

NO. 65053-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

GREGORY SHEARER,

Appellant.

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

The Honorable Charles R. Snyder, Judge

BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

RECEIVED
APPELLANT'S BRIEF
JAN 11 2011
39

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <i>Defense pretrial motion in limine to preclude Honcoop's out-of-court statements to Austin and Baca</i>	2
2. <i>Trial testimony</i>	3
C. <u>ARGUMENT</u>	12
THE TRIAL COURT ERRONEOUSLY ADMITTED HONCOOP'S WRITTEN STATEMENTS AS RELIABLE PRIOR INCONSISTENT STATEMENTS UNDER ER 801(d)(1)(i). TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT.	12
1. <i>The trial court erred by admitting Honcoop's written statement as substantive evidence under ER 801(d)(1)(i).</i>	13
2. <i>Shearer's trial counsel was ineffective for failing to object to the admissibility of Honcoop's written statements as substantive evidence.</i>	20
D. <u>CONCLUSION</u>	27

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>Brown v. Spokane County Fire Protection Dist. No. 1</u> 100 Wn.2d 188, 668 P.2d 571 (1983).....	24
<u>State v. Bargas</u> 52 Wn. App. 700, 763 P.2d 470 (1988) <u>review denied</u> , 112 Wn.2d 1005 (1989).....	23
<u>State v. Benn</u> 120 Wn.2d 631, 845 P.2d 289 <u>cert. denied</u> , 510 U.S. 944 (1993).....	20
<u>State v. Briscoeray</u> 95 Wn. App. 167, 974 P.2d 912 (1999) <u>review denied</u> , 139 Wn.2d 1011 (1999).....	24
<u>State v. Brown</u> 127 Wn.2d 749, 903 P.2d 459 (1995).....	23
<u>State v. Burke</u> 163 Wash.2d 204, 181 P.3d 1 (2008)	22
<u>State v. Chapin</u> 118 Wn.2d 681, 826 P.2d 194 (1992).....	22
<u>State v. Dawkins</u> 71 Wn. App. 902, 863 P.2d 124 (1993).....	20
<u>State v. Gerdts</u> 136 Wn. App. 720, 150 P.3d 627 (2007).....	19
<u>State v. Guizzotti</u> 60 Wn. App. 289, 803 P.2d 808 (1991) <u>review denied</u> , 116 Wn.2d 1026 (1991).....	24

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Hardy</u> 133 Wn.2d 701, 946 P.2d 1175 (1997).....	12, 22
<u>State v. Hendrickson</u> 129 Wn.2d 61, 917 P.2d 563 (1996).....	20
<u>State v. Hendrickson</u> 138 Wn. App. 827, 158 P.3d 1257 (2007) <u>aff'd.</u> , 165 Wn. 2d 474, <u>cert. denied</u> , 129 S. Ct. 2873 (2009)	20
<u>State v. Nelson</u> 74 Wn. App. 380, 874 P.2d 170 <u>review denied</u> , 125 Wn.2d 1002 (1994).....	13, 16, 17, 18
<u>State v. Nieto</u> 119 Wn. App. 157, 79 P.3d 473 (2003).....	12, 13, 15, 17, 18
<u>State v. Osborn</u> 59 Wn. App. 1, 795 P.2d 1174 <u>review denied</u> , 115 Wn.2d 1032 (1990).....	13
<u>State v. Roberts</u> 73 Wn. App. 141, 867 P.2d 697 <u>review denied</u> , 124 Wn.2d 1022, 881 P.2d 255 (1994)	19
<u>State v. Saunders</u> 91 Wn. App. 575, 958 P.2d 364 (1998).....	20
<u>State v. Slider</u> 38 Wn. App. 689, 688 P.2d 538 (1984) <u>review denied</u> , 103 Wn.2d 1013 (1985).....	23
<u>State v. Smith</u> 97 Wn.2d 856, 651 P.2d 207 (1982).....	13, 15, 17, 18

TABLE OF AUTHORITIES (CONT'D)

Page

<u>State v. Sua</u> 115 Wn. App. 29, 60 P.3d 1234 (2003).....	13
<u>State v. Sunde</u> 98 Wn. App. 515, 985 P.2d 413 (1999).....	24
<u>State v. Thach</u> 126 Wn. App. 297, 106 P.3d 782 <u>review denied</u> , 155 Wn. 2d 1005 (2005).....	20
<u>State v. Viney</u> 52 Wn. App. 507, 761 P.2d 75 (1988).....	21
<u>State v. Williams</u> 79 Wn. App. 21, 902 P.2d 1258 (1995).....	21
<u>State v. Williamson</u> 100 Wn. App. 248, 996 P.2d 1097 (2000).....	22

FEDERAL CASES

<u>Strickland v. Washington</u> 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).....	20
--	----

RULES, STATUTES AND OTHER AUTHORITIES

4 D. Louisell & C. Mueller <i>Federal Evidence</i> § 419 (1980).....	15
ER 801	1, 2, 11, 12, 13, 15, 16, 17, 19, 21, 25
ER 802	13
ER 803	22
RCW 9A.72.085	16

U.S. Const. Amend. VI.....	19
Wash. Const. art. I, § 22.....	19

A. ASSIGNMENTS OF ERROR

1. The trial court erred by finding the complainant's written statement to a police officer was admissible as substantive evidence under ER 801(d)(1)(i).

