 207 (1982)).

“In assessing the reliability of a prior inconsistent statement, courts consider whether (1) the witness made the statement voluntarily; (2) there were minimal guarantees of truthfulness; (3) the statement was given

following one of the legally permissible methods for determining whether there was probable cause; and (4) the witness was later subject to cross-examination.” *Nieto*, 119 Wn. App. at 162-63; *Thach*, 126 Wn. App. at 308.

In the present case, the defendant sought admission of Johnson’s handwritten statement as follows:

[DEFENSE ATTORNEY]: Move for admission of, I believe it’s Defendant’s Exhibit 16 [the handwritten statement], Your Honor.

[DEPUTY PROSECUTOR]: Well, Your Honor, it’s hearsay. Under what exception is he seeking to admit it?

[DEFENSE ATTORNEY]: Well, Your Honor, this is the witness on the stand. I think there’s some information in here that –

THE COURT: I’m going to reserve ruling on Exhibit 16.

RP 294. *See* RP 303-04.

After the conclusion of Johnson’s testimony, the court held:

THE COURT: Counsel, Exhibit 16. Interesting discussion about the whole area in Mr. Tegland’s little courtroom handbook on Washington Evidence, 2011/2012 Edition. Apparently, if this were in affidavit form, there’s a very good chance that I would admit it, um , but it’s in declaration under penalty of perjury form. We don’t have any case law on that except for two Division 1 Court of Appeals cases which are somewhat inconclusive in their holdings about the admissibility of this document.

Certainly, you can use it for impeachment purposes, and I certainly allowed [the defense attorney] to do [so], but owing to the fact that it’s not in affidavit form but rather a declaration form and since our State Supreme Court hasn’t spoken on the issue, I hesitate to admit it. If you find some cases that could persuade me differently I

would reconsider it, but right now Exhibit 16 is not admitted.

[DEFENSE ATTORNEY]: Your Honor, if I may, and I don't have it on the tip of my tongue, but Washington State by statute recognizes a declaration to be of equal value as an affidavit and doesn't differentiate between the two.

THE COURT: Well, that was all pointed out in these two Division 1 cases that are discussed on pages 411 and 412 of Mr. Tegland's document, his handbook. And certainly he said it sure would be helpful if the State Supreme Court would settle the issue once and for all by amending Evidence Rule 801.

RP 317-18.

The defense attorney then argued for admission of the statement under ER 803(a)(1) and (5), and the deputy prosecutor responded. RP 318-20, but the court maintained its ruling:

THE COURT: Okay. Well, I would encourage you both to read Pages 411 and 412 of Mr. Tegland's treatise, his handbook. But, like I said, if you find a case that is different from what those Division 1 cases seem to indicate, I'm willing to reexamine the whole situation.

But my ruling stands. Exhibit 16 is not admitted.

RP 320-21.

Although Defendant argues that "[t]he trial court erred in refusing to allow [him] to introduce Johnson's written statement to police" as substantive evidence at trial, Opening Brief of Appellant, p. 16-34, the record shows otherwise. Specifically, although the first three requirements

of ER 801(d)(a)(i) were satisfied in this case, the final requirement was not.

The first requirement of ER 801(d)(a)(i) was met because Johnson testified at trial and was subject to cross-examination. RP 228-316.

Given that at least one sentence of Johnson's written statement is arguably inconsistent with her trial testimony, *see* section II *below*, it may also be assumed *arguendo* that Johnson's testimony was inconsistent with her written statement. If so, the second requirement of ER 801(d)(1)(i) was met as well.

The third requirement for admissibility is that the statement "was given under oath subject to penalty of perjury. *Nieto*, 119 Wn. App. at 161; *Thach*, 126 Wn. App. at 307; ER 801(d)(1)(i).

"An unsworn written statement will satisfy the oath requirement if it is signed and contains language such as, 'I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct,'" *Nieto*, 119 Wn. App. at 161.

Indeed, RCW 9A.72.085 provides, in relevant part, that:

[w]henver, under any law of this state or under any rule, order, or requirement made under the law of this state, any matter in an official proceeding is required or permitted to be supported, evidenced, established, or proved by a person's sworn written statement, declaration, verification, certificate, oath, or affidavit, ***the matter may with like force and effect be supported, evidenced, established, or proved***

in the official proceeding by an unsworn written statement, declaration, verification, or certificate, which:

- (1) Recites that it is certified or declared by the person to be true under penalty of perjury;*
- (2) Is subscribed by the person;*
- (3) States the date and place of its execution; and*
- (4) States that it is so certified or declared under the laws of the state of Washington.*

The certification or declaration may be in substantially the following form:

“I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct”:

.....
.....
(Date and Place) (Signature)

RCW 9A.72.085 (emphasis added).

