IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KEVIN M. BREIMON, Appellant.	No. 38381-1-II UNPUBLISHED OPINION

Hunt, J. — Kevin M. Breimon appeals his jury convictions for second degree domestic violence assault and felony harassment (death threat). He argues that (1) the trial court erred in allowing testimony about the victim's prior inconsistent statements after the victim admitted to having made the prior inconsistent statements, (2) his trial counsel's representation was ineffective in failing to object to a victim advocate's testimony about a different prior inconsistent statement without allowing the victim an opportunity to admit or to deny the statement, and (3) the judgment and sentence contains a scrivener's error. Breimon also raises numerous issues in his pro se Statement of Additional Grounds for Review[1] (SAG). We affirm Breimon's convictions and sentence, but we remand for correction of the clerical error in his judgment and sentence.

[1] RAP 10.10.

FACTS

I. Background

A. Victim's Statements to Deputy

On July 5, 2008, Sonia Johnson called Clark County law enforcement and reported that her boyfriend, Kevin Breimon, had injured and threatened her. That same day, Clark County Deputy Sheriff Jeremy Brown contacted Johnson at her ex-husband's house, where Johnson had gone because she was afraid of Breimon. Johnson told Brown that Breimon had assaulted her twice in her home. Johnson was upset, crying, "very shaken up," and appeared fearful.

Brown also noted Johnson's several injuries, which she stated had occurred during the altercations with Breimon. These injuries included: (1) abrasions on her calf and right wrist, (2) bruising to her left shoulder/bicep area, and (3) an obviously swollen finger. Johnson told Brown that Breimon had bent her finger back until it popped. During his contact with Johnson, Brown did not note any indications that Johnson might have been drinking.

B. *Smith* Affidavit

Brown had Johnson complete a *Smith* affidavit[2]—her written statement about the assault and harassment and her written response to numerous written questions, often annotated with additional information.[3] Johnson stated that on July 1, she and Breimon had been arguing.

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[2] A "*Smith* affidavit" is domestic violence victim statement. *State v. Smith*, 97 Wn.2d 856, 651 P.2d 207 (1982). When the victim signs the affidavit under penalty of perjury and certain other factors are met (*see* detail below), *Smith* affidavits are admissible as non-hearsay statements under ER 801(d)(1)(i). *See State v. Nelson*, 74 Wn. App. 380, 386-87, 874 P.2d 170 (1994) (discussing *Smith*, 97 Wn.2d 858-61).

[3] Johnson's *Smith* affidavit is not part of the record designated on appeal.

Breimon grabbed her face and squeezed it so hard she could not breathe; smashed her glasses into her face; and, after noticing some handwriting on her hand, grabbed her finger and bent it backward "until it cracked." Johnson eventually managed to grab her keys and leave when Breimon became distracted.

On July 3, Johnson and Breimon were arguing about her ex-husband's child support payments when Breimon lunged at her, hit the table in front of her, grabbed her face, and told her she did not respect him. Johnson managed to calm Breimon by telling him that she loved him. During this altercation, Breimon threatened to kill Johnson and her ex-husband if they reunited.

Johnson was afraid to return home or to go to work because Breimon knew where she lived and worked and she was "[a]fraid of him breaking [her] doors down." Johnson's written statements were virtually identical to her oral statements to Brown. Johnson signed the affidavit under penalty of perjury.

C. Breimon's Arrest and Statements

Because Johnson had told Brown that Breimon would likely run from law enforcement officers, Brown went to Johnson's apartment to contact Breimon with backup, including a K-9 unit. Breimon was cooperative, and Brown arrested Breimon without incident.

After Brown advised Breimon of his *Miranda*[4] rights, Breimon denied knowing anything about Johnson's injuries or the details of the alleged assaults; he also denied having been verbally or physically abusive to Johnson that week. Although Brown had mentioned to Breimon that the alleged incidents had occurred that week, Brown had not told Breimon exactly when. Yet

[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Breimon stated repeatedly, "[W]hy would she report *four days later* that I did this?" I Report of Proceedings (RP) at 53 (emphasis added).

D. Victim's Statements to Doctor Jacobson

On July 7, two days after Johnson reported the assault and after Breimon's arrest, she saw Dr. Gail Jacobson about her (Johnson's) injured finger, which X-rays revealed was fractured. Dr. Jacobson found Johnson to be quiet and reluctant to talk about the incident. But she did tell Dr. Jacobson that she had injured her finger when "her boyfriend grabbed her finger and pulled backwards, hyperextending it." I RP at 26. Johnson did not, however, explain why she had waited several days to report the injury.

