

NO. 43235-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

MAXIMUS MASON,

Appellant.

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

The Honorable Linda CJ Lee, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Ineffective assistance of counsel deprived appellant of his right to a fair trial in relation to the second degree assault conviction.

2. The information is defective because it omits an element of the harassment offense.

3. The trial court abused its discretion by excluding defense evidence because it was not timely disclosed.

4. The trial court abused its discretion by excluding defense evidence because it was not relevant.

5. The trial court abused its discretion by excluding defense evidence because it prejudiced the State.

Issues Pertaining to Assignments of Error

1. Is reversal of the second degree assault conviction required because defense counsel was ineffective in failing to object to a jury instruction that defined recklessness in a manner that relieved the State of proving an element of the crime beyond a reasonable doubt?

2. Is reversal of the harassment conviction required because the State failed to allege the "true threat" element of the crime of harassment in the information?

3. The trial court excluded late-disclosed photographs showing the wife/victim of several crimes involving domestic violence in a romantic pose with her husband/defendant at a party after the couple had separated at the wife's request, and at a time the wife claimed to no longer be interested in reuniting with her husband.

Did the trial court abuse its discretion under CrR 4.7, and ERs 401-403, by excluding the evidence?

B. STATEMENT OF THE CASE

Cheryl Miller Mason married the appellant, Maximus Mason, in 1998. The couple has two sons together. 1RP 76-77.¹ They separated in November 2010 at Miller Mason's request. 1RP 78. They each rented houses on the same block in Tacoma. 1RP 143, 389. The boys lived with Miller Mason, but Mason was permitted to visit the boys when he could. 1RP 79-80.

Mason was evicted from his residence in April 2011. 1RP 143-44. He moved back in with Miller Mason for a few weeks, during which time the couple shared a bed. 1RP 144, 391-92, 395. Mason moved his

¹ The verbatim report of proceedings is cited as follows: 1RP -- six sequentially paginated volumes covering 2/27, 2/29, 3/1, 3/5, 3/6, 3/7; 2RP -- 2/28; 3RP -- 3/9; 4RP -- 3/16/2012.

belongings into Miller Mason's house and garage. 1RP 144-45, 396. Mason had his own vehicle, but also had keys for Miller Mason's car and used it with her permission. 1RP 145-46, 397-98. Mason attempted to reunite but Miller Mason told him she was not interested. 1RP 80-82, 145.

One night during this period the couple argued about Miller Mason's whereabouts. According to Miller Mason, Mason kicked her door in and pushed her. Miller Mason asked him to leave, which he did. 1RP 82, 85. Mason then stayed with a friend, but left much of his property at Miller Mason's house and garage. 1RP 82-84. Mason may have had a key to the garage, but did not have a key to the house. 1RP 84. Miller Mason no longer permitted Mason to visit unannounced. 1RP 85-86.

In early May, Miller Mason and Mason agreed to initiate dissolution proceedings. 1RP 87. By then, Miller Mason was romantically involved with Maurice Taylor. 1RP 87-88. On the night of May 4, 2011, Miller Mason and Taylor had consensual sex in Miller Mason's bed. 1RP 89-91, 224-27. As the two lay in bed, Miller Mason's dog began to bark. Miller Mason got out of bed, looked out a window, and saw Mason walking in her front yard. 1RP 91-94. She saw he had brought her car back after having it that day. 1RP 94. Miller Mason

alerted Taylor to Mason's presence, threw on a football jersey, closed her bedroom door, and came out into the living room. 1RP 95-99, 229.

According to Miller Mason, Mason kicked the door in and approached his wife. He had a gun in his hand. 1RP 99-100. Taylor, meanwhile, was frantically getting dressed in the bedroom. He could not identify who came into the house, but did see the person had a handgun. 1RP 230-32, 243-44. Taylor saw Miller Mason backing away from a man toward the back of the house. 1RP 232-33. When they passed the bedroom doorway, Taylor ran toward the door to get out of the house. 1RP 236-37, 243-45. He saw a silhouette approaching him, and the person told him not to go to his car. 1RP 232-34. Taylor ran off. 1RP 247.

After running for about a block, Taylor stopped and called police. 1RP 61-63, 235-36, 264-68. Taylor told police that in addition to the command not to go to his car, the man with the gun also said, "I should fucking shoot you." 1RP 267-68.