In this case, Johnson’s statement was written on a pre-printed form, which included the following language, just above her signature,

I DECLARE UNDER PENALTY OF PERJURY, UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE ABOVE STATEMENTS ARE TRUE AND CORRECT.

Exhibit 16; Appendix A; RP 296-97. The line following this declaration indicated that the statement was signed at “Tacoma, Pierce County, WA” by Johnson on “12-13-10.” Exhibit 16; RP 293-94. Thus, the statement appears to satisfy the four requirements of RCW 9A.72.085, and although it is “[a]n unsworn written statement,” it “satisf[ies] the oath requirement,” *Nieto*, 119 Wn. App. at 161, of ER 801(d)(a)(i).

Hence, the first three requirements for admissibility of Johnson's statement were satisfied. Nevertheless, the final requirement was not.

The final requirement for admissibility is that the statement "was provided at 'a trial, hearing, or other proceeding, or in a deposition.'" *Nieto*, 119 Wn. App. at 161; *Thach*, 126 Wn. App. at 307; ER 801(d)(1)(i). Johnson's statement was not provided at a trial, hearing or in a deposition. *See* RP 292-93.

To determine whether Johnson provided her statement at an "other proceeding," under ER 801(d)(a)(i) "courts consider whether (1) the witness made the statement voluntarily; (2) there were minimal guarantees of truthfulness; (3) the statement was given following one of the legally permissible methods for determining whether there was probable cause; and (4) the witness was later subject to cross-examination." *Nieto*, 119 Wn. App. at 162-63.

In the present case, only the first and last prongs of this four-prong test were established.

With respect to the first prong, there was probably sufficient evidence in the record that Johnson made that statement voluntarily. *See* RP 292-93. She testified that the police asked her to write the statement, and that, although she felt she was "still in shock," she chose to write that statement. RP 292-93. She did not indicate that the officer exercised any

duress or coercion to get her to write her statement. *See Id.* Hence, here, as in *Thach*, 126 Wn. App. at 308, the statement seems to have been made voluntarily.

With respect to the last prong, Johnson was, as is required for admission of her statement, “later subject to cross-examination.” *Nieto*, 119 Wn. App. at 162-63; *Thach*, 126 Wn. App. at 308-09; RP 228-316.

However, neither the second nor third prongs were satisfied in this case.

The second prong requires that “there were minimal guarantees of truthfulness.” *Nieto*, 119 Wn. App. at 162; *Thach*, 126 Wn. App. at 308-09.

While Johnson testified that she signed under the pre-printed language that stated, “I declare under the penalty of perjury.... [u]nder the laws of the State of Washington that the above statements are true and correct,” she also testified that “[i]t doesn’t make a lot of sense when you’re in shock.” RP 297. Her testimony proceeded as follows:

Q And do you see what’s in written in bold below your handwritten statement there?

A What’s in bold? I don’t know.

Q I declare under penalty of perjury –

A Yes.

Q --under the laws of the State of Washington that the above statements are true and correct?

A Yes.

Q And you signed that?

- A Yes.
- Q And you're now telling this jury that what you signed there was not true and correct?
- A No, it was true in different parts. *It doesn't make a lot of sense when you're in shock. I mean, you try writing something down and when your brain is not thinking clearly and see how it comes out.*

RP 297 (emphasis added).

While it is unclear whether Johnson was referring (1) to the declaration that her statement was made under penalty of perjury or (2) to her statement itself when she testified that “*it* doesn't make a lot of sense when you're in shock,” its clear her testimony undercuts the notion that her statement had minimal guarantees of truthfulness. Indeed, Johnson was either testifying (1) that the “penalty of perjury” declaration did not make sense to her at the time she signed it, *or* (2) that her statement itself did not make sense because she was in shock when she wrote it. Either way, her testimony indicates that her statement lacked minimal guarantees of truthfulness.

This case is similar to that of *Nieto*. There, the Court found that where the declarant “did not read the ‘penalty of perjury’ language,” that this “language had no meaning to her,” and that it was not otherwise explained to her, the declarant’s “statement lacked minimal guarantees of truthfulness and thus was not sufficiently reliable” to be admissible.