Dr. Jacobson believed that although there were many ways this injury could have occurred, the injury was consistent with Johnson's explanation. Dr. Jacobson saw no external injuries on Johnson's finger. During her contact with Johnson, Dr. Jacobson did not notice the smell of any intoxicants.

II. Procedure

The State charged Breimon with second degree assault/domestic violence[5] and felony harassment (death threat)/domestic violence.[6] Before trial, Johnson informed the State that she intended to recant her prior statements to Brown and Dr. Jacobson, asserting that (1) Breimon had not assaulted or threatened her, and (2) she had injured her finger by shutting it in a car door.

[5] RCW 10.99.020(5)(b); RCW 9A.36.021.

[6] RCW 10.99.020(5), RCW 9A.46.020(1)(a)(i), RCW 9A.46.020(2)(b)(ii).

A. State's Evidence

At trial, the State presented testimony from Dr. Jacobson, Brown, Johnson, Johnson's friend Stacy Dunn, and victim advocate Amy Harlan.

1. Dr. Jacobson's testimony

Dr. Jacobson testified as described above. Over Breimon's hearsay objections, the trial court admitted Dr. Jacobson's testimony about Johnson's explanation of how she had injured her finger, as statements made for the purpose of medical diagnosis or treatment.[7]

2. Deputy Brown's testimony

Before the State called Brown, and outside the jury's presence, the State raised an issue about the order of testimony. The prosecutor stated, "Obviously, since my victim will be recanting, I'll be using [Deputy Brown's testimony] to impeach her." I RP at 38. The parties discussed whether the State could present Brown's impeachment testimony before Johnson testified and recanted her prior statements on the witness stand. The State asserted that it was not calling Brown solely to offer impeachment testimony. The trial court allowed the State to call Brown before the jury heard Johnson's recantation, apparently limiting this testimony to non-impeachment testimony. Breimon did not object.

On direct examination and later as a rebuttal witness, Brown testified as described above. Brown also testified about the circumstances under which Johnson had filled out the *Smith* affidavit.

[7] ER 803(a)(4).

3. Johnson's testimony

After Brown testified, the State called Johnson. Throughout her testimony, Johnson asserted that she had not wanted the case to go forward and that she did not want to be in court.

Johnson testified that (1) she was currently 36 years old; (2) she had known Breimon since she was 15; (3) they had been in a romantic relationship from the time she was 15 until she was 20; (4) they had two children, who were now 16 and 17 years old; (5) she and Breimon were apart for about 13 years, but they had since reestablished the relationship; (6) Breimon was living with her at the time of the alleged incidents even though he was not an authorized tenant; (7) her landlord had threatened her with eviction for allowing an unauthorized person to live in her apartment; (8) she (Johnson) had been afraid of Breimon during their previous relationship but was not currently afraid of him; and (9) she still loved and cared for Breimon.

Johnson admitted that she had told Brown that Breimon had assaulted, injured, and threatened her, and that she had told Dr. Jacobson that Breimon had injured her (Johnson's) finger. But Johnson claimed that her earlier statements to Brown and Dr. Jacobson and her statements in the *Smith* affidavit had been lies. She asserted that she had lied because she was trying to find a way to get Breimon out of her apartment in order to avoid eviction.

Johnson further asserted that (1) around the time of the alleged incidents, she had been drinking regularly; (2) she had injured her finger some time before she called the police, when she accidentally shut it in a car door after reaching into the car to grab her purse; (3) this injury occurred when she was with her friend Stacy Dunn; and (4) she was drunk when she called the police, reported the assault and harassment, and completed the *Smith* affidavit. Over Breimon's

objections, the State admitted Exhibit 7, the *Smith* affidavit, as substantive evidence under ER 801(d)(1)(i).

4. Stacy Dunn's testimony

Johnson's friend Stacy Dunn, testified that Johnson had called and said that she had had Breimon arrested, that she was drunk, and that she had lied to the police. Dunn corroborated that Johnson had hurt her (Johnson's) finger in Dunn's presence a few days before Breimon went to jail. Dunn further testified Johnson had said that although she (Johnson) had made up the allegations when she called the police, she was unable to recall everything she had said because she had been drunk when she called. Dunn asserted that Johnson had a serious drinking problem.