2. Trial counsel deprived the appellant of his constitutional right to effective assistance by failing to object to the trial court's ruling admitting the complainant's written statement as substantive evidence under ER 801(d)(1)(i).

Issues Pertaining to Assignment of Error

1. The complainant made oral and written statements to her boss and a police officer accusing her live-in boyfriend, the appellant, of hitting and threatening to kill her. The complainant recanted at trial. The trial court initially ruled the out-of-court statements were admissible only to impeach the complainant's trial testimony. The court later decided the written statements were admissible as substantive evidence under the prior inconsistent statement exemption to the rule against hearsay set forth in ER 801(d)(1)(i). Where the state failed to establish the written statement was voluntary and bore sufficient guarantees of trustworthiness, did the court err by admitting it under ER 801(d)(1)(i)?

2. Did trial counsel deprive the appellant of his constitutional right to effective representation by failing to object to the trial court's admission of the written statement as substantive evidence under ER 801(d)(1)(i)?

B. STATEMENT OF THE CASE

1. *Defense pretrial motion in limine to preclude Honcoop's out-of-court statements to Austin and Baca*

The state charged Gregory P. Shearer with felony harassment and fourth degree assault against his girlfriend, Lynn Honcoop, for events occurring during an argument at their shared residence. CP 94-95.

Shearer moved in limine to prevent admission of Honcoop's accusatory statements to Austin and Baca made the morning after the alleged incident. Shearer argued the statements were hearsay and regarded matters for which neither witness had personal knowledge. CP 85-86; 1RP 16-18.¹ The state argued the statements fell within exceptions to the rule against hearsay because they were present sense impressions and excited utterances. Alternatively, they were admissible to impeach her trial testimony in the event she recanted. 1RP 19-23, 25-26, 28-29, 31.

¹ Shearer cites to the verbatim report as follows: 1RP – (1/12/2010); 2RP – (four volumes sequentially paginated, 1/13, 1/14, 1/19, 1/20/2010); 3RP – (2/17/2010); 4RP (2/25/2010).

The trial court ruled the witnesses would be permitted to recount Honcoop's descriptions of her physical condition as present sense impressions. 1RP 23. The court also permitted the state to elicit the witness' observations of Honcoop's demeanor when she made her statements. 1RP 23-25, 31. The court rejected the state's claim that the statements were excited utterances, finding they were not made until the following morning and after there was time to concoct a story. 1RP 23-24, 26-30. Instead, the court allowed Honcoop's statements for the limited purpose of impeachment insofar as they differed from her anticipated trial testimony. 1RP 31.

2. *Trial testimony*

Lynn Honcoop worked as a cashier at a Bellingham Lowe's store. 2RP 44-45. Operations Manager Steven Austin supervised Honcoop and other employees. 2RP 170-71. One of Austin's duties was to monitor employee attendance. As a result, Austin spoke with Honcoop many times to discuss absences and tardiness. 2RP 46-47, 173-74.

Austin testified that during these discussions, Honcoop revealed Shearer abused her at home. 2RP 173-76. Austin recalled one instance, about a year before trial, when Honcoop reported to work sporting a fresh black eye. After initially saying she suffered from vertigo and fell down,

Honcoop disclosed Shearer had elbowed her in the eye and knocked her down the stairs at home. 2RP 106, 176-77. Honcoop told Austin she was not initially forthcoming, and did not report the incident to police, because she loved Shearer, believed he could change, and feared retaliation. 2RP 177-79. Although Austin suspected there had been other assaults, this was the only instance in which he saw evidence showing Honcoop had been hurt. 2RP 179.

That is, until Honcoop reported for work one morning in October 2009 visibly upset, crying, and holding her arm. 2RP 180-81, 199. She disclosed Shearer hurt her the night before. 2RP 179-81. Honcoop showed Austin a bruise on her shoulder or neck and red marks on her side. 2RP 182, 200. Austin recommended Honcoop call police. 2RP 183, 200. She told Austin she feared calling police because there were weapons at home that Shearer could retrieve before police arrived and that police could end up hurting him. 2RP 188-89. She did call police, however. 2RP 183-84.

