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REC'D
JUL 29 2014
King County Prosecutor
Appellate Unit

NO. 71523-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

GYORGY ZATLOKA,

Appellant.

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

The Honorable Douglass North, Judge

BRIEF OF APPELLANT

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8
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APPELLATE UNIT

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issue Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural Facts</u>	1
2. <u>Substantive Facts</u>	2
C. <u>ARGUMENT</u>	8
THE TRIAL COURT ERRED IN ALLOWING THE JURY TO CONSIDER HEARSAY THAT BOLSTERED THE COMPLAINING WITNESS' CREDIBILITY.....	8
a. <u>Jorgensen's Statement Was Hearsay Because the Jury Was Not Instructed to Limit its Consideration to a Non-Hearsay Purpose</u>	9
b. <u>Admission of the Comment Prejudiced Zatloka</u> ...	11
c. <u>Alternatively, Counsel Was Ineffective in Failing to Request a Limiting Instruction</u>	13
D. <u>CONCLUSION</u>	14

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Micro Enhancement Int’l, Inc. v. Coopers & Lybrand, LLP,</u> 110 Wn. App. 412, 40 P.3d 1206 (2002).....	11
<u>State v. Aaron,</u> 57 Wn. App. 277, 787 P.2d 949 (1990).....	10
<u>State v. Aho,</u> 137 Wn.2d 736, 975 P.2d 512 (1999).....	13
<u>State v. Athan,</u> 160 Wn.2d 354, 158 P.3d 27 (2007).....	9, 11
<u>State v. Babich,</u> 68 Wn. App. 438, 447, 842 P.2d 1053 (1993).....	9
<u>State v. Barragan,</u> 102 Wn. App. 754, 9 P.3d 942 (2000).....	14
<u>State v. Bourgeois,</u> 133 Wn.2d 389, 945 P.2d 1120 (1997).....	12
<u>State v. Demery,</u> 144 Wn.2d 753, 30 P.3d 1278(2001).....	10
<u>State v. Dixon,</u> 37 Wn. App. 867, 684 P.2d 725 (1984).....	12
<u>State v. Donald,</u> 68 Wn. App. 543, 844 P. 2d 447 (1993).....	11
<u>State v. Fisher,</u> 165 Wn.2d 727, 202 P.3d 937 (2009).....	8
<u>State v. Garcia,</u> 179 Wn.2d 828, 318 P.3d 266 (2014).....	8

State v. Halstien,
122 Wn.2d 109, 857 P.2d 270 (1993).....11

State v. Lamb,
175 Wn.2d 121, 285 P.3d 27 (2012).....8

State v. Thomas,
109 Wn.2d 222, 743 P. 2d 816 (1987).....13

OTHER JURISDICTIONS

Strickland v. Washington,
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....13

State v. Smith,
162 Ohio App.3d 208, 832 N.E.2d 1286 (2005).....10

RULES, STATUTES, AND OTHER AUTHORITIES

ER 105.....10

ER 801.....9

ER 802.....9

Const. art. I, § 22.....13

U.S. Const. amend. VI.....9, 13

A. ASSIGNMENTS OF ERROR

1. The court erred in overruling appellant's objection to hearsay regarding allegations appellant had beaten his wife.

2. The court erred in failing give a limiting instruction regarding the jury's use of hearsay.

3. Defense counsel was ineffective in failing to request a limiting instruction for the jury's use of hearsay.

Issue Pertaining to Assignments of Error

The trial court overruled appellant's hearsay objection to testimony that a witness "found out" appellant was hitting his wife, presumably to provide context for appellant's own statements when the witness confronted him. Did the trial court err when it failed to limit the jury's consideration of Jorgensen's information to a permissible non-hearsay, non-substantive purpose or was defense counsel ineffective in failing to request such an instruction?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Gyorgy Zatloka with one count of second-degree assault – domestic violence with the aggravating factor that the offense was part of an ongoing pattern of abuse over a prolonged period of time. CP 7-8. The jury found Zatloka guilty as charged

and found by special verdict that he and Mrs. Zatloka were members of the same family or household at the time. CP 72, 73. At a bench trial, the court found an ongoing pattern of abuse and found there were substantial and compelling reasons to depart from the standard range. CP 80, 84. Zatloka had no prior offenses. CP 75. His standard range was, therefore, three to nine months. CP 75. The court imposed an exceptional sentence of 18 months as well as 18 months community custody. CP 77-78. Notice of appeal was timely filed. CP 95.