Meanwhile, Miller Mason said Mason grabbed her throat with both hands and backed her into the kitchen very quickly. Miller Mason's head slammed into the kitchen wall and she temporarily lost consciousness. 1RP 102-04, 159-60. She quickly awakened, at which point Mason punched her several times in the face. 1RP 108, 113-14.

Mason briefly went outside while Miller Mason got up and went into her bedroom. 1RP 104-05, 160-62. Mason reentered the house, with gun still in hand. He was angry Miller Mason had sex with another man in their bed. 1RP 105-06. Mason grabbed Miller Mason by the hair and said, "I should kill you right now." 1RP 107-08, 158-59.

According to Miller Mason, Mason tossed her onto the bed, forcibly spread her legs open, and inserted his penis into her vagina. He pulled it out within a minute without ejaculating. 1RP 116. He turned her over onto her stomach and "whacked" her back with a fraternity paddle he had left behind when he moved. 1RP 117-19. Mason then again forcibly inserted his penis into her vagina. 1RP 120-21, 171, 269-70. He was "mean" to Miller Mason, who said the sex was painful. 1RP 122.

Mason grabbed her by the hair and dragged her outside. He had the gun in his hand. Miller Mason screamed, so Mason dragged her back into the house. 1RP 123-25. He took her into their younger son's bedroom, threw her onto the bed, and began to pace around and say things. 1RP 126. The dog again began to bark, so Mason left the room and Miller Mason followed. Mason opened the door and Miller Mason saw several police officers outside the house. 1RP 126-27. One of the officers observed Mason holding a semiautomatic pistol in his hand. 1RP 360-62,

368-70. Mason slammed the door closed and ran into Miller Mason's bedroom in the back of the house. 1RP 65, 68, 126-27, 360-62.

At some point during the incident, Mason broke Miller Mason's cell phone. 1RP 126-29. He also broke two necklaces she was wearing that night. 1RP 130-34, 281, 333. The incident ended when Mason opened the door and surrendered to the police. 1RP 46-47, 68, 74, 272, 362-63.

After securing the scene, officers took a statement from Miller Mason. 1RP 274-79, 283-93. They searched the house and an officer found a handgun under a dresser in Miller Mason's bedroom. 1RP 278-79, 331-32, 341-42.

Contrary to Miller Mason's above version of events, Miller Mason told the officer she saw Mason chase Taylor away from the house. 1RP 283. She also disclosed that when Mason tried to have intercourse the second time, she fought him off before penetration occurred. 1RP 278, 288.

Miller Mason went to the hospital, where she was examined by an emergency room nurse and a forensic nurse examiner. 1RP (2/29) 175-78, 206-08.² She told the emergency room nurse that Mason sexually

² There is an overlap the transcripts for the February 29 and March

assaulted her and hit her in the face. 1RP 207-08. Her face was bruised and swollen and she complained of a headache. 1RP 209-10. She had bruises on her forearms, ankles, thighs and wrists. Miller Mason also complained of pain in her genital area. 1RP 216-17. After a CT scan, she was diagnosed with a concussion syndrome. 1RP 134, 211. Miller Mason said the facial pain and swelling lasted two weeks. 1RP 135, 37.

The forensic nurse examiner collected samples from Miller Mason's overall genital area, anal area, and inside her vagina. 1RP 134, 137-38, (3/1) 179-80. Taylor's DNA was found in each sample. Mason was excluded as a contributor. 1RP (3/1) 195-200. Contrary to her other reports, Miller Mason told the nurse examiner her perpetrator penetrated her anus with his penis. 1RP (2/29) 189.

The State charged Mason with first degree rape, first degree burglary, unlawful imprisonment, felony harassment, second degree assault, third degree malicious mischief, and tampering with a witness.³

proceedings. The former ends at page 197, while the latter begins at page 166. To avoid confusion regarding portions contained within the overlap, the particular volume is identified.

³ Because the jury found Mason not guilty of tampering with Miller Mason, the facts relating to that charge have been omitted. CP 233.

Mason testified he owned a gun for protection because the family garage had twice been burglarized. 1RP 392-95. Miller Mason gave him a house key when he moved back in April 2011. 1RP 396. Throughout the separation period and after moving back in, Mason took the boys to and from school. 1RP 389-90, 397, 405-07.

Mason admitted that when he moved back in with his wife, they often argued about the "back-and-forth nature" of their marriage. 1RP 400-02, 443-44. Because of the arguments, Mason decided to temporarily move out of Miller Mason's home and stayed with a friend. 1RP 402-03. He left most of his belongings at Miller Mason's home and garage. 1RP 403-04. He still had a key to her house and continued to come over. 1RP 406-07. When he did, he routinely checked the garage to see if it had been broken into. 1RP 405-06.