5. Amy Harlan's testimony

Amy Harlan, a victim advocate from the Domestic Violence Prosecution Center, testified that she had talked to Johnson after Johnson reported the incidents. Johnson had (1) made it clear from the start that she did not want the case to proceed, (2) stated that her statements to the police were lies, and (3) stated that she had intentionally slammed her finger in a car door in order to have an injury to report to the police. Harlan further testified that Johnson had not said that she had been with anyone when she slammed her finger in the car door and that she appeared to be fearful and reluctant to talk. Harlan clarified, however, that Johnson had said she was fearful because she had lied to the police and prosecutor "about him."

B. Defense

After the State rested its case, Breimon moved to dismiss the charges for lack of evidence. He argued that the State had presented only impeachment evidence against its own witness,

Johnson. The State countered that Johnson's *Smith* affidavit provided sufficient substantive evidence to take the case to the jury. The trial court agreed with the State and denied Breimon's motion to dismiss.

Because the trial court had indicated that some of Breimon's numerous prior convictions might be admissible if Breimon chose to take the witness stand, Breimon chose to not testify. He presented no other witnesses.

C. Verdict; Judgment and Sentence

The jury found Breimon guilty of second degree assault and felony harassment based on Breimon's threat to kill Johnson. The jury also returned a domestic violence special verdict on the second degree assault count, but not on the felony harassment count. Although Breimon was convicted by a jury, the judgment and sentence entered by the trial court states that Breimon had pleaded guilty to the charges.

Breimon appeals his convictions and argues that there is a scrivener's error on his judgment and sentence.

ANALYSIS

I. Admissibility of Brown's Testimony about Johnson's Statements

Breimon first argues that it was reversible error for the trial court to allow Brown to testify about the content of Johnson's prior inconsistent out-of-court statements after Johnson admitted to having made these prior inconsistent statements and had testified about the content of these statements. Breimon contends that allowing Brown to reiterate Johnson's prior inconsistent statements unduly emphasized them. Any such error was clearly harmless.

A. Standard of Review

We review a trial court's admission of evidence for abuse of discretion. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). But the erroneous admission of evidence is not grounds for reversal "unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). Such is not the case here.

B. Harmless Error

Even assuming, without deciding, that the trial court should not have allowed Brown to testify about Johnson's prior inconsistent statements, any error was clearly harmless. Johnson admitted that she had made these prior inconsistent statements to Brown. The trial court also admitted Johnson's *Smith* affidavit, which contained essentially the same statements, as substantive evidence. Because the jury was thereby well aware of what Johnson had previously told Brown about the incident, independent of Brown's testimony, there is no reasonable probability that Brown's testimony about the content of Johnson's prior statements materially affected the trial's outcome.

C. Alleged "Vouching"

Breimon further argues, however, that Brown's testimony was particularly harmful because it suggested that Brown was "vouching for the credibility of [Johnson's prior] statements" and this was compounded by Brown's status as a law enforcement officer creating a

"'special aura of reliability.'" Br. of Appellant at 8 (quoting *State v. Demery*, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001)). Again, we disagree.

Given that Johnson (1) had admitted to having made these statements to Brown with full knowledge that Brown was a law enforcement officer, (2) had made identical statements in her *Smith* affidavit and signed the affidavit under penalty of perjury, and (3) had made similar statements to Dr. Jacobson, Breimon does not persuade us that Brown's mere status as a law enforcement officer would likely have caused the jury to give extra weight to his testimony about the content of Johnson's statements to him. Again, any error in admitting Brown's testimony about the content of Johnson's statements was harmless.

Brown did, however, offer additional testimony about the circumstances under which Johnson made these statements and her demeanor at that time. We agree with Breimon that these aspects of Brown's testimony could have enhanced the credibility of Johnson's prior statements. But Brown's testimony about Johnson's demeanor and the circumstances of her prior statements were factual evidence that was admissible independent of Brown's testimony about the content of Johnson's statements. Accordingly, we hold that even if the trial court erred by admitting Brown's testimony about the content of Johnson's prior inconsistent statements, any such error was harmless.