2. Substantive Facts

Zatloka was born and raised in Hungary. RP 516. He married his wife Klara at age 21, while still in Hungary. RP 516. In 1985, the couple arrived in Seattle after a stay at a refugee camp in Germany. RP 520. Initially, Zatloka was employed in engineering. RP 520-22. However, he lost his job when the start-up company he worked for went bankrupt. RP 520-22. He was also diagnosed with Graves disease, which has, at times over the years, rendered him incapable of working. RP 522-24. He did occasional freelance repair and design work and took care of the business side of his wife's tailoring business. RP 522-24.

Approximately three years ago, his wife was diagnosed with breast cancer. RP 537-38. He testified she became very depressed and began to smoke more, drink alcohol, and cry every day about how much she hated

Zatloka for bringing her to the United States. RP 537-38. He frequently hid from her yelling. RP 541. In spring of 2013, the couple began to discuss the possibility of divorce. RP 550-51.

On June 26, 2013, Zatloka's wife came home from work and began smoking heavily and drinking vodka. RP 553. After several drinks, she started an argument with Zatloka about the dangers of breast reconstruction surgery. RP 555. She began to scream at him, physically blocked him from leaving the room, and began kicking the furniture and hitting the wall with her hand. RP 557. Zatloka began pouring out her beers before she could drink them, and his wife fell to the ground as she tried to twist a beer bottle away from him. RP 559. She also tripped on a bottle as she tried to spit on him. RP 560. She fell to her knees when he backed away as she was hitting him with both fists in the chest and shoulders. RP 560. Zatloka backed away, grabbed the hose from the kitchen sink sprayed his wife with water for a second or two. RP 561.

After that, she became quiet. RP 561. When she went out for a walk, Zatloka followed her at a distance to make sure nothing happened to her. RP 561. While in the park, she fell again down a hill through some bushes. RP 563. In the morning, she did not appear to be injured, and two days later, Zatloka left on a planned vacation. RP 348, 564. When he returned, he was arrested. RP 359-60. While in prison, he was served with

divorce papers, which he was too overwhelmed to respond to. RP 565. He testified he loves his wife and did not want a divorce. RP 566.

Klara Zatloka recalled the night of June 26 differently. She testified that when she got home from work, her husband was packing for a vacation. RP 338. She told him she was resentful that he was taking a vacation because he did not have a job. RP 338. She claimed he grabbed her by the hand, dragged her on her knees 21 feet around the corner into the kitchen, called her a stupid bitch, told her, "you screw up everything," and sprayed her with the kitchen hose. RP 338-39, 343. Her hand began to hurt. RP 343. She could not say what exactly it was, in the course of the grabbing or pulling, that injured her hand. RP 393.

The next morning, her hand was swollen, and she told Zatloka that she would not lie about her injury to protect him. RP 348. On July 5, she went to the doctor and learned her hand was fractured. RP 348-49. Because she was scared, she told the doctor she had injured her hand in a fall. RP 349. She called her son, who convinced her to come and stay with him, and she called the police. RP 349-50, 475-76. She testified she was afraid because Zatloka had previously told her if she wanted a divorce, he would beat her very badly one last time, and then let her go. RP 351.

Later, she told the hand specialist the fracture occurred during an altercation with her husband. RP 352, 487. The Zatlokas' son Gregory

testified his mother came to live with him until she was certain Zatloka was in custody, and is now so afraid that she checks the jail roster before leaving the house. RP 474-75. He testified that, since June 26, 2013, his mother lives in constant fear of her husband. RP 476.

The court admitted past incidents in the Zatlukas' marriage under ER 404(b). The court held the incidents, mostly limited to the past 10 years, were admissible to explain Mrs. Zatloka's delay in seeking medical attention and calling the police, to explain her inconsistent statement to the first doctor that her injury was the result of a fall, to show Zatloka's motive, and to rebut his assertion of accident or mistake. CP 89-90.

Mrs. Zatloka testified that, after a kayaking trip in 2002, her husband beat her causing bruising all over her body. RP 324-26. At the time, Mrs. Zatloka told inquiring friends she was bruised from kayaking. RP 327. Zatloka testified this was the truth, and in fact both of them came back bruised. RP 545. Mrs. Zatloka admitted she did sometimes get bruised from their energetic outdoor activities such as windsurfing. RP 370. However, she testified she lied to her friends at the time out of fear and shame. RP 327.

In 2005, Mrs. Zatloka testified, her husband threw a flashlight at her during an argument, and the battery somehow flew out of the flashlight and struck her in the head, requiring stitches. RP 329-30. Zatloka drove her to

the hospital. RP 330. She testified she told the nurse she was injured playing with the dog because she was ashamed and afraid of Zatluka, who was in the room at the time. RP 331-32. She testified he cried and promised not to hurt her again. RP 332.

