70054-5

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NO. 70054-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW SMITH,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. The State concedes the prejudicial domestic violence designation was not a necessary element in the to convict instruction, yet it was included and referred to throughout the jury instructions, denying Mr. Smith a fair trial.

To increase punishment on future offenses, the State pled that the instant offenses were against a family or household member. RCW 9.94A.535(21) (additional points added to offender score for prior offenses where domestic violence designation had been pled and proved). Although the State now concedes that language related to the special allegation did not need to be in the to convict instructions, the to convict instructions included an element of "domestic violence," a pejorative term that was peppered throughout the instructions in this case. *Compare* Resp. Br. at 13 *with* CP 25, 26, 28, 32, 34, 42. Because it was not an element of the charged crimes, there was "no reason to inform the jury of such a [prejudicial] designation." *State v. Hagler*, 150 Wn. App. 196, 202, 208 P.3d 32 (2009). Domestic violence is a particularly pejorative term. *State v. Cross*, 156 Wn.2d 580, 632, 132 P.3d 80 (2006); *Hagler*, 150 Wn. App. at 202. The court's repeated use of this language, including unnecessarily requiring the jury to deliberate on it while determining Mr. Smith's culpability on the

charged acts, misstated the law and denied Mr. Smith a fair trial. Const. art. I, § 3; U.S. Const. amend. XIV; *State v. O'Hara*, 167 Wn.2d 91, 103, 217 P.3d 756 (2009).

As set forth in the opening brief, the issue is one of manifest constitutional error that may be raised for the first time on appeal. *Compare* Resp. Br. at *with* Op. Br. at 12-14. The denial of a fair trial violates the constitutional right to due process. Const. art. I, § 3; U.S. Const. amend. XIV. Further, instructional errors that implicate due process, such as by misstating the law, may be raised for the first time on appeal. *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) (and cases cited therein), *abrogated by State v. O'Hara*, 167 Wn.2d 91.

The State takes the unlikely position that law of the case precludes Mr. Smith from raising the issue on appeal. Resp. Br. at 6-9. But, as even the State recognizes, challenges to jury instructions not excepted to below can be raised for the first time on appeal if the error affects a constitutional right. Resp. Br. at 7. The State also misses the mark in trying to apply the law of the case doctrine against Mr. Smith. The law of the case doctrine dictates that the State bears the burden of proving elements added to the charge in the jury instructions without objection. *State v. Hickman*, 135 Wn.2d 97, 101-02, 954 P.2d 900

(1998). But "a defendant may assign error to elements added under the law of the case doctrine." *Id.* at 102. An "exception to the rule that a jury instruction must be excepted to exists in the case of manifest error affecting a constitutional right." *State v. Salas*, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995) (internal quotation marks omitted). "Constitutional errors are treated specially because they often result in serious injustice to the accused." *Id.* These principles are set forth in the very cases relied on by the State. *See* Resp. Br. at 7 (citing *Hickman*, 135 Wn.2d at 102; *Salas*, 127 Wn.2d at 182).[1]

Such constitutional errors are presumed prejudicial. The State does not satisfy its burden of showing the error was harmless beyond a reasonable doubt. As set forth in Mr. Smith's opening brief, use of the term domestic violence is inflammatory. Op. Br. at 12-13. The phrase was not merely included in an instruction—it was an element of both to convict instructions to be found by the jury and it was peppered throughout the instructions as a whole. CP 25, 26, 28, 32, 34, 42. The State argues any prejudice was harmless because Ms. Mitchell's 9-1-1

[1] Inclusion of "domestic violence" as an element to be proved beyond a reasonable doubt in the to convict instructions and then peppered throughout the instructions is not an "error in definitional instructions." *See* Resp. Br. at 11. Mr. Smith does not assign error to the definition of domestic violence but to the very use of that term and to its prominent inclusion as an element in the to convict instructions.

call established domestic violence was an issue. Resp. Br. at 16. But the State neglects to recognize that Ms. Mitchell denied the veracity of her call. *E.g.*, RP 33-37, 81-82, 84. Moreover, the State's argument ignores the sheer volume of reference to the pejorative term and that the structure of the instructions required the jury to consider it while deliberating on Mr. Smith's underlying guilt.

The court did not need to place the laden term domestic violence in the to convict instruction or throughout the jury instructions. The instructions should have been bifurcated and/or used less prejudicial terminology such as "against a family or household member." The error was not harmless beyond a reasonable doubt, and this Court should reverse the convictions and remand for a new trial.

2. The trial court abused its discretion by admitting four photographs relating to an alleged prior assault of Ms. Mitchell that was not established by a preponderance of the evidence, was irrelevant, and was highly prejudicial.

The trial court allowed the State to show the jury four photographs, including of an injured Ms. Mitchell, purporting to relate to a prior assault by Mr. Smith. *See* Exhibit 6; RP 58-59. As argued in the opening brief, the trial court abused its discretion on three

independent grounds and the erroneous admission prejudiced Mr. Smith.