Nieto, 119 Wn. App. at 163-64. Similarly, here, Johnson either testified

that the penalty of perjury language didn't make a lot of sense to her or that her statement itself did not make a lot of sense. RP 297. *See also* RP 293-96.

Either way, the second prong of the four-prong test was not established and the trial court properly denied Defendant's motion to admit Johnson's statement.

Nor was the third prong of the four-prong test to establish reliability established here. This final prong requires that the statement was "given following one of the legally permissible methods for determining whether there was probable cause," *Nieto*, 119 Wn. App. at 162-63.

This Court quoted *Smith* in finding that "the legally permissible methods for determining whether there was probable cause" include "(1) *filing of an information by the prosecutor in superior court*; (2) grand jury indictment; (3) inquest proceedings; and (4) filing a criminal complaint before a magistrate." *Thach*, 126 Wn. App. at 309 (*quoting Smith*, 97 Wn.2d at 862, 651 P.2d 207 (citations omitted) (*quoting State v. Jefferson*, 79 Wn.2d 345, 347, 485 P.2d 77 (1971))(emphasis added).

In *Thach*, this Court found that the officer took the victim's statement "as part of a standard procedure for determining probable cause" because that officer testified that this statement "was part of the evidence

[he] gathered and forwarded to the prosecutor” and that “[t]he prosecutor used all of this information in order to establish probable cause and to determine whether to file an information in the superior court.” *Thach*, 126 Wn. App. at 309.

There was no such testimony in this case. Johnson provided no testimony as to why Officer Thompson asked for her written statement, or what he did with that statement once she wrote it. *See* RP 228-316. Nor did Officer Thompson, who was on military leave at the time of the trial, RP 449-50, provide such testimony. Indeed, there was nothing in the record to suggest that here, as in *Thach*, the prosecutor used the statement “to establish probable cause and to determine whether to file an information in the superior court.” *Thach*, 126 Wn. App. at 309. Because the statement was not given as part of a grand jury indictment, inquest proceedings or the filing of a criminal complaint before a magistrate, there was nothing in the record to show that “the statement was given following one of the legally permissible methods for determining whether there was probable cause.” *Nieto*, 119 Wn. App. at 162-63; *Thach*, 126 Wn. App. at 309. *See* RP 328-29. Hence, the third prong was not established and Johnson’s statement was not admissible here.

Therefore, the trial court's decision to deny Defendant's motion to admit that statement and the defendant's conviction itself should be affirmed.

Although Defendant argues that "the court erred in holding that Johnson's statement was inadmissible because it was not in 'affidavit form,'" Opening Brief of Appellant, p. 21, RP 317-18, a trial court's decision on the admissibility of evidence may be affirmed on any ground the record adequately supports even if the trial court did not consider that ground. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Here, as shown above, the record adequately supports denying admission of Johnson's statement because Defendant failed to demonstrate "minimal guarantees of truthfulness" or that "the statement was given following one of the legally permissible methods for determining whether there was probable cause." Thus, even if ground relied upon by the trial court was invalid, the court's decision to deny admission of that statement should be affirmed because the record adequately supports valid grounds for that denial.

Therefore, the court's decision to deny Defendant's motion to admit Johnson's statement, and the defendant's conviction should be affirmed.

2. EVEN HAD THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO ADMIT JOHNSON'S WRITTEN STATEMENT, THAT ERR WOULD BE HARMLESS BECAUSE THERE IS NO REASONABLE PROBABILITY IT AFFECTED THE TRIAL'S OUTCOME.

An evidentiary error is harmless if there is no reasonable probability that the error affected the trial's outcome. *State v. Templeton*, 148 Wn.2d 193, 59 P.3d 632 (2002); *State v. Pavlik*, 165 Wn. App. 645, 656, 268 P.3d 986 (2011).

In the present case, the defendant would have gained nothing from the admission of the written statement that he did not gain through cross-examination of Johnson on the contents of that statement. Indeed, only one to two sentences of Johnson's six-sentence written statement were arguably inconsistent with her testimony at trial. *Compare* Exhibit 16, Appendix A, *with* RP 228-316.

In the first sentence of her written statement, Johnson wrote, "I showed up at his [i.e., the defendant's] house around 2am due to him calling me." Exhibit 16; Appendix A. Johnson's testimony at trial was consistent with this statement. She testified that the defendant called her as she was leaving a bar at about 1:00 a.m., and invited her to his residence. RP 234-35, 268-72.

