NO. 43235-8

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MAXIMUS MASON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda CJ Lee, Judge

No. 11-1-01921-9

BRIEF OF RESPONDENT

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

1. Did the defendant fail to meet his burden under ***Strickland v. Washington*** of showing both deficient performance and resulting prejudice necessary to succeed on a claim of ineffective assistance of counsel?

2. Did the State include all of the essential elements in the charging document for the crime of harassment?

3. Has defendant failed to show that the trial court abused its discretion when it excluded photographs that were untimely disclosed but did not preclude defendant from testifying to matters that established the same point?

STATEMENT OF THE CASE.

1. Procedure

On May 6, 2011, the Pierce County Prosecutor's Office charged Maximus Dwayne Mason ("defendant") with rape in the first degree, burglary in the first degree, unlawful imprisonment, felony harassment, assault in the second degree, assault in the fourth degree, and malicious mischief in the third degree. CP 1-4. On August 26, 2011, the information was amended to include one count of tampering with a witness. CP 7-10. On November 10, 2011, the information was amended to include under the burglary in the first degree charge that defendant unlawfully and feloniously, with intent to commit a crime against a person... the defendant... was armed with a handgun...with sexual motivation as defined in RCW 9.94A.030. CP 15-18. On February 17,

2012, the State dropped defendant's assault in the fourth degree charge. CP 19-22.

On February 27, 2012, jury trial commenced before the Honorable Linda CJ Lee. 1 RP 1. The jury found the defendant guilty of the following crimes: criminal trespass in the first degree (lesser included), harassment (lesser included), assault in the second degree, and malicious mischief in the third degree. CP 224-223, 3/9/2012 RP 3-4. The jury found the defendant not guilty of the following crimes: rape in the first degree, burglary in the first degree, residential burglary (lesser included), unlawful imprisonment, felony harassment, and tampering with a witness. CP 224-233; 3/9/2012 RP 3-4.

The jury answered "no" to the special verdict question of whether the defendant committed the crime of burglary in the first degree or any lesser crime of burglary in the first degree with a sexual motivation. CP 234-241, 3/9/2012 RP 5. The jury answered "yes" to the question that defendant and Ms. Mason were members of the same family at the time of the commission of the following crimes: any lesser crime of burglary in the first degree (trespass), felony harassment or any lesser crime of felony harassment, assault in the second degree (harassment), and malicious mischief in the third degree. CP 234-241, 3/9/2012 RP 4-6. The jury answered "yes" to the question that defendant was armed with a firearm at the time of the commission of the following crimes: any lesser crime of

burglary in the first degree, any lesser crime of felony harassment, and assault in the second degree. CP 234-241, 3/9/2012 RP 4-6.

On March 16, 2012, the court sentenced defendant to the standard range of 12 months in custody, followed by 36 months for the firearm sentencing enhancement, for a total of 48 months. CP 259-263, 3/6/2012 RP 11. The court sentenced defendant to 364 days for the crimes of criminal trespass, harassment, gross misdemeanor harassment, and malicious mischief in the third degree to run concurrently. CP 259-263, 3/16/2012 RP 12.

On March 23, 2012, defendant filed a timely notice of appeal. CP 264.

2. Facts

Defendant and Ms. Mason married in 1998, had two boys together, and were still married during the time of trial. 2 RP 76-77.

In November 2010, defendant and Ms. Mason separated. 2 RP 78. The two were living separately, with defendant living about three houses away from Ms. Mason. 2 RP 80. In April 2010, defendant was evicted from his residence so he moved in with Ms. Mason for a few weeks. 2 RP 81.

In April 2011, defendant and Ms. Mason got into a physical altercation where he kicked the door down, and pushed Ms. Mason around the room. 2 RP 82. The defendant questioned her about where she had spent the evening and who she had been with. 2 RP 81-82. Ms. Mason

responded that it was none of defendant's business. 2 RP 82. Ms. Mason asked defendant to leave after this incident. 2 RP 82. When defendant moved out, he took his personal belongings, but stored his other items in the garage. 2 RP 83.