As they waited for police to arrive, Honcoop explained to Austin how she received her injuries. Shearer grabbed her arm and punched her in the back, abdomen, and back of the head during an argument the night before. 2RP 184-86. Shearer told her if she called the police, *she* would

be dead before officers arrived. 2RP 186-87. Honcoop told Austin that at the time, she did not think Shearer would act on the threat, but after further thought believed he might actually kill her. 2RP 187.

Bellingham Police Officer Reuben Baca reported to the store and first spoke with Austin. 2RP 189-90, 271-72. Austin told Baca that Honcoop was upset, had bruises, and disclosed there were weapons at her home. 2RP 190. He escorted Baca to the security office where a crying and "out of control" Honcoop waited. 2RP 190-91, 272-73, 321.

Baca persuaded Honcoop to calm herself and after she regained her composure, she freely discussed the previous night's incident. 2RP 191-92, 273-74. Honcoop told Baca that Shearer punched her five or six times in the back and arm and once pulled her up off the floor by the hair. 2RP 275-78. She had a bruise on her upper arm and another on her elbow. 2RP 221-32, 275. There were no visible marks on her back, head, or neck. 2RP 239-40, 276, 323-25. Over Shearer's hearsay objection, the trial court permitted Baca to testify that Honcoop told him Shearer warned her if she called the police *she* would be dead before officers arrived. Consistent with the pretrial ruling, the trial judge ruled the evidence was admissible, but only as impeachment. 2RP 278-79.

Baca asked Honcoop a series of standard "risk assessment" questions. 2RP 283-86, 330. Among other responses to the questions, Honcoop said Shearer threatened to "take out" others as well as her. 2RP 286. She disclosed he had previously threatened to kill her and had intimidated, threatened or assaulted her about 10 times before. 2RP 287, 332. Honcoop indicated that she believed Shearer would carry out her threat to kill her. 2RP 287.

Honcoop also revealed there were weapons, including two handguns, at her home. 2RP 288, 331. Baca, fellow officer Mark Jones, and Honcoop went to Honcoop's home some time after the interview. 2RP 108, 249-50, 288-89. Shearer was not there when they arrived. 2RP 289. The officers "cleared" the home and recovered a loaded pistol, an expandable baton, and a knife. 2RP 233-34, 289-94, 333-35, 341-42.

Baca, Jones, and a third officer later arrested Shearer without incident. 2RP 250, 258-59, 295-96, 319, 335-37.

Honcoop presented a different version of events at trial. She and Shearer had lived together for more than nine years at the time of the incident and planned to get married. 2RP 37-38. Theirs was a "very loving and respectful relationship." 2RP 38. The couple had verbal

arguments and nothing more. 2RP 38. She estimated there had been about 10 arguments in the five years preceding trial. 2RP 112.

One such argument occurred the night before her fateful discussion with Austin at work. Shearer was angry and frustrated because Honcoop was not doing her fair share of the household chores. 2RP 48-49. A lengthy verbal argument ensued during which Shearer was yelling, telling her what he wanted her to do, and saying hateful things. 2RP 49-61. For example, Shearer called Honcoop "worthless" several times over the course of about an hour and said he did not want to be in the relationship. 2RP 57-59.

Finally, Honcoop told Shearer she would call police if he continued yelling. She had used this tactic successfully at other times to end arguments. 2RP 62-64, 119. Shearer responded that if she called police, *he* – not Honcoop or anyone else -- would be dead before officers arrived. 2RP 64, 120, 127-29, 161-64. Shearer had also threatened to commit suicide on previous occasions. 2RP 129, 166. Honcoop's ploy worked again; Shearer stopped yelling shortly thereafter and the couple went to sleep. 2RP 65-68.

Honcoop was upset and angry when she woke up for work the following morning because of the mean words Shearer used during his

tirade. 2RP 73-74, 107. She wanted Shearer to suffer consequences for his hurtful language. She knew she could retaliate against Shearer through Austin because he had tried to help her before. 2RP 121-22, 165-66.

She was crying when she arrived at work and told Austin she needed to speak with him. 2RP 74-76. She and Austin met about an hour later in the store security office. Honcoop testified she lied, telling Austin that Shearer punched her in the arm and back the night before. 2RP 75-78, 83, 122-23. She showed Austin a bruise on her arm. In truth, she received the arm injury while "roughhousing" with Shearer and hurt her back falling down stairs. 2RP 79-80, 116-17.

After at least an hour of talking in the office, Austin "pressured" Honcoop into calling police. 2RP 82-83, 123-24. Austin dialed the phone and made her feel as if he would fire her if she did not follow through. 2RP 155-56. Honcoop told a 911 operator her boyfriend had hit her during a domestic dispute the night before. 2RP 84. After she hung up, Honcoop and Austin continued talking about the events and what she could do to get help. 2RP 84-85.