Zatluka recalled that the couple were arguing. RP 546. However, he testified he merely swung the flashlight around as he turned to leave, and the bungee cord (that was holding the battery in) somehow released and the battery flew out and struck his wife entirely by accident. RP 546. He explained he regretted that their arguing had led to her accidental injury and told her he would never argue with her again. RP 548. Mrs. Zatluka agreed it was possible her husband did not intend the flashlight battery to hit her. RP 371.

Since that time, according to Mrs. Zatluka, her husband has not hit her, but has instead pushed her, head-butted her, screamed at her, called her stupid, made fun of her Hungarian accent, and told her she would never survive without him. RP 332-34, 384-85. She testified he required her to ask permission before taking either of the family's two cars. RP 387.

A friend of the Zatlukas, Larry Jorgensen, testified he spoke to Zatluka's wife and "found out that George was hitting her." RP 416. The court overruled Zatluka's hearsay objection and motion to strike this testimony. RP 417. When Jorgensen confronted Zatluka, he claimed

Zatloka admitted it and told him that is acceptable in Hungary. RP 417. Jorgensen admitted he did not witness any abuse, this conversation occurred eight years ago, and Zatloka agreed never to do it again. RP 417, 420-21. Zatloka denied this conversation ever happened. RP 533. He recalled only a conversation where he and Larry compared child-rearing practices in the United States and Hungary. RP 533, 594.

Jorgensen's wife Tina testified she saw Mrs. Zatloka's bruises in 2002 after the kayaking trip and her stitches in 2006. RP 423-25. She testified Mrs. Zatloka initially was withdrawn and avoided questions about her injuries, but later told her what had happened. RP 425-26. She described Mrs. Zatloka as crying and fearful and reluctant to do anything about the situation because of her fear. RP 426. Tina Jorgensen also testified Zatloka was very controlling of his wife, frequently talking for her in conversations and insisting she could not speak English properly. RP 427-28. She testified she saw no physical abuse, but claimed she saw Zatloka physically intimidate his wife by yelling at her and backing her into their trailer. RP 431-32.

Another friend testified she also saw the bruises in 2002 and the stitches from the flashlight incident. RP 440-41. She testified Mrs. Zatloka was remote and did not want to discuss what happened at the time. RP 442. She agreed Zatloka often unnecessarily spoke for his wife when she had no

trouble communicating on her own. RP 442-43. The Zatlukas' son testified he also saw the stitches in late 2005, and that when his mother talked to him about the injury, she was frightened and did not know what to do. RP 471.

C. ARGUMENT

THE TRIAL COURT ERRED IN ALLOWING THE JURY TO CONSIDER HEARSAY THAT BOLSTERED THE COMPLAINING WITNESS' CREDIBILITY.

Larry Jorgensen never saw any physical abuse. RP 420-21. Yet he testified he talked to Klara Zatloka and “found out that George was hitting her.” RP 416. Zatloka objected to the hearsay and moved to strike, but the court overruled the objection. RP 417.

Evidentiary rulings are reviewed for an abuse of discretion. State v. Garcia, 179 Wn.2d 828, 846, 318 P.3d 266 (2014). A court abuses its discretion when the ruling is manifestly unreasonable or based on untenable grounds. Id. (quoting State v. Lamb, 175 Wn.2d 121, 127, 285 P.3d 27 (2012)). A trial court abuses its discretion when it fails to abide by the requirements of an evidentiary rule. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

Here, the trial court abused its discretion in overruling Zatloka's objection without limiting the jury's use of the statement to a permissible non-hearsay purpose. The admission of this hearsay statement without a limiting instruction was error that requires reversal of Zatloka's

conviction. Alternatively, his conviction should be reversed because his attorney was ineffective in failing to request a limiting instruction.

- a. Jorgensen's Statement Was Hearsay Because the Jury Was Not Instructed to Limit its Consideration to a Non-Hearsay Purpose.

Hearsay is an oral or written assertion, "other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is inadmissible unless it falls within certain exceptions. ER 802. Hearsay is objectionable because the witness repeating it does not have personal knowledge. State v. Babich, 68 Wn. App. 438, 439-40, 447, 842 P.2d 1053 (1993). Moreover, use of hearsay at trial also implicates a defendant's constitutional rights. The federal confrontation clause of the Sixth Amendment gives a defendant the right to "be confronted with the witnesses against him." U.S. Const. amend. VI.

Jorgensen's testimony that he found out Zatloka was hitting his wife is hearsay. ER 801. Jorgensen testified he had no personal knowledge of any abuse, but learned this from Zatloka's wife. RP 420-21.