II. No Ineffective Assistance of Counsel

Breimon next argues, through appellate counsel, that his trial counsel provided ineffective assistance in failing to object to improper impeachment testimony, namely Harlan's testimony that Johnson had stated that she (Johnson) had intentionally slammed her finger in the car door "so

that she would have a story to tell law enforcement." Breimon contends that this testimony was improper impeachment and that it was highly prejudicial because (1) Johnson testified that she had accidentally, as opposed to intentionally, slammed her finger in the car door; (2) the State failed to give Johnson the opportunity to explain or to deny this statement and, thus, failed to lay a proper foundation for this testimony; and (3) Harlan's contradictory testimony likely affected the jury's evaluation of Johnson's credibility, a core issue at trial. This argument fails.

Breimon also raises several additional ineffective assistance of counsel claims in his SAG. These arguments also fail because they either depend on facts outside the record or Breimon fails to establish prejudice. We address each in turn.

A. Standard of Review

To establish ineffective assistance of counsel, Breimon must show that (1) his trial counsel's performance was deficient, and (2) this deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). "If either part of the test is not satisfied, the inquiry need go no further." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996) (citing *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856; *State v. Fredrick*, 45 Wn. App. 916, 729 P.2d 56 (1986)), *overruled on other grounds by Carey v. Musladin*, 549 U.S. 70 (2006).

To demonstrate prejudice, Breimon must show that there was a reasonable probability that the outcome of the trial would have been different absent the alleged deficient performance. *State v. Townsend*, 142 Wn.2d 838, 844, 15 P.3d 145 (2001); *In re Personal Restraint of Pirtle*, 136

Wn.2d 467, 487, 965 P.2d 593 (1998). "Reasonable probability" means "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. We review an ineffective assistance of counsel claim de novo, based on the record below. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

B. No Prejudice Shown on This Record

To demonstrate prejudice based on defense counsel's failure to object to Harlan's testimony, Breimon must show that the trial's result would have been different if his counsel had made this objection. *See State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (citing *Hendrickson*, 129 Wn.2d at 80; *McFarland*, 127 Wn.2d at 336-37). Defense counsel's failure to object could have affected the trial's outcome only if the trial court would have sustained the objection had counsel raised it.

In order to determine whether the trial court would have sustained such an objection, the record must show whether Johnson would have admitted or denied having made the statement to Harlan. *State v. Dixon*, 159 Wn.2d 65, 76, 147 P.3d 991 (2006). But these are not facts we can discern from this record. Accordingly, Breimon cannot establish prejudice on this record and his appellate counsel's ineffective assistance of counsel argument fails. *State v. Byrd*, 30 Wn. App. 794, 800, 638 P.2d 601 (1981) ("A personal restraint petition is the appropriate procedure to raise a claim of ineffective assistance of counsel based upon matters outside the record on appeal."); *see also McFarland*, 127 Wn.2d at 335.

C. SAG Ineffective Assistance Arguments

1. Failures to object to hearsay

In his SAG, Breimon also argues that his trial counsel provided ineffective assistance in failing to object on hearsay grounds when (1) the State solicited hearsay testimony by asking Brown why he had contacted Breimon, and (2) Brown responded by stating that he had contacted Breimon after having been "advised that he [Breimon] had injured his girlfriend and threatened her." SAG at 6. Regardless of whether counsel could have successfully objected on this ground, this error was not prejudicial in light of Johnson's *Smith* affidavit and the fact that she admitted having told Brown that Breimon had assaulted and threatened her.

Breimon next argues that his trial counsel should have objected on hearsay grounds when (1) the State asked Brown whether Johnson told him how she had been injured, by whom, and why she was at her ex-husband's home rather than at her own apartment; and (2) Brown responded. Again, given Johnson's *Smith* affidavit and her admission that she made these statements to Brown, any potential error in defense counsel's failing to object to this line of questioning was not prejudicial.

Breimon also argues that his counsel was ineffective for failing to object to Brown's testimony that Johnson had warned him that if he tried to contact Breimon, Breimon would run. But Brown also testified that Breimon did not attempt to run when Brown contacted him (Breimon) at Johnson's residence. Given that Breimon did not attempt to flee and that he had cooperated with Brown, this error, if any, was not prejudicial.