In May 2011, Ms. Mason began dating Maurice Taylor. 2 RP 87. On May 4, 2011, Mr. Taylor went to Ms. Mason's home to have an "intimate date." 2 RP 89. Mr. Taylor arrived around 6:00pm and they went straight to Ms. Mason's bedroom to have intercourse. 2 RP 89-90. During this time, the lights in the bedroom were on and the blinds were down. 2 RP 91.

At some point, Ms. Mason heard her dog barking, which indicated to her that someone was outside of her house. 2 RP 93-94. Ms. Mason looked outside and saw defendant as well as her car which the defendant had borrowed from her. 2 RP 93-94.

Ms. Mason saw defendant storm through the yard and head toward the house. 2 RP 95. Ms. Mason immediately warned Mr. Taylor that defendant was outside. 2 RP 95. She put on a football jersey, but did not have enough time to put anything on the lower half of her body. 2 RP 95. Ms. Mason closed the bedroom door to let Mr. Taylor get dressed. 2 RP 95.

When defendant kicked the front door open, Ms. Mason saw a gun in his hands. 2 RP 99-100. Ms. Mason was standing in the living room when defendant came toward her and grabbed her by the neck; then

defendant shoved Ms. Mason's head into the kitchen wall with enough force to create a hole. 2 RP 102-103. Ms. Mason lost consciousness. 2 RP 104.

Mr. Taylor ran out of the house; he heard someone behind him say "I should fucking shoot you," and instructed him to not get into his car. 2 RP 233-234. Mr. Taylor then called the police. 2 RP 236.

Ms. Mason woke up to find herself on the kitchen floor; She went back to the bedroom; defendant followed her there. 2 RP 106. With the gun still in his hand, but without pointing it directly at her face, the defendant said to Ms. Mason, "I should kill you now." 2 RP 107. Defendant grabbed Ms. Mason by her hair and dragged her around the floor by it. 2 RP 108. Defendant also began punching Ms. Mason on the side of her face. 2 RP 113-114. Next, defendant picked Ms. Mason up and threw her onto the bed. 2 RP 107. Defendant grabbed Ms. Mason by the ankles and spread her legs apart. 2 RP 108. As defendant began to unbuckle his pants, he said, "How are you going to just give this away? This is mine. And if I can't have it no one else can." 2 RP 108. Defendant inserted his penis into Ms. Mason's vagina. 2 RP 109. This incident occurred for about 60 seconds, and the defendant did not ejaculate at this point. 2 RP 116. After he withdrew his penis, defendant flipped Ms. Mason onto her stomach and hit her on the tailbone with a fraternity paddle. 2 RP 117-118. The defendant reinserted his penis into her again. 2 RP 121.

When he was done and while still armed with the gun, defendant pulled Ms. Mason outside. 2 RP 123. Ms. Mason started screaming, so defendant took her back inside, then he returned outside. 2 RP 124. Ms. Mason picked up her broken cell phone from the floor, that had been thrown by defendant when he first entered the house, and tried to dial 911. 2 RP 124-127. Defendant also broke two necklaces that Ms. Mason was wearing. 1 RP 130-132. When defendant re-entered Ms. Mason's residence, he started rambling with the gun still in his hand. 2 RP 125-126. The police arrived shortly afterward. 2 RP 125-126.

On May 4, 2011, Officer Wimbles responded to an "unknown trouble." 3 RP 264. Officer Wimbles first came into contact with Mr. Taylor who had informed Officer Wimbles that the call was about intimidation with a weapon. 3 RP 264. Mr. Taylor reported that he was with Ms. Mason at her house when defendant kicked in the door while armed with a handgun; defendant then chased him out of the residence. 3 RP 266. Mr. Taylor related to Officer Wimbles that while he was running to his vehicle, defendant yelled, "I should fucking shoot you; don't get into that car." 3 RP 266-268.

Mr. Taylor took the officers to the house. 3 RP 270. As the officers approached, defendant answered the door, made a "loud noise," then slammed the door shut. 3 RP 270. Officer Michael Clark saw that

defendant had a black handgun in his hand. 4 RP 361-362. Another officer knocked on the door a second time, defendant answered the door, and he was taken into custody. 3 RP 272. The officers found the handgun underneath a dresser in the bedroom. 3 RP 278.