Honcoop recalled that Officer Baca arrived about 30 minutes after her phone call. 2RP 86-87, 124-25. Honcoop was still upset and repeated her lies to Baca. 2RP 86-90, 96-97.

At Baca's request, Honcoop then provided a written statement that was admitted without objection as Exhibit 2. 2RP 95-100, 125-29, 282-83 (attached as Appendix). Baca watched her complete the statement. 2RP 96-97, 282-83. The following language appeared at the top of the statement:

I _____ certify or declare, under penalty of perjury

under the laws of the State of Washington, that the following ___s statement voluntarily given by me is true and correct. I have read the statement or it has been read to me and I know and understand the contents of the statement.

Ex. 2. "Lynn Honcoop" was printed on the long blank line and "2 Pg" appeared on the short blank line. Below the block of language were Baca's name, Honcoop's signature, the location, date, and time. Ex. 2; 2RP 98-100.

The information Honcoop wrote in the statement, which appeared below the above information, was essentially the same as what she had told Baca. 2RP 100. Among other things, Honcoop wrote Shearer punched her about five or six times. Ex. 2. She also wrote, "I said I would call the police. [Shearer] said I would be dead before they (cops) would show up." Ex. 2; 2RP 127.

During her testimony, Honcoop called this document her "false statement to the cops." 2RP 126. With respect to the quoted portion about calling police, Honcoop testified Shearer was referring to himself as the person who would be dead before police arrived. 2RP 128-29.

After the meeting in the office, Honcoop accompanied Baca to her home to show police where the incidents of the night before occurred. She felt compelled to obey Baca, thinking she would be arrested for noncooperation if she did not. 2RP 108-09, 138-39, 159-60. While at the home she gave Baca a gun, ammunition, a knife, and Shearer's baton. 2RP 109-10, 137-39. Later that day she returned home at Baca's request and turned over a second gun that was inside Shearer's vehicle. 2RP 110-11, 253-54, 293-94. Honcoop testified that Shearer neither used nor threatened to use the weapons during their argument the night before. The weapons, all legally possessed, were for the couple's safety at home and while they camped in the backcountry. 2RP 141-43.

Honcoop admitted she told Austin that Shearer had previously caused her to have a black eye, but maintained she never complained to her boss of any other physical assaults. 2RP 105-06. Nor had she told Austin she ever feared Shearer because of what he might do to her. 2RP 106-07.

As for the night before, Honcoop said, Shearer did not hit her. He did lose his temper and gently pull her hair to get her attention, but the argument was strictly verbal. 2RP 111-12. She did not admit to police she lied because she feared she would get into trouble. 2RP 146-47. She did not expect her lies to result in prosecution. 2RP 148.

At the conclusion of the state's case, Shearer moved to dismiss the felony harassment charge. 2RP 401-02. Counsel argued the only evidence indicating Shearer threatened to kill Honcoop was Honcoop's written "going to call the police" statement set forth above. 2RP 403. Counsel maintained it was "equally as plausible" to interpret the statement as Shearer threatening to kill himself – as Honcoop testified -- as it was to read it as a threat to kill Honcoop. 2RP 403.

The trial court denied the motion. The court agreed with counsel that without the written statement, "there would be no evidence of a threat whatsoever[.]" 2RP 406. The court held that because Honcoop made the statement under penalty of perjury, it was admissible as substantive evidence under ER 801(d)(1). 2RP 406. With respect to Shearer's factual argument, the court held it was for the jury to resolve any ambiguity regarding the threat statement. 2RP 407. Counsel did not object.

Shearer presented no evidence. A Whatcom County jury found Shearer guilty of each offense. CP 26-27. The trial judge sentenced Shearer within the standard range based on an offender score of 0. CP 15-24.

C. ARGUMENT

THE TRIAL COURT ERRONEOUSLY ADMITTED HONCOOP'S WRITTEN STATEMENTS AS RELIABLE PRIOR INCONSISTENT STATEMENTS UNDER ER 801(d)(1)(i). TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT.

The state presented evidence that Honcoop told Austin and Baca that Shearer punched her several times and threatened to kill her if she called police during the course of their argument. The trial court initially admitted Honcoop's oral statements for the limited purpose of impeaching her contrary trial testimony. At the close of the state's case, however, the court admitted Honcoop's written statement as substantive evidence under ER 801(d)(1)(i). This was error; the state failed to establish the written statements were sufficiently reliable to be used as substantive evidence. Without the erroneous admission of the written statement, the evidence would be insufficient to prove either felony harassment or assault. Trial counsel was thus ineffective for failing to object to the court's ruling. This Court should reverse Shearer's convictions and remand for a new trial.