On May 4, 2011, Mason used Miller Mason's car with her permission. 1RP 407-08. The agreement was that Mason would return the car that night, which he did. 1RP 408-10. He parked in front of the house and walked back to check the garage. 1RP 410-13. As he passed by on the side of the house, Mason looked in Miller Mason's bedroom window and saw his wife and Taylor having sex. 1RP 414. Mason turned around and headed for the front door, intending to confront Miller Mason

and Taylor. A handgun he had with him for safety remained in his pocket. 1RP 415. Mason was hurt and upset. 1RP 417.

Mason opened the front door with the key, but the chain kept the door from opening more than about 12 inches. 1RP 415-16, 447. When he pushed the door with his shoulder, it flew open. 1RP 417. Unbeknownst to him, Miller Mason was standing behind the door. 1RP 417-19. According to Mason, the door hit Miller Mason's face and caused the bruising and swelling. 1RP 448.

They began to argue, but Taylor emerged and Mason focused on him. 1RP 419. Mason told Taylor to leave. The gun remained in his pocket. Taylor walked out and Mason followed him to the porch. Fearful Taylor may have a weapon in the car, Mason told him not to get into it. 1RP 420-22. Taylor walked away. 1RP 422.

Mason went back inside the house and he and his wife resumed their argument. He decided to retrieve some of his belongings because at that point, he was "done with everything." 1RP 422-23. Miller Mason was getting in his way, so he pushed her and the back part of her head hit and dented the kitchen wall. 2RP 423-24, 447-49.

One of the items he planned to take with him was Miller Mason's phone, which he had bought. The phone rang while he held it, and he

slammed it to the floor. 1RP 424. The argument continued as Mason proceeded to the bedroom to gather more things. Miller Mason followed Mason into the bedroom. 1RP 425-26. Mason angrily ripped necklaces from Miller Mason's neck. 1RP 426, 447, 451.

He made at least two trips to the car with items he had gathered up, during which time Miller Mason remained inside. 1RP 427-29. As he collected more belongings, he took the gun out of his pocket and put it under a dresser. 1RP 430-31. He had not brandished the gun during the incident. 1RP 452-53. He also did not have sex with Miller Mason, and did not throw her on the bed, pull her hair, hit her with a paddle, choke her, or punch her. 1RP 436.

When Mason opened the door to leave, he saw police officers in the front yard. 1RP 432-33. One officer had his gun drawn and trained on him. He became scared and closed the door. 1RP 432-34. When an officer called for him to come out, he did. He was immediately arrested. 1RP 434-35.

After hearing this evidence, the jury found Mason not guilty of first degree rape, not guilty of first degree burglary or residential burglary and instead guilty of the lesser included crime of first degree criminal trespass, not guilty of unlawful imprisonment, not guilty of felony harassment and

instead guilty of harassment, guilty of second degree assault against Miller Mason, guilty of third degree malicious mischief, and not guilty of witness tampering. CP 225-33. The jury also found Mason was armed with a firearm during commission of the trespass, harassment and assault. CP 235, 238, 240. Finally, the jury found each of those offenses, as well as the malicious mischief, involved domestic violence. CP 234, 237, 239, 241.

The trial judge sentenced Mason to a standard range term of 12 months for second degree assault, plus 36 months for the firearm enhancement for a total of 48 months. The court imposed 18 months of community custody. CP 245-58; 4RP 11. For the remaining counts, all misdemeanors, the trial court imposed concurrent terms of 364 days in jail, all of which were suspended for two years. CP 259-63; 4RP 12.

C. ARGUMENT

1. THE TRIAL COURT GAVE AN INCORRECT JURY INSTRUCTION ON RECKLESSNESS AND DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT.⁴

The trial court's instruction defining "recklessness" misstated the law, thereby relieving the State of its burden of proving an essential element of the crime of assault. Reversal of the assault conviction is required because counsel was ineffective in failing to take exception to the flawed instruction.

- a. The Jury Instruction Defining Recklessness Misstated The Law And Relieved The State Of Its Burden Of Proof.