2. Failure to investigate admissibility of prior offenses

Breimon next argues that his trial counsel provided ineffective assistance in failing to investigate fully the admissibility of his (Breimon's) prior offenses and in failing to inform him

properly about which prior offenses would have been admissible had he decided to testify. The record shows that Breimon and his counsel discussed that some of Breimon's prior offenses could be introduced if he chose to testify; but the record does not show the content of this discussion or explain what information defense counsel gave Breimon or what counsel advised him at that time. Without this relevant information, which is outside the record on appeal, we cannot address this issue. *Byrd*, 30 Wn. App. at 800; s*ee also McFarland*, 127 Wn.2d at 335. Accordingly, Breimon's SAG ineffective assistance arguments also fail.

III. Other SAG Issues[8]

Breimon raises several additional issues in his SAG. He argues that (1) the trial court denied him his right to testify on his own behalf by incorrectly informing him that his prior assaults would be admissible if he took the witness stand; (2) the trial court erred when it admitted and considered Johnson's *Smith* affidavit as substantive evidence; (3) the trial court erred when it denied his motion to dismiss for lack of evidence because the evidence was insufficient to support the charges; (4) the trial court improperly shifted the burden of proof during the State's closing argument; and (5) the State committed prosecutorial misconduct by appealing to the jury's sympathy in closing argument and by pursuing these charges after Johnson recanted her statements. These arguments fail, some, because they rely on facts not included in the record designated on appeal.

[8] Both through his appellate counsel and in his SAG, Breimon argues that cumulative error denied him a fair trial. Because we must consider all of Breimon's alleged errors when we conduct our cumulative error analysis, we address this argument near the end of our analysis of his SAG arguments.

A. No Denial of Right to Testify

Breimon argues that the trial court interfered with his constitutional right to testify in his own defense[9] when it "incorrectly" advised him that his prior assault charges could be used against him if he chose to testify. He further argues that even if some of his prior offenses were admissible as impeachment evidence under ER 609,[10] these prior convictions would have been excluded under ER 403,[11] ER 405,[12] or ER 608.[13] We disagree.

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[9] *See* U.S. Const. amends. V, VI, XIV.

[10] ER 609 provides in part:

> (a) General Rule. For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.
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> (b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

[11] ER 403 allows exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

[12] ER 405 provides methods of proving character by reputation or specific instances of character.

[13] ER 608 allows reputation evidence and specific instances of conduct to show witness character and conduct.

Breimon has a lengthy criminal history. CP 94-97. According to the three-and-a-half page declaration of criminal history attached to his judgment and sentence, he has numerous convictions, including the following for assault[14]: (1) a third degree assault committed as a juvenile,[15] (2) ten fourth degree assaults (including six domestic violence (DV) assaults); (3) two or three[16] assaults of no specific degree committed in 1992; (4) two 1992 "simple" DV assaults; and (5) a 1993 custodial assault.

During the State's case-in-chief, the trial court asked defense counsel whether Breimon was planning to testify. Defense counsel responded: "No. Well, we'll ask the Court about that. He has a number of priors, Your Honor. And I do think if he testified, the Court might allow those to come in." I RP at 56. The trial court responded, "I noticed that. And it would probably be opening the proverbial (inaudible) door." I RP at 56. Defense counsel then asked the trial

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[14] The declaration of Breimon's criminal history also includes conviction for the following, mostly misdemeanor, crimes: (1) harassment; (2) resisting arrest; (3) two non-felony violations of a no contact order; (4) felony violation of a no contact order; (5) six first degree drivings while license suspended (DWLS), (6) third degree DWLS; (7) attempt to elude a pursuing police vehicle; (8) three third degree malicious mischiefs (one committed while Breimon was a juvenile); (9) four minor in possession; (10) second degree criminal trespass; (11) three first degree criminal trespasses; (12) two false reportings; (13) two obstructings a law enforcement officer; (14) two possessions of drug paraphernalia; (15) three third degree theft; (16) malicious mischief with no degree specified; (17) urinating in public; (18) taking a vehicle without permission; (19) second degree possession of stolen property; (20) a possession of dangerous weapon; (21) making false statements to a public servant; (22) possession of marijuana; and (23) first degree burglary. CP 94-97.

[15] We note that evidence of juvenile adjudications is not generally admissible under ER 609. ER 609(d).

[16] It appears from the record that one of these assaults may have been listed twice. *See* RP at 94, 96.

court for "a mini ruling on that," stating that he had already advised Breimon against testifying. I RP at 56. The trial court then stated to Breimon:

> [Y]ou understand you have quite a long history of assaults, violation of court orders, and so forth. And should you testify, you could be questioned about your history.