First, the trial court failed to consider whether the State proved the alleged prior assault occurred by a preponderance of the evidence. This analysis must occur on the record prior to admission of evidence under ER 404(b). *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (setting forth four-part test for admissibility); *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (analysis must be conducted on the record); *State v. Jackson*, 102 Wn.2d 689, 694, 689 P.2d 76 (1984) (emphasizing importance of on-the-record analysis). As it must, the State concedes the trial court did not find the prior assault by a preponderance of the evidence. Resp. Br. at 23. Relying on Ms. Mitchell's testimony that she reported an assault, the photographs themselves, and the issuance of a no-contact order, the State argues there is sufficient evidence for this Court to find the prior assault by a preponderance of the evidence on review. *Id.* But it was the trial court's duty to judge the credibility of Ms. Mitchell's recantation of that prior assault against this evidence to determine whether the jury should have been allowed to view images of what the State purported to be an assaulted Ms. Mitchell. *Accord* Op. Br. at 17-18 (discussing

evidence). Any doubts about admissibility of the evidence, should have been resolved in favor of exclusion. *Thang*, 145 Wn.2d at 642.

The trial court abused its discretion also because Exhibit 6 was irrelevant to Ms. Mitchell's credibility, the non-propensity purpose for which it was admitted. As it did at trial, the State argues that the photographs negated Ms. Mitchell's recantation of the July 30 assault and thereby diminished the credibility of her recantation of the October 4 assault. But the photographs at Exhibit 6 prove neither that an assault occurred on July 30 nor that, if Ms. Mitchell was assaulted, Mr. Smith was the perpetrator. The evidence was also irrelevant because there were no photographs of Ms. Mitchell or her home relating to the October 4 incident. In fact, Ms. Mitchell was not injured on that date. RP 70, 72-75. Consequently, Exhibit 6 did not relate to the October 4 incident except to prejudice the jury in violation of ER 404(b).

Finally, even if the other criteria were satisfied, the trial court abused its discretion by admitting Exhibit 6 because any slight probative value was outweighed by its prejudicial effect. *State v. Smith*, 106 Wn.2d 772, 775, 725 P.2d 951 (1986) (ER 404(b) must be read in conjunction with ER 403). As discussed, even if Exhibit 6 bore some relevance, its probative value was minimal. Exhibit 6 related to a

separate, prior alleged assault—not the October 4 incident that formed the basis of the instant offense. Any slight probative value was further diminished because the State introduced other evidence to impeach Ms. Mitchell's credibility, including the recorded 9-1-1 call and Ms. Martin's testimony that Mr. Smith was in the apartment on October 4 and she heard a commotion upstairs. RP 138-39, 142, 145-46. 148-49, 151-52. While the probative value was minimal, the prejudicial effect of admitting three photographs of Ms. Mitchell's bloodied and bruised shoulder was not. The repetitive showing of gruesome, inflammatory photographs is "look[ed upon] unfavorably" because of the photographs' overly prejudicial nature. *State v. Crenshaw*, 98 Wn.2d 789, 807, 659 P.2d 488 (1983).

The State tries to argue that any error in admitting the photographs was harmless. But its argument fails. As the State emphasized in closing argument, Ms. Mitchell's credibility was a key issue for the jury in determining Mr. Smith's guilt. RP 58, 80, 214-16, 225-26. In fact, Ms. Mitchell was "the sole source of all th[e] information about the [alleged] assault." RP 240-41. It cannot be said that the admission of repetitive photographs of Ms. Mitchell's alleged injuries from a prior alleged assault did not materially affect the verdict

within reasonable probabilities. Moreover, even if the prejudice is somehow insufficient to merit reversal on its own, Mr. Smith has alleged cumulative error denied him a fair trial. Op. Br. at 25-26. The State concedes this issue by failing to address it. *State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) (issue conceded where no argument set forth in response).

3. The State concedes that the judgment and sentence must be cleansed of all reference to the vacated assault conviction.

The State concedes that pursuant to *State v. Turner*, 169 Wn.2d 448, 454, 466, 238 P.3d 461 (2010), the judgment and sentence should be remanded with directions to enter a corrected judgment and sentence that removes all reference to the vacated assault conviction. *See* Resp. Br. at 29-30. For the reasons set forth in the parties' briefing, this Court should accept the State's concession.

B. CONCLUSION

As set forth above and in the opening brief, Matthew Smith's convictions should be reversed because he was denied a fair trial when the court instructed the jury that "domestic violence" is an element of the offenses and included the inflammatory term throughout the instructions, because prejudicial photographs were improperly admitted

and because the court's instruction on the reasonable doubt standard misstated the prosecution's burden of proof, confused the jury's role, and denied Mr. Smith his right to a fair trial. These errors warrant a new trial standing alone or in the cumulative. In the alternative, the parties agree the matter must be remanded to allow all reference to the vacated assault conviction to be removed from the judgment and sentence.

DATED this 21st day of March, 2014.

Respectfully submitted,

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Washington Appellate Project
Attorney for Appellant

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DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 70054-5-I
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MATTHEW SMITH,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF MARCH, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	MATTHEW SMITH 1442 SWEETBAY CT BELLINGHAM, WA 98229	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF MARCH, 2014.

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