The officers then conducted a welfare check and found Ms. Mason was inside. 3 RP 273. Ms. Mason was scared and crying. 3 RP 273. Her face was severely swollen and her hair was in disarray. 3 RP 273.

Ms. Mason was taken to the hospital, and examined in the emergency room where they performed a rape kit, and took pictures of her face. 2 RP 134. Nicole Albery, a forensic nurse examiner, performed a sexual assault examination on Ms. Mason. 3 RP 179. Ms. Mason appeared exhausted, had swelling on the left side of her face, and swelling on her upper lip. 3 RP 185, 3 RP 178. Ms. Albery performed a "blind vaginal" swab on Ms. Mason, and noticed that there were several lacerations on the vaginal area. 3 RP 172.

William Dean works for the Washington State Patrol Crime Laboratory, tested the swabs and found Mr. Taylor and Ms. Mason's DNA, and someone else's that was unidentifiable. 3 RP 197.

While defendant was in jail, he contacted Matthew Roberts, who then asked Ms. Mason to not cooperate with the prosecution. 2 RP 141.

Defendant wanted Ms. Mason to write a letter that made his character "look good." 2 RP 141.

Defendant testified on his own behalf. Defendant stated that on May 4, 2011, he was not living with Ms. Mason, and did not have permission to enter her home. 5 RP 441. On May 4, 2011, defendant borrowed Ms. Mason's car to get to work and he needed to return the car that night. 5 RP 408. When defendant pulled into the driveway, he noticed a strange car. 5 RP 409-104. Defendant was carrying his gun in his back pocket. 5 RP 410. Defendant began walking toward the garage to check on their belongings when he saw his wife having intercourse with Mr. Taylor through a window. 5 RP 413-414. The defendant then headed toward the house to confront Mr. Taylor and Ms. Mason. 5 RP 415. Defendant denied that he made any statements to shoot Mr. Taylor or that he pointed the gun at Mr. Taylor. 5 RP 420. Defendant testified he and Ms. Mason got into a heated argument and that he pushed her against the wall, which caused a dent. 5 RP 422-433. Defendant admitted to ripping the necklaces off of Ms. Mason's throat, and breaking Ms. Mason's cell phone. 5 RP 460-461. Defendant denied he ever pointed the gun at Ms. Mason or that he had threatened to kill her. 5 RP 427. Defendant also denied having any sexual contact with Ms. Mason that night. 5 RP 435.

C. ARGUMENT.

1. THE DEFENDANT HAS FAILED TO DEMONSTRATE THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *see also* ***State v. Thomas***, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. ***Strickland***, 466 U.S. 668 at 687. The

threshold for the deficient performance prong is high. ***Strickland,*** 466 U.S. 668 at 687; ***State v. Grier,*** 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). "To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome a strong presumption that counsel's performance was reasonable." ***Grier,*** 171 Wn.2d 17 at 33. "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *Id.* at 33.

Second, a defendant must show that he or she was prejudiced by the deficient representation. ***Strickland,*** 466 U.S. 668 at 687. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." ***State v. McFarland,*** 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also* ***Strickland,*** 466 U.S. 668 at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland,*** 466 U.S. 668 at 694. "A court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law and must exclude the possibility of arbitrariness, whimsy, caprice, nullification, and the like." ***Grier,*** 171 Wn.2d 17 at 34; *see also* ***Strickland,*** 466 U.S. 668 at 694-95.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie,*** 110 Wn.2d 263, 751 P.2d 1165 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland,*** 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn,*** 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." ***Strickland,*** 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. ***Mickens v. Taylor,*** 535 U.S. 162, 122 S. Ct. 1237, 152 L.Ed.2d 29 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. ***Strickland,*** 466 U.S. at 489; ***United States v. Layton,*** 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied,* 489 U.S. 1046 (1989); ***Campbell v. Knicheloe,*** 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied,* 488 U.S. 948 (1988).