I RP at 57. Breimon responded that he understood this. The trial court then asked him whether he had talked his counsel and decided that he was not going to testify. Breimon responded that he was not going to testify.[17]

Breimon is correct that assault is not a crime involving dishonesty or false statement. *State v. Rhoads*, 101 Wn.2d 529, 533, 681 P.2d 841 (1984). Accordingly, the trial court could not have admitted any of the prior assault convictions under ER 609(a)(2). It also appears that the trial court could not have admitted Breimon's juvenile assault adjudication or his non-felony fourth degree assault convictions and simple assault convictions under ER 609(a)(1). It is important to note, however, that the trial court did not tell Breimon that his prior assaults *would* be admissible under ER 609; rather, it told him that if he testified, there was a *chance* they could be admitted for some unspecified purpose. The trial court's statement was correct.

As for Breimon's 1992 assaults lacking a specified degree and his 1993 custodial assault, we cannot tell from the record whether these were felony assaults admissible under ER 609(a)(1).[18] Nor can we determine whether some of these assaults might fall outside the ER

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[17] Breimon did not discuss what his counsel had told him before bringing this issue to the trial court's attention.

[18] Although the declaration of criminal history does not show that the parties counted the 1992 assaults as points in Breimon's offender score, we cannot tell from the record why this is so.

609(b) ten-year time limit because there is no information in the record indicating when Breimon was released from confinement imposed for those convictions.

Moreover, we cannot address Breimon's related claim that any prejudice caused by admission of these prior convictions would have outweighed their probative value because the record before us on appeal contains no facts showing the nature of these offenses. *See* ER 609(a)(1). In a direct appeal we cannot address issues dependent on facts outside the record. *Byrd*, 30 Wn. App. at 800; s*ee also McFarland*, 127 Wn.2d at 335. Accordingly, Breimon has failed to show that the trial court erred to the extent it warned him that some of his assaults could be admitted as impeachment evidence under ER 609.

And even if some of Breimon's prior assaults would not have been admissible under ER 609, the trial court might have admitted some of the prior assaults if Breimon had opened the door to this evidence during his testimony if he had taken the witness stand. *See e.g. State v. Ortega*, 134 Wn. App. 617, 626-27, 142 P.3d 175 (2006) (defense opened the door to evidence of otherwise excluded prior assault conviction when defendant testified and asserted he had been falsely arrested for the prior assault), *review denied*, 160 Wn.2d 1016 (2007). Nor can we address Breimon's assertion that his prior assaults would have been inadmissible as unduly prejudicial (ER 403) because there is nothing in the record disclosing the details of these assaults; and, without such information, we cannot evaluate how prejudicial these prior convictions might be.

We also disagree with Breimon's assertion that his prior assault convictions were not admissible under ER 405 or ER 608. On the contrary, there are a several purposes for which

these prior convictions could have been relevant other than to prove character or reputation; for example, some of Breimon's past history might have been relevant to whether Johnson reasonably feared that Breimon would carry out his threats against her. That these prior convictions could have been excluded for character or reputation purposes does not establish that they would have been inadmissible for such other legitimate purposes had Breimon testified. We hold, therefore, that Breimon fails to show that the trial court improperly interfered with his right to testify.

B. *Smith* Affidavit

Breimon next argues that the trial court erred when it admitted Johnson's *Smith* affidavit and considered the affidavit as substantive evidence. Again, we disagree.

Johnson acknowledged at trial that (1) she had provided Brown with a *Smith* affidavit in which she stated that Breimon had assaulted and threatened to kill her, and (2) she had signed the written affidavit under penalty of perjury. Johnson claimed, however, that she had been drinking when she gave this statement and that she did not recall whether she had completed the entire form. Breimon objected to the State's motion to admit the affidavit, arguing that (1) it was not clear that Johnson had completed the affidavit, (2) parts of the affidavit were not actually Johnson's statements but merely her responses to leading questions, and (3) some of the questions and responses were irrelevant and prejudicial. The trial court admitted Johnson's *Smith* affidavit subject to the State's verifying that Johnson had completed the entire affidavit. After Brown testified that he had explained the affidavit to Johnson and that Johnson had completed the affidavit herself, the trial court admitted it into evidence.