1. *The trial court erred by admitting Honcoop's written statement as substantive evidence under ER 801(d)(1)(i).*

“Hearsay” is an out-of-court statement offered in court to prove the truth of the matter asserted therein. ER 801(c); State v. Hardy, 133 Wn.2d 701, 713, 946 P.2d 1175 (1997). Hearsay is inadmissible unless a specific exception applies. ER 802. However, an out-of-court statement is not hearsay if:

[t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, *or other proceeding*, or in a deposition[.]

ER 801(d)(1) (emphasis added). The proponent of the statement's admissibility bears the burden of proving these elements. State v. Nieto, 119 Wn. App. 157, 160, 79 P.3d 473 (2003). As with other evidentiary rulings, this Court reviews a trial court's admission of evidence under ER 801(d)(1)(i) for abuse of discretion. State v. Osborn, 59 Wn. App. 1, 5, 795 P.2d 1174, review denied, 115 Wn.2d 1032 (1990).

This Court must construe ER 801(d)(1)(i) according to its plain meaning and give effect to all its language. State v. Sua, 115 Wn. App. 29, 48, 60 P.3d 1234 (2003). The purposes of the rule and circumstances of each case must be considered to determine whether a statement was

produced within the context of an "other proceeding." Nieto, 119 Wn. App. at 162.

Reliability is the key factor in determining whether this kind of evidence should be admitted. State v. Smith, 97 Wn.2d 856, 861, 651 P.2d 207 (1982). In measuring the reliability of a prior inconsistent statement, courts consider whether (1) the witness made the statement voluntarily; (2) there were minimal guaranties of truthfulness; (3) the statement was part of the standard procedure for determining the existence of probable cause; and (4) the witness was later subject to cross examination. State v. Nelson, 74 Wn. App. 380, 387, 874 P.2d 170, review denied, 125 Wn.2d 1002 (1994).

Factors (1) and (2) are at issue in Shearer's case. Honcoop said she knew from past experience that Austin liked her and did not like Shearer. 2RP 121-22, 131-32. She knew she could exact revenge against Shearer by telling Austin lies. 2RP 81, 122-23. Honcoop did not, however, plan to call police and say Shearer assaulted her. Rather, Austin insisted she report Shearer and went so far as to dial the police non-emergency number and hand her the phone. 2RP 82, 123-24, 155. Honcoop testified Austin made her feel like if she did not follow through, he would have fired her from her job. 2RP 130, 156.

Honcoop also knew Austin spoke with Baca outside her presence before she met with the officer. 2RP 124, 189-91, 271-72. Austin also accompanied Baca into the security office for the meeting with Honcoop. 2RP 189-92, 272. In Austin's presence, Baca asked Honcoop to essentially repeat what she told her supervisor. 2RP 125. Honcoop felt compelled by Baca to provide a written statement. 2RP 148. Throughout her time with Baca, Honcoop felt obligated to cooperate for fear of being arrested. 2RP 108-09, 138-39. She did not anticipate her initial report to Austin would result in prosecution and felt like once events unfolded, she could not stop them. She felt "pressured" by the police and the state to portray Shearer as dangerous and to see matters through. 2RP 147-49.

This evidence establishes Honcoop did not voluntarily make her written statement to Baca. The state did not adequately rebut this evidence. It therefore failed to meet its burden of proving Honcoop's written statement was sufficiently reliable to be admissible under ER 801(d)(1)(i).

As for factor (2), the state failed to show Honcoop's written statement contained minimal guarantees of trustworthiness. This term has been interpreted as requiring "an oath and the circumstance of a formalized proceeding" Nieto, 119 Wn. App. at 163 (quoting Smith,

97 Wn.2d at 862 (quoting 4 D. Louisell & C. Mueller, *Federal Evidence* § 419 at 169-71 (1980))).

Three cases are instructive. In the first, State v. Smith, the hospitalized declarant, the victim of a severe assault, told a police officer she was afraid and did not know what to do. The officer advised her nothing could be done unless she was willing to testify in court. The declarant later that day came to the police department and learned that by giving a voluntary sworn statement, prosecution against the defendant was likely. After she wrote her statement, a detective took her before a notary and read her the affidavit portion and oath. The declarant reread and signed the affidavit, and the notary subscribed and affixed a seal to the statement. Smith, 97 Wn.2d at 858. The Court held, "Minimal guaranties of truthfulness were met since the statement was attested to before a notary, under oath and subject to penalty for perjury." Smith, 97 Wn.2d at 862.