Presumably, the court overruled the objection on the grounds that the information was context for Zatloka's own purported statement. See State v. Athan, 160 Wn.2d 354, 385, 158 P.3d 27 (2007) ("Statements not used to prove the truth of the matter asserted, but instead used to provide

context to a defendant's otherwise admissible statement do not violate the Sixth Amendment.") (citing State v. Smith, 162 Ohio App.3d 208, 832 N.E.2d 1286, 1291 (2005)). Jorgensen's testimony was not admissible as substantive evidence of the truth of the matter asserted. ER 801(c). It was not admissible to show prior abuse. It may have been admissible for the limited, non-substantive purpose of showing the context of Zatloka's response.

But the court abused its discretion in failing to properly limit the jury's consideration of this statement. "[W]hen the trial court admits third party statements to provide context to a defendant's responses, the trial court should give a limiting instruction to the jury, explaining that only the defendant's responses, and not the third party's statements, should be considered as evidence." State v. Demery, 144 Wn.2d 753, 761-62, 30 P.3d 1278 (2001). When evidence is admitted for a limited purpose, a limiting instruction is both mandatory (when requested) and of vital importance to the defense. State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990) (citing ER 105¹). A defendant has the right to a limiting instruction to minimize the damaging effect by explaining the limited

¹ ER 105 states, "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

purpose to the jury. State v. Donald, 68 Wn. App. 543, 547, 844 P.2d 447 (1993).

But here, nothing limited the jury's consideration of Jorgensen's testimony. Nothing prevented the jury from taking it as additional confirmation of prior abuse. The mere existence of a permissible use of the evidence does not mitigate the error. "The fact that the statement may serve more than one purpose does not negate its use to prove the truth of the matter asserted." Athan, 160 Wn.2d at 386. Without a proper limiting instruction, the jury was free to see Jorgensen's testimony as further corroboration of the prior incidents and of Klara Zatloka's credibility. See, Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 430, 40 P.3d 1206 (2002) (absent a request for a limiting instruction, evidence admitted as relevant for one purpose is considered relevant for others.). Jorgensen's statement that he learned Zatloka was hitting his wife was hearsay, and the court erred in allowing the jury to consider it as substantive evidence.

b. Admission of the Comment Prejudiced Zatloka.

Evidentiary error requires reversal when "the error, within reasonable probability, materially affected the outcome of the trial." State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). This means the error is prejudicial unless "the evidence is of minor significance in

reference to the overall, overwhelming evidence as a whole.” State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Jorgensen’s statement was not directed at some minor, tangential issue in the case. Discussing the use of hearsay testimony in cases that pit the credibility of an accused against a complainant, this Court has urged that care be exercised to prevent the unfair bolstering effect that occurs when the alleged victim is essentially allowed to put her version of the story before the jury twice. State v. Dixon, 37 Wn. App. 867, 874, 684 P.2d 725 (1984). Admission of this out-of-court statement appeared to confirm Zatloka’s wife’s accusations of past abuse. Allowing Jorgensen to repeat the accusations unfairly bolstered her credibility and undermined his.

Moreover, by overruling defense counsel’s objections to this inadmissible evidence, the court exacerbated the problem. Not only did the court’s ruling do nothing to mitigate the prejudicial effect of this out-of-court statement by an unknown person, by overruling the objection the court essentially put its imprimatur on Jorgensen’s testimony. Because this case came down to a credibility call between Zatloka and his former wife, the admission hearsay that repeated his wife’s accusations likely affected the outcome of the case and this Court should reverse Zatloka’s conviction.

c. Alternatively, Counsel Was Ineffective in Failing to Request a Limiting Instruction.

If this Court finds counsel waived the issue by not requesting a limiting instruction, counsel's failure to do so constituted ineffective assistance. Accused persons are guaranteed the right to effective assistance of counsel. U.S. Const. amend. VI; Const. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P. 2d 816 (1987). Defense counsel is constitutionally ineffective when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). To demonstrate prejudice, the defendant need only show a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Under certain circumstances, courts have held lack of request for a limiting instruction may be legitimate trial strategy because such an

instruction would have reemphasized damaging evidence to the jury. See, State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence). But that theory is inapplicable here. Zatloka had nothing to lose from an instruction reminding the jury that the out-of-court statement that caused Jorgensen to act was not substantive evidence it could consider in determining the relative credibility of the parties in this case.

D. CONCLUSION

The erroneous admission of hearsay rendered Zatloka's trial unfair and requires reversal of his conviction.

DATED this 29th day of July, 2014.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 71523-2-1
)	
GYORGY ZATLOKA,)	
)	
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 29TH DAY OF JULY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GYORGY ZATLOKA
C/O COMPASS HOUSING ALLIANCE
77 S. WASHINGTON STREET
SEATTLE, WA 98104

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF JULY 2014.

X Patrick Mayovsky

COURT OF APPEALS
STATE OF WASHINGTON
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