When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. ***Kimmelman,*** 477 U.S. at 375;

United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. ***Cuffle v. Goldsmith,*** 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the ***Strickland*** test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. ***State v. Thomas,*** 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Defendant alleges that trial counsel's failure to object to the jury instruction defining "recklessness" was ineffective assistance of counsel. Brief of Appellant 16.

Errors of law in jury instructions are reviewed *de novo.* ***State v. Vander Houwen,*** 163 Wn.2d 25, 29, 177 P.3d 93 (2008). Jury instructions are erroneous if they misstate the law. *Id.* A party may not raise a claim of error for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3).

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. ***State v. Colwash***, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. ***State v. Rahier***, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), (citing ***State v. Jackson***, 70 Wn.2d 498, 424 P.2d 313 (1967)). Only those exceptions to instructions

that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. ***State v. Harris***, 62 Wn.2d 858, 385 P.2d 18 (1963).

The defense attorney did not take exception to the trial court's jury instruction defining "recklessness." 6 RP 500-09, 6 RP 527-33. Therefore, the defendant has not preserved this issue for appeal except within the context of an ineffective assistance of counsel claim.

In ***State v. Keend,*** 140 Wn. App. 858, 862, 166 P.3d 1268 (2007), the defendant appealed his second degree assault conviction for punching another man in the jaw. *Id.* at 862-863. The defendant challenged the jury instruction defining "reckless" for the first time on appeal by arguing that his counsel was ineffective for failing to object to this instruction. *Id.* at 863-864. Defendant argued that the last sentence of the "recklessness" instruction misled the jury by creating a mandatory presumption and allowed the jury to convict him if it found that he acted intentionally. *Id.* at 863-865. The instruction given to the jury was taken from 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.03, which stated:

> a person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such a substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Id. at 863-864. The court found that the defendant's argument was without

merit. *Id.* at 865. As a whole, the jury instructions, including the "to convict" instruction and the definitional instructions were clear, accurate, and separately listed. *Id.* at 868. It was also presumed that juries follow all instructions that the trial court gives them. *Id.* at 868.

Similar to ***Keend,*** the defendant is arguing this definitional issue for the first time on appeal under an ineffective assistance of counsel claim. The defendant is also challenging the same definition of "reckless" that the court in ***Keend*** found to be clear and accurate. CP 199 (Instruction 42).

> Reckless was defined as:
>
> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonably person would exercise is the same situation.

CP 199 (Instruction 42).

The RCW definition of reckless is identical to the jury instruction. *See* RCW 9A.08.010.

> In addition, the "to convict instruction" states:
>
> To convict the defendant of the crime of assault in the second degree as charged in count V, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> 1) That on or about May 4, 2011, the defendant intentionally assault C.M.;

2) That the defendant thereby recklessly inflicted substantial bodily harm on C.M.; and
3) That this act occurred in the State of Washington.

CP 197 (Instruction 40).

The defendant's attorney was not deficient when he did not object or propose his own instructions because the jury instructions were correct. As the court stated in ***Keend,*** it is presumed that jurors will follow all of the instructions that the trial court gives them. Therefore, there was no definitional error.

The defendant cites to ***State v. Harris,*** 164 Wn. App. 377, 263 P.3d 1276 (2011). The defendant was convicted of first degree assault of a child for shaking a two month old infant. *Id.* at 279-280. Defendant became irritated with his girlfriend's baby when he started crying, so he picked it up and shook him. *Id.* at 380. Two years after the assault, the baby could not sit up, roll over, speak, and had to eat through a feeding tube. *Id.* at 381. The baby was expected to suffer from these injuries for the rest of his life. *Id.*

On appeal, defendant challenged the denial of a requested instruction on recklessness and argued that the trial court's instructions misstated the law by giving a jury an incorrect definition of "recklessness." *Id.* at 383. Defendant contended that he was prevented from arguing his theory of the case due to the faulty instruction. *Id.* at

383. During closing, the defense counsel's closing argument drew a sustained objection from the State when defense counsel appeared to argue his theory of the case. *Id.* at 385.