Nelson is in accord. There a woman was arrested after she agreed to commit a sexual act on an undercover police detective for money. At the station the woman identified Nelson as her pimp. The detective wrote down the substance of the woman's disclosures as the woman's official statement. Two days later, the woman met with the detective and a

prosecutor. Nelson, 74 Wn. App. at 382-83 & n.1. The woman was then taken before a notary where she signed the affidavit, thereby attesting to the truth of the written statement. Nelson, 74 Wn. App. at 383 n.1. The notary witnessed the signature, certified the statement, and affixed a seal. Nelson, 74 Wn. App. at 383.²

More problematic for this Court was whether the record established the woman knew her statement was being taken under penalty of perjury. Nelson, 74 Wn. App. at 390. The woman was equivocal at trial as to whether she read the affidavit. However, the prosecutor had reviewed the statement with the woman and explained the significance of the affidavit when she originally signed it. In addition, the notary testified it was her standard practice to ask a witness whether she read the affidavit and would not execute it if given a negative response. For these reasons, this Court held the woman's signature on the affidavit satisfied the

² This Court rejected Nelson's assertion that without the notary's administration of an oath, the woman's signature on the affidavit lacked formal guaranties of truthfulness. This Court found because the form of the affidavit complied with RCW 9A.72.085, it constituted a sworn statement for purposes of the oath requirement of ER 801(d)(1)(i). Nelson, 74 Wn. App. at 389-90. Honcoop's statement contained a form that also complied with RCW 9A.72.085. Shearer therefore does not base his challenge to the statement's reliability on the absence of an oath administered by a notary or the form of the affidavit.

required minimal guarantees of trustworthiness. Nelson, 74 Wn. App. at 390.

The final case to consider is Nieto, which involved admission of a statement handwritten and signed by a witness during a police station interview. Nieto, 119 Wn. App. at 159-60. In the statement, the witness described her sexual relationship with Nieto and disclosed they had "consensual" intercourse several times before she turned 16. Nieto, 119 Wn. App. at 160.

Nieto argued the police interview did not qualify as an "other proceeding" under ER 801(d)(1)(i). Nieto, 119 Wn. App. at 162. This Court agreed, finding that unlike in Smith and Nelson, "no notary was present here, nor were any other formal procedures involved." Nieto, 119 Wn. App. at 163.

Further, the witness testified she did not read the "penalty of perjury" language contained in the boilerplate, pre-printed statement form and that the language had no meaning to her. Nor did the officer remember reading the language to the witness. Nieto, 119 Wn. App. at 163. And unlike in Nelson, the state did not establish that the prosecutor reviewed the statement with the witness and explained the importance of the perjury language, or that the notary regularly asked a witness whether

she read the language and executed the document only upon an affirmative answer. Nieto, 119 Wn. App. at 163-64.

Shearer's case is analogous to Nieto and readily distinguishable from Smith or Nelson. First, neither Austin nor Baca sought the expertise and authority of a notary. Second, the state failed to demonstrate Honcoop knew her statement and signature were given under penalty of perjury. On direct examination, the prosecutor asked Honcoop to read the certification language, including the "penalty of perjury" provision, that appeared at the top of the first page of Exhibit 2. 2RP 98-99. After Honcoop did so, the prosecutor asked whether Honcoop signed her name "under that statement under penalty of perjury[.]" 2RP 99. Honcoop answered in the affirmative. 2RP 99. On redirect, when the prosecutor asked whether she believed she "could get in trouble for lying by writing that statement," Honcoop replied, "I believe I can be charged with a false police report." 2RP 151-52. Finally, Baca said nothing about the oath during his testimony.

At best, the prosecutor established Honcoop knew how to read and recognize her signature. There is no indication Honcoop read the certification language at the time she wrote and signed her statement. In addition, Honcoop's testimony she believed she could be charged with

mere false reporting, rather than perjury, indicated she did not understand the significance of the language. For all these reasons, the state failed to prove the statement's reliability for use as substantive evidence under ER 801(d)(1)(i). The trial court abused its discretion by admitting the written statement under this rule.

2. *Shearer's trial counsel was ineffective for failing to object to the admissibility of Honcoop's written statements as substantive evidence.*

Failing to object to inadmissible evidence generally waives a challenge on appeal. State v. Roberts, 73 Wn. App. 141, 146, 867 P.2d 697, review denied, 124 Wn.2d 1022, 881 P.2d 255 (1994). Because an ineffective assistance claim raises an issue of constitutional magnitude, however, Shearer may raise this issue for the first time on appeal. State v. Gerdts, 136 Wn. App. 720, 726, 150 P.3d 627 (2007).

The federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. I, § 22. A defendant is denied this right when his attorney's performance "(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). Shearer meets both requirements here.