In the second and third sentences of her written statement, Johnson wrote, "I thought he was going to harm himself. So I stayed while his friends left." Exhibit 16; Appendix A. Although Johnson testified at trial that the defendant told her that he didn't want to live anymore, and that she noticed he was bleeding badly, she indicated that this was not until after the assault. RP 248-49. Johnson did testify that she stayed while the defendant's friends left. RP 237.

In the fourth sentence of her Johnson's written statement, she wrote, "He wasn't making a lot of sense and he grab[b]ed my throught [i.e., throat] making so I could not breath[e] or talk." Exhibit 16; Appendix A. Johnson testified consistently with this sentence at trial, stating, that the defendant "got on top of me and then put his hand on my throat and started squeezing" until she couldn't breathe. RP 237-39.

In the fifth sentence of her written statement, Johnson wrote, "I was able to pull his hand off for a second, but he kept grabbing my throught [throat]." Exhibit 16; Appendix A. Again, Johnson testified consistently with this statement, indicating that the defendant did in fact "let go" of her throat, but that he then strangled her again. RP 239-40.

In the sixth and final sentence of her written statement, Johnson wrote, "I asked him to stop and told him everything was going to be ok." Exhibit 16; Appendix A. Again, Johnson testified consistently with this

sentence at trial, stating, that she tried to get the defendant to stop, told him that he was hurting her, and ultimately “told him everything was going to be okay.” RP 238-40.

Hence, the only portion of Johnson’s written statement that was arguably inconsistent with her testimony at trial was the notion that she “stayed while his friends left,” because “[she] thought [the defendant] was going to harm himself.” Exhibit 16; Appendix A. At trial, Johnson testified on direct that after the defendant’s friends left, “it was late and [she and the defendant] went to go to bed.” RP 237. She testified that she stayed at the defendant’s residence after the assault “[b]ecause he said he didn’t want to live anymore.” RP 248.

While this testimony may arguably be inconsistent with the notion in her written statement that Johnson “stayed while his friends left,” because “[she] thought [the defendant] was going to harm himself,” Exhibit 16; Appendix A, the defendant was able to draw this inconsistency out for the jury on cross-examination of Johnson. That cross-examination proceeded as follows:

- Q Okay. So you’re telling me now that what’s written on this page [i.e., Johnson’s written statement] is not accurate insofar as it talks about why you went over to Steve’s house?
- A Yes, it doesn’t say why I went over to his house. It says I showed up. It doesn’t say why I went over to his house.

- Q *And then it says, I thought he was going to harm himself so I stayed while his friends left?*
- A *Like I said, everything was just –I was just trying to get pieces out of my brain and write what I could write down. I don't think you ever...*
- Q *And do you see what's written in bold below your handwritten statement there?*
- A What's written in bold? I don't know.
- Q *I declare under penalty of perjury—*
- A *Yes*
- Q *—under the laws of the State of Washington that the above statements are true and correct?*
- A *Yes.*

RP 296-97 (emphasis added).

Given such cross-examination, the jury had before it both Johnson's testimony that after the defendant's friends left, "it was late and [she and the defendant] went to go to bed," RP 237, and the arguably inconsistent portion of her written statement. Specifically, the jury knew that Johnson wrote in her statement that she "stayed while [the defendant's] friends left" because she "thought he [i.e., the defendant] was going to harm himself." RP 296. Moreover, the jury knew that she wrote this statement "under penalty of perjury... under the laws of the State of Washington." RP 297.

Admission of Johnson's written statement would have added nothing to such effective cross-examination. The defense attorney had already exposed the only inconsistency between that statement and

Johnson's trial testimony. Admitting the writing itself would have simply been cumulative. *See* ER 403.

Thus, there is no reasonable probability that the failure to admit Johnson's written statement into evidence at trial affected the trial's outcome. As a result, even if it was error to deny Defendant's motion to admit Johnson's written statement, that error was harmless. *See Templeton*, 148 Wn.2d 193; *Pavlik*, 165 Wn. App. 645.

Therefore, the defendant's conviction should be affirmed.

D. CONCLUSION.

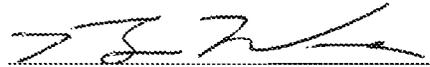
The trial court properly denied Defendant's motion to admit Erin Johnson's written statement to police as substantive evidence at trial because Defendant failed to demonstrate minimal guarantees of truthfulness or that the statement was given following one of the legally permissible methods for determining whether there was probable cause.