A *Smith* affidavit is admissible as substantive evidence if (1) the witness voluntarily made

the statement, (2) there were minimal guaranties of truthfulness, (3) the statement was taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause, and (4) the witness was subject to cross examination when giving the subsequent inconsistent statement. *State v. Smith*, 97 Wn.2d 856, 861-63, 651 P.2d 207 (1982). Factors one and four were clearly met here; Breimon does not argue that factor three was not also satisfied. Challenging factor two, however, Breimon suggests that Johnson's drinking and her "nonresponsive" answers to the questionnaire demonstrate that her statement lacked the required minimal guaranties of truthfulness. The record does not support this argument.

That some of Johnson's responses to the questions in the affidavit may have been nonresponsive alone does not establish that Johnson was unable to understand the significance of her statement or that she had signed the statement under penalty of perjury. Furthermore, Brown's testimony that Johnson did not appear intoxicated, did not smell of alcohol, and did not slur her words, and Johnson's testimony that she signed the affidavit under penalty of perjury, establish minimal guaranties of truthfulness and undermine Breimon's assertion that Johnson had been too intoxicated to engage in the *Smith* affidavit process. *See State v. Nelson*, 74 Wn. App. 380, 390, 874 P.2d 170 (statement in *Smith* affidavit advising witness she was signing affidavit under penalty of perjury was sufficient to establish minimal guarantee of truthfulness), *review denied*, 125 Wn.2d 1002 (1994). Accordingly, we hold that the trial court did not err in admitting Johnson's *Smith* affidavit as substantive evidence under ER 801(d)(1)(i).[19]

[19] Citing *State v. Hochhalter*, 131 Wn. App. 506, 128 P.3d 104 (2006), Breimon also argues that the *Smith* affidavit was not admissible because Johnson testified she had fabricated the story. But *Hochhalter* is inapposite because it involved the admissibility of a victim's oral statement as an excited utterance under ER 803(a)(2), not the admission of a *Smith* affidavit. *Hochhalter*, 131

C. Sufficient Evidence

Breimon further argues that the trial court erred in denying his motion to dismiss for insufficient evidence at the close of the State's case. He also argues that the evidence was insufficient to support the convictions. Breimon's arguments focus on his claim that there would not have been sufficient evidence to support the State's case without Johnson's *Smith* affidavit, which he asserts the trial court improperly admitted. We have already held that the trial court properly admitted this affidavit. Thus, Breimon's arguments fail.

Breimon also suggests that the State relied entirely on evidence it used to impeach its own witness. Breimon is incorrect. A *Smith* affidavit is admissible as substantive evidence; thus, this argument also fails. *Smith*, 97 Wn.2d at 862-63.

In addition, Breimon appears to argue that the *Smith* affidavit and Johnson's statements to Brown were not sufficient evidence of the offenses because Johnson testified that she had fabricated her prior inconsistent statements to Brown and that she had been intoxicated when she made those statements. But the jury heard Johnson's recantation and explanation. And it was for the jury to evaluate Johnson's credibility and the weight to give her prior statements and her trial testimony. Clearly, the jury did not believe Johnson's recantation at trial and afforded it little or no weight. We will not review a jury's weight and credibility determinations on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits any reasonable juror to find the essential elements of the crime beyond a

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Wn. App. at 516.

reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A defendant claiming insufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences that may be drawn from that evidence. *Salinas*, 119 Wn.2d at 201. We hold that the evidence is sufficient to support Breimon's convictions.

D. Burden Shifting

Breimon next argues that the State improperly shifted the burden of proof to him and undermined his presumption of innocence. Much of this argument reiterates the insufficiency argument above and does not require independent consideration. But Breimon also argues that the State shifted the burden of proof in its closing argument when it argued that there was a "lack of evidence of drinking by Ms. Johnson." He also seems to argue that this was an improper characterization of the evidence because there was evidence that Johnson was an alcoholic. We disagree.