An ineffective assistance of counsel claim is reviewed de novo. State v. Thach, 126 Wn. App. 297, 319, 106 P.3d 782, review denied, 155 Wn. 2d 1005 (2005). Deficient performance may be shown where counsel fails to object to inadmissible prejudicial evidence. See, e.g., State v. Hendrickson, 129 Wn.2d 61, 77-79, 917 P.2d 563 (1996) (failing to object to evidence of prior convictions); State v. Hendrickson, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007) (trial counsel ineffective for failing to object to inadmissible hearsay testimony), aff'd., 165 Wn. 2d 474, cert. denied, 129 S. Ct. 2873 (2009); State v. Dawkins, 71 Wn. App. 902, 907-10, 863 P.2d 124 (1993) (failing to object to evidence of uncharged crimes).

A defendant claiming ineffective assistance based on counsel's failure to object to the admission of evidence must show (1) an absence of legitimate tactical reasons for failing to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

There was no legitimate tactical reason for failing to object to admission of Honcoop's written statement under ER 801(d)(1)(i). Trial counsel's pretrial motion to exclude Honcoop's statements to Austin and Baca as inadmissible hearsay belies any such claim. CP 85-86; IRP 16-18. Counsel prevailed because the trial court ruled pretrial the statements were not admissible as substantive evidence under the "excited utterance" exception. After doing that, why would counsel want the jury to be permitted to use the same evidence under ER 801(d)(1)(i)?

Second, for the reasons articulated above, the trial court would have sustained an objection to admission of the written statement under ER 801(d)(1)(i) because it was not reliable.

Third, an evidentiary error is prejudicial if it is reasonably probable that the error materially affected the jury's verdict. State v. Viney, 52 Wn. App. 507, 511, 761 P.2d 75 (1988). In its pretrial ruling, the trial court properly ruled Honcoop's statements oral were admissible only to impeach her later inconsistent trial testimony. Prior inconsistent statements are not hearsay if they are offered merely to challenge the declarant's credibility rather than for the truth of the matter asserted. State v. Williams, 79 Wn. App. 21, 26, 902 P.2d 1258 (1995). The statements may not, however, be

used as evidence that the facts contained therein are substantively true. State v. Burke, 163 Wash.2d 204, 219, 181 P.3d 1 (2008).

During the pretrial hearing, the prosecutor sought to have Honcoop's statements offered as excited utterances. Excited utterances are an exception to the general rule excluding hearsay evidence. ER 803(a)(2). A statement qualifies as an excited utterance only if (1) a startling event occurs; (2) the statement is made while the declarant remains under the stress of the event; and (3) the statement relates to the event. State v. Hardy, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997). The key to the exception is spontaneity. State v. Chapin, 118 Wn.2d 681, 688, 826 P.2d 194 (1992).

The trial court should consider the passage of time between the startling event and the statements, the declarant's emotional state, and whether the declarant had an opportunity to reflect on the event and fabricate a story. State v. Williamson, 100 Wn. App. 248, 258, 996 P.2d 1097 (2000). "The longer the time interval, the greater the need for proof that the declarant did not actually engage in reflective thought." Chapin, 118 Wn.2d at 688.

The time between Shearer's alleged assault and Honcoop's statements to Austin and Baca was long – about seven hours and after a

night's sleep. 2RP 47, 68. This was ample time to reflect about the alleged incident. Importantly, Honcoop testified she not only had time to reflect, but also decided to fabricate and give an exaggerated version of events.

These circumstances strongly support the trial court's discretionary decision that Honcoop's statements were not excited utterances. See State v. Brown 127 Wn.2d 749, 759, 903 P.2d 459 (1995) (statements during 911 call not excited utterances where rape complainant testified she had opportunity to, and did in fact, fabricate part of her story before making call); Brown v. Spokane County Fire Protection Dist. No. 1, 100 Wn.2d 188, 195-96, 668 P.2d 571 (1983) (fire truck passenger's recorded statements, made 30 to 40 minutes after traffic accident in which motorist hit truck, not excited utterances because they came after opportunity to calm down and reflect on incident); State v. Bargas, 52 Wn. App. 700, 704, 763 P.2d 470 (1988) (statements made to officer after complainant had gone back to sleep, bathed, talked with friend, and was calmed by officer for several minutes not excited utterances), review denied, 112 Wn.2d 1005 (1989); State v. Slider, 38 Wn. App. 689, 692-93, 688 P.2d 538 (1984) (toddler's accusations of sexual assault made morning after incident and in response mother's leading questions "attenuated the degree

of reliability . . . beyond that countenanced under the strict limits of the excited utterance exception."), review denied, 103 Wn.2d 1013 (1985).