Even had the trial court erred in denying Defendant's motion to admit Johnson's written statement, that error would be harmless because there is no reasonable probability it affected the trial's outcome.

Therefore, the court's decision to deny admission of that statement and the defendant's conviction should be affirmed.

DATED: FEBRUARY 5, 2013

MARK LINDQUIST
Pierce County
Prosecuting Attorney



BRIAN WASANKARI
Deputy Prosecuting Attorney
WSB # 28945

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~US mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

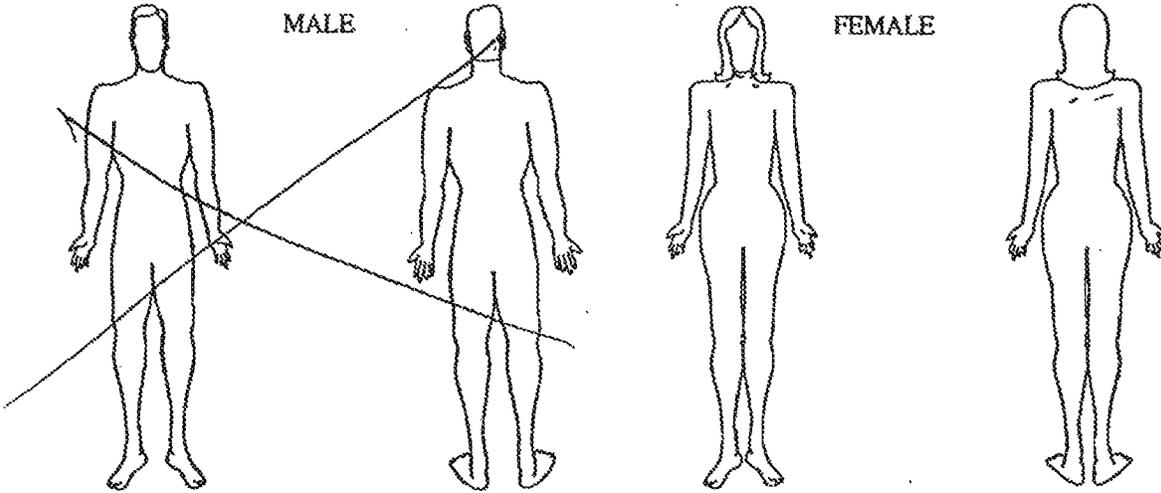
file

2/5/13 *Johnson*
Date Signature

APPENDIX A

VICTIM'S ACCOUNT OF INJURIES

Incident Number
103470136



TO THE VICTIM:

Mark the areas where you were hit or injured. Indicate as much detail as possible without over simplifying or over exaggerating your injuries.

Other than the Police, did you call or speak to anyone else about the assault? Yes No

If Yes, Who did you contact? Honey Deer & Don Hardesty

Victim will be at a temporary address... Yes No

If Yes, Attach a memo.

Completed by OFFICER / victim was unavailable... Yes No

VICTIM'S STATEMENT:

- I have physically pointed out to the Officer where I was injured.
- I have indicated on the diagram where I was injured.
- I was able to point out to the Officer the person who injured me.
- I have pointed out to the Officer the object used to injure me.
- I understand all of the questions.

- Yes No

Victim's Statement: I showed up at His house around 2am
due to him calling me. I thought he was
going to harm himself. so I stayed while his
friends left. He wasn't making a lot of sense
and he grabbed my throat making so I could
not breath or talk. I was able to pull his
hand off for a second but he kept grabbing my
throat. I asked him to stop and to let his every
thing was going to be ok

"I DECLARE, UNDER PENALTY OF PERJURY, UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE ABOVE STATEMENTS ARE TRUE AND CORRECT."

Signed at Tacoma, Pierce County, WA [Signature] 12-13-10
 (City) Victim's Signature Date

Witness _____ Date _____

LIST AT LEAST (1) PERSON WHO HAS FREQUENT CONTACT WITH YOU

1.	(Name) <u>DONALD HARDESTY</u>	(Phone) <u>253 282 8002</u>	(Relationship) <u>FRIEND</u>
2.	(Name)	(Phone)	(Relationship)

PIERCE COUNTY PROSECUTOR

February 05, 2013 - 9:54 AM

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