In closing, the State argued:

> This case for the defendant is all based around the fact that Sonia Johnson is a drunk. She's a drunk. So No. 1, she must not deserve the protections of the law. She's a drunk. Her friend says she drinks every day. To the point that she's throwing up blood. She's just a drunk, every single day she drinks.
>
> And she doesn't remember what she told the police, because she was just too drunk. She was too drunk to remember what she told the police. She was drunk when she gave the statement, that's why she babbled -- she just babbled something off. She has no idea. She's a drunk. So the whole drinking was brought in to cloud the whole issue, this bad person who drinks so much.
>
> The funny thing is there's no evidence of drinking. No evidence whatsoever. You have an officer who's trained to patrol DUIs, to deal with people who are intoxicated on all different levels at all times. And he couldn't even note the odor of intoxication [sic] on her. You have a doctor who is dealing with patients at all times, who has to be able to note whether or not somebody's been drinking to do their job. And she did not even note the odor of alcohol or alcoholic beverages. Neither of them could even -- noted no level of intoxication from the behavior, and neither of them smelled alcohol.

> But today we're to believe she made this story up because she was drunk. She was drunk on the day of the incident, that's what Stacy said. She said she was drunk when she gave the statement to the officers. And, in fact, she says she got to the house of her ex-husband driving. She was so intoxicated, the kind that makes you throw up blood, but she was able to drive to a home and give not one consistent story to an officer, but two. One written. And then two days later, although she can't remember now what she said, give the same statement to the doctor. That's how drunk she was. And neither the officer or the doctor, who are trained in noting intoxication and the odor of alcohol, had noted any of that.

I RP at 134-36.

The State simply argued to the jury that the evidence strongly suggested that Johnson was not intoxicated when she made her statements to Brown and to Dr. Jacobson. In so doing, the State was not shifting the burden to the defense; nor was it mischaracterizing the evidence. The State was merely emphasizing the facts in evidence that showed Johnson was not intoxicated when she made her prior inconsistent statements. Accordingly, we hold that the State neither shifted the burden of proof to Breimon nor improperly undermined his presumption of innocence.

E. No Prosecutorial Misconduct

Breimon next argues that the prosecutor committed misconduct by asking the jury in closing argument to convict based on sympathy for the victim and by pursuing these charges after the victim recanted. This argument also fails.

Breimon refers to the portion of the State's closing argument in which the prosecutor suggested that Johnson had recanted her prior statements because she was afraid. Although such an argument may appeal to a jury's emotions, nonetheless the argument was based on the evidence and it was relevant to Johnson's motive to recant her prior statements to Brown. *See State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991) (in closing argument, prosecutor

has wide latitude in drawing and expressing reasonable inferences from the evidence). We hold that the State's closing argument was not prosecutorial misconduct.

Johnson's prior statements to Brown and to Dr. Jacobson supported the charges, in spite of Johnson's subsequent recantation.

IV. No Cumulative Error

In both his appellate counsel's brief and his SAG, Breimon argues that the errors alleged by appellate counsel and in his SAG amount to cumulative error. Again, we disagree.

The cumulative error doctrine applies when several errors occurred at the trial court level, none of which alone warrants reversal, but the combined errors effectively denied the defendant a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031 (2004); *see also State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Breimon bears the burden of proving an accumulation of errors of sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994). He does not meet this burden here.

Breimon has raised numerous arguments that require evaluation of facts outside the record on appeal. We have held that many of his other arguments fail because he does not establish error. Thus, the only issues we can consider in our cumulative error analysis are those that we noted were potentially error but which we determined were harmless, or those that we have presumed were error but did not result in prejudice. Those issues include Breimon's arguments that: (1) the trial court erred when it admitted improper impeachment testimony from Brown because Johnson testified that she had made these prior inconsistent statements and that these

statements were false; and (2) he (Breimon) received ineffective assistance of trial counsel when his trial counsel failed to object to Brown's numerous hearsay statements. The jury already had for its consideration Johnson's *Smith* affidavit, which contained most of the same evidence that came in through Brown's hearsay statements and the impeachment testimony. Thus, these alleged errors were not prejudicial. Accordingly, we hold that these alleged errors did not result in reversible cumulative error.

V. Scrivener's Error

Finally, Breimon argues that his judgment and sentence erroneously states that he pleaded guilty to the charges. The State concedes that this notation on the judgment and sentence is incorrect. The record clearly supports this concession because Breimon was tried and convicted by a jury. Accordingly, we remand to the trial court for correction of this scrivener's error.

We affirm Breimon's convictions and sentence, but we remand to the trial court for correction of the scrivener's error in the judgment and sentence concerning the basis of Breimon's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

I concur:

Penoyar, A.C.J.

I concur in the result only.

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Quinn-Brintnall, J.