Reckless was defined as "a person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a *wrongful act* may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation." *Id.* at 384. The court held that although the portion of this instruction is drawn directly from the culpability statute defining recklessness, RCW 9A.08.010(1)(c), it did not adequately convey the mental state required to convict the defendant for first degree assault of a child. *Id.* at 384. To convict the defendant of first degree assault of a child, the jury had to find that the defendant recklessly disregarded the substantial risk that "great bodily harm" would occur to the child as a result of the defendant's actions under RCW 9A.36.120(1)(b)(i), and not that a "wrongful act" would occur. *Id.* at 385. In addition, the denial of the requested instructions deprived defendant of an opportunity to argue his theory of the case. *Id.* at 385.

In ***State v. Gamble,*** 154 Wn.2d 457, 114 P.3d 646 (2005), the Washington State Supreme Court addressed whether first degree manslaughter was a lesser included offense of second degree felony murder with assault as a predicate felony. ***Gamble,*** 154 Wn.2d at 459.

The Court held that manslaughter was not a lesser included offense of second degree felony murder where second degree assault, RCW 9A.36.021(1)(a), is the predicate felony. *Id.* at 459.

The court in ***Harris*** acknowledged that ***Gamble*** never discussed whether "wrongful act" must be used in place of a specific wrongful act contemplated by the charging statute. ***Harris,*** 164 Wn. App. at 387. As a result, the ***Harris*** court followed a Division One's decision in ***State v. Peters,*** 163 Wn. App. 836, 848, 261 P.3d 199 (2011), holding that a jury instruction relieved the State of its burden to prove each element of a manslaughter charge where the instruction stated that a person is reckless or acts recklessly when he or she knows of and disregards "a substantial risk that *a wrongful act may occur"* rather than that "a substantial risk that *death* may occur." (emphasis added). ***Harris,*** 164 Wn. App. at 387.

This case is significantly distinguishable from ***Harris***. Unlike in ***Harris,*** the injury inflicted in this case is distinguishable. In ***Harris,*** the defendant was arguing that he was not aware of the substantial risk that "great bodily harm" would occur to the baby as a result of shaking the baby. In this case, the defendant is not arguing that he disregarded the risk, but is arguing that he did not assault Ms. Mason. Unlike in ***Harris,*** the State made no objection to the closing argument and the defendant was able to argue his theory of the case. The defense attorney during closing

argument said that defendant may have opened the door, which resulted in hitting Ms. Mason's face, but that what the jury needed to "find under the instruction here is that she suffered substantial bodily harm, which is temporary but substantial disfigurement." 6 RP 593.

Where the jury instructions regarding recklessness were proper, defense counsel was not deficient for failing to object. The defendant has also failed to show that had he objected to the jury instructions, the court would have sustained the objection.

Even assuming ***arguendo*** that the defendant's attorney performed deficiently from failing to object to this one definitional instruction of recklessness, the defendant has failed to show that "but for" the attorney's deficient performance, the outcome of the case would have been different.

The outcome of this case would not have been materially affected even if defendant's attorney had proposed a new definition replacing "wrongful act" with "substantial injury" instruction, and the court had given it. The State presented evidence of the defendant causing substantial injury to Ms. Mason by providing pictures of her face. 2 RP 135-136. The jury heard testimony from Ms. Mason, the officers, the forensic nurse, and were able to reasonably conclude that defendant disregarded the risk that substantial injury would occur.

To focus on the alleged claim that defense counsel's performance was ineffective because defense counsel did not object to this one incident, is to lead the court away from the proper standard of review under ***Strickland*** and its progeny. The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 751 P.2d 1165 (1988). The Sixth Amendment guarantees reasonable competence, not perfection, and counsel can make demonstrable mistakes without being constitutionally ineffective. ***Yarborough v. Gentry***, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L.Ed.2d 1 (2003).