In contrast, see State v. Sunde, 98 Wn. App. 515, 520, 985 P.2d 413 (1999) (trial court did not abuse discretion by admitting statements as excited utterances where facts showed complainant was in excited state from time assailant first threatened her with gun until police arrested him about two hours later. "Further, there was no evidence that she had an opportunity to fabricate a lie as in Brown."); State v. Briscoeray, 95 Wn. App. 167, 174, 974 P.2d 912 (1999) (trial court did not abuse discretion by admitting statements as excited utterances where complainant, who was upset and crying, approached guard shack within 30 to 40 seconds after neighbor reported abuse and exclaimed assailant tried to kill her, guard called 911 within minutes, complainant remained upset as she spoke with 911 operator, and officer arrived during 911 call and immediately asked what happened), review denied, 139 Wn.2d 1011 (1999); State v. Guizzotti, 60 Wn. App. 289, 296, 803 P.2d 808 (1991) (911 recording properly admitted under excited utterance exception under following facts: accused allegedly raped complainant on boat; accused followed complainant into boatyard; complainant hid for about seven hours until daybreak; complainant remained awake through night because she thought

defendant was looking for her and she feared for her life; complainant ran for phone and made call in morning), review denied, 116 Wn.2d 1026 (1991).

For these reasons, the trial court did not abuse its discretion by prohibiting admission of Honcoop's statements as excited utterances. Without admission of the corresponding written statements as substantive evidence under ER 801(d)(1)(i), the state would not have been able to present sufficient evidence to prove Shearer committed either charged offense. Defense counsel's failure to object to the written statement thus resulted in prejudice to Shearer. Counsel deprived Shearer of his rights to effective representation and a fair trial. This Court should reverse his convictions and remand for a new trial.

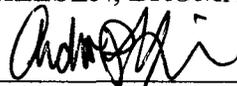
D. CONCLUSION

The trial court erred by admitting Honcoop's written statement to Baca as substantive evidence under ER 801(d)(1)(i). Shearer's trial counsel was ineffective for failing to object to the court's admission of the evidence. Shearer is therefore entitled to reversal of his convictions and remand for a new trial.

DATED this 19 day of October, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

APPENDIX



RECEIVED

OCT 12 2010

Nielsen, Broman & Koch, P.L.L.C.



Bellingham Police Department

Statement Form

Event 09B-37636

I LYNN HONCOOP, certify or declare, under penalty of perjury
(PRINT NAME OF PERSON MAKING STATEMENT)

under the laws of the State of Washington, that the following AP statement voluntarily given by
me is true and correct. I have read the statement or it has been read to me and I know and understand
the contents of the statement.

OFFICER R. BROWN 187 SIGNED Lynn Honcoop
(Person making statement)

LOCATION Bellingham DATE 10-6-09 TIME 0925
(CITY WHERE STATEMENT GIVEN) (DATE AND TIME OF STATEMENT)

I Lynn Honcoop was sitting ^{on the floor} up stairs in the
master bedroom. setting laundry down when Greg came
in and started yelling at me about not doing what
I need to do around the house like cleaning the
kitchen, dishes, and general stuff around like that. He
started yelling at me about not keeping promises
like going to counseling. for my past issues. Then
I ~~he~~ went into my room (guestroom) where my clothes
and belongings are. so something away. Greg came
in and went off about his credit card debit
and I said that was not my fault and he

Page 1 of 2

SIGNED Lynn Honcoop
(PERSON MAKING STATEMENT)

Bellingham

POLICE

Washington State Accredited Agency

Bellingham Police Department

Statement Form

Supplemental Only

Case 09R-37436

ran into the room and started punching me with his closed fist, about 5 or 6 six times. I said I would call the police Greg said I would be dead before they (cops) would show up. he then told me to get up. I didn't get up as fast as he wanted to so he pulled me up by my hair.

Greg wanted to show me what I wasn't doing so he told me to hurry up or he would push me down the stairs so I hurried down the stairs. When he was done showing me went ^{back} upstairs into the master bedroom and I layed down on the floor and Greg asked if I wanted to sleep on the bed. I asked if it was because he was feeling guilty he agreed.

Page 2 of 2

WITNESS R BACA 184 SIGNED Lyn Horcoff
(PERSON MAKING STATEMENT)

POL 68 REV 1/2009

17

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 65053-0-1
)	
GREGORY SHEARER,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20TH DAY OF OCTOBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SHANNON CONNOR
WHATCOM COUNTY PROSECUTOR'S OFFICE
311 GRAND AVENUE
BELLINGHAM, WA 98227

- [X] GREGORY SHEARER
7945 KENDALL ROAD
MAPLE, WA 98266

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF OCTOBER, 2010.

x *Patrick Mayovsky*

FILED
COURT OF APPEALS
2010 OCT 20 PM 4:04