The entirety of the record reveals that defendant received his Sixth Amendment right to counsel. He made appropriate objections. RP 63, 105, 125, 134, 141, 142, 267, 276, 316, 317, 340, 456, 459. The record reflects that defense counsel had a strategy and purpose. He cross–examined the State's witnesses highlighting inconsistencies in testimony, and defense counsel called on defendant to testify that he had permission to enter the house, and that no sexual assault, or physical assault, had occurred. RP 48-50, 70-75, 143-171, 182-187, 189, 202-203, 240-246, 283-290, 292-293, 344-349, 366-369. He made a coherent closing argument. RP 575-597. It is clear that defendant had counsel that represented his interests and who tested the State's case. The defendant was acquitted of rape in the first degree, burglary in the first degree, the

lesser included crime of residential burglary, unlawful imprisonment, felony harassment, and tampering with a witness. CP 224-233; 3/9/2012 RP 3-4. Looking at the entirety of the record, defendant cannot meet his burden on either prong of the ***Strickland*** test.

2. THE JURY INSTRUCTION FOR HARASSMENT CONTAINED THE ESSENTIAL ELEMENTS OF THE CRIME.

The defendant argues that "true threat" is an essential element of harassment that must be included in the charging document. Brief of Appellant at 20. However, the Supreme Court of Washington has recently put this issue to rest in ***State v. Allen,*** _ Wn.2d _, _ P.3d _ (2013) (Slip Opinion 86119-6). The Supreme Court held that the "true threat" requirement is not an essential element of the harassment statute that must appear in the information or "to convict" instruction. *Id.* at 20. Therefore, there was no error in the defendant's information.

3. THE TRIAL COURT PROPERLY EXCLUDED UNTIMELY SUBMITTED PHOTOGRAPHS.

Discovery decisions based on CrR 4.7 are within the sound discretion of the court. ***State v. Hutchinson***, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998). A court will not "disturb a trial court's discovery decision absent a manifest abuse of that discretion." ***State v. Blackwell,*** 120 Wn.2d 822, 845 P.2d 1017 (1993). A trial court abuses its discretion

when its decision is manifestly unreasonable, or when it exercises its discretion on untenable grounds or for untenable reasons. ***State v. Ramos,*** 83 Wn. App. 622, 636, 922 P.2d 193 (1996). Exclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly. ***Hutchinson***, 135 Wn.2d at 882.

CrR 4.7(h)(7)(i) states:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.

A trial court may exclude testimony as a sanction for a discovery violation. ***Hutchinson,*** 135 Wn.2d at 881. The factors to be considered when deciding whether to exclude evidence as a sanction are 1) the effectiveness of less severe sanctions; 2) the impact of witness preclusion on the evidence at trial and the outcome of the case; 3) the extent to which the other party will be surprised or prejudiced by the witness's testimony; and 4) whether the violation was willful or in bad faith. *Id.* at 882-883.

The defendant is alleging that the trial court abused its discretion when it excluded evidence of the photographs. Brief of Appellant 24.

During trial, which began at the end of February 2012, the defendant sought to introduce two photographs of Ms. Mason and defendant together, which were time stamped on December 20, 2010. RP

380. The defendant argued that these pictures were relevant because the pictures showed defendant with Ms. Mason after the couple had separated, but before defendant moved in with Ms. Mason. RP 380. The defendant argued that these photographs indicated that the couple was trying to reconcile, and challenged the theory of the State's case. RP 380-381. The State objected on a number of grounds: 1) they were not timely provided as discovery, and 2) relevance. RP 380.

The court decided to exclude the evidence because the court heard no reasonable explanation with why these photographs were not provided to the State earlier. RP 382. The photographs were taken on December 20, 2010, and the defendant had these photographs in his possession. RP 382. In addition, these photographs were not relevant because they were taken almost five and a half months before the alleged incident in this case, and there were a number of occurrences between the time frame of these photographs and the incident. RP 383. The court also found that these photographs would have prejudiced the State and gave an appearance that the State might have been hiding something. RP 382.

Given the late disclosure and time frame of the photographs, the court reasonably granted the motion to exclude because it could not find any lesser sanction that could have been imposed. RP 384. In addition, the court only excluded the photographs. The court never precluded the

defendant from arguing his theory of reconciliation with Ms. Mason. This information came out in defendant's testimony. RP 402. Therefore, the trial court did not abuse its discretion when it excluded the photographs.

D. CONCLUSION.

The State respectfully requests the Court to affirm the defendant's convictions.

DATED: March 12, 2013.

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

3/12/13
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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: **tnichol@co.pierce.wa.us**

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