Under RCW 9A.36.021(1)(a), a person commits second degree assault if he "[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm." The conduct at issue for second degree assault is Mason's act of grabbing Miller Mason by the neck, shoving her head into the kitchen wall, and allegedly punching her in the face. 1RP 102-04, 108,

⁴ This issue is identical to the issue raised in State v. Johnson, __ Wn. App. __, __ P.3d __, 2012 WL 5992099 (2012). Division One of this Court rejected the claim, finding counsel was not ineffective for proposing the same flawed instruction.

113-14, 159-60, 564.⁵ The "to convict" instruction for second degree assault provides:

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 assaulted 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).

RCW 9A.08.010(1)(c), in addressing general levels of culpability, states, "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 substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation."

Instruction 42 defined "recklessness" as follows:

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

⁵ The prosecutor specifically elected these acts for the second degree assault charge. 1RP 564.

deviation from conduct that a reasonable person would exercise in the same situation.

When recklessness as to a particular result is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that result.

CP 199 (emphasis added).

The italicized portion of Instruction 42 misstates the law. It does not adequately convey the mental state required to convict Mason for second degree assault under RCW 9A.36.021(1)(a). To accurately hold the State to its burden of proof, the instruction should have substituted the term "substantial bodily harm" for the term "a wrongful act."

In State v. Harris, the defendant was charged with first degree assault of a child, which required the State to prove "the person . . . [i]ntentionally assaults the child and . . . [r]ecklessly inflicts great bodily harm." State v. Harris, 164 Wn. App. 377, 383, 263 P.3d 1276 (2011), (quoting RCW 9A.36.120(1)(b)(i)). The first paragraph of the instruction defining recklessness was identical to the one used in Mason's case. Harris, 164 Wn. App. at 384.

To convict for first degree assault of a child, the jury needed to find Harris recklessly disregarded the substantial risk that "great bodily harm" would occur as a result of his actions under RCW 9A.36.120(1)(b)(i), not

that "a wrongful act" would occur. Harris, 164 Wn. App. at 385. The instruction defining recklessness relieved the State of its burden to prove Harris acted with disregard that a substantial risk of great bodily harm would result when he shook the child. Harris, 164 Wn. App. at 387.

A jury instruction defining the recklessness requirement must account for the specific risk contemplated under that statute, *i.e.*, "great bodily harm" rather than some undefined "wrongful act." Harris, 164 Wn. App. at 386 (citing State v. Gamble, 154 Wn.2d 457, 468, 114 P.3d 646 (2005)) ("the risk contemplated per the assault statute is of 'substantial bodily harm'").

The court in State v. Johnson extended Harris to second degree assault as charged in Mason's case. 2012 WL 5992099, at *8-9. The court explicitly held the instruction defining recklessness "should have used the more specific statutory language of 'substantial bodily harm', not 'wrongful act'". 2012 WL 5992099, at *8. The Court concluded the trial court erred in giving the instruction. Id.

Instruction 42 in Mason's case is flawed for the same reason. It needed to account for the specific risk contemplated by the second degree assault statute, *i.e.*, "substantial bodily harm" as opposed to a generic "wrongful act." The instruction relieved the State of its burden of proving

Mason acted with a disregard that a substantial risk of substantial bodily harm would result when he grabbed C.M. by the neck, shoved her head into the wall, and allegedly punched her face.

b. Defense Counsel Was Ineffective For Failing to Object to the Instruction.

Article I, section 22 and the Sixth Amendment guarantee criminal defendants effective representation. Strickland v. Washington, 466 U.S. 688, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); In re Personal Restraint of Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005). Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007).

Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Prejudice occurs if, absent the deficient performance, it is reasonably probable the verdict would have differed. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

Mason's counsel did not take exception to the trial court's jury instruction defining "recklessness." 1RP 500-09, 527-33. Counsel

performed deficiently in failing to object to an instruction that lessened the State's burden of proof.

Counsel has an obligation to research the relevant law. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); State v. Brown, 159 Wn. App. 366, 371, 245 P.3d 776, review denied, 171 Wn. 2d 1025 (2011). Mason's trial commenced more than four months after this Court issued its decision in Harris. As well, Division One issued its opinion in State v. Johnson, which involved the identical issue Mason raises, nearly three months before Mason's trial began. Had Mason's counsel researched relevant law, he would have known about these cases. Counsel performed deficiently by failing to do a minimally competent degree of research.

Counsel's deficient performance prejudiced Mason because there is a reasonable probability the jury's verdict would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Cienfuegos, 144 Wn. 2d 222, 229, 25 P.3d 1011 (2001) (citing Strickland, 446 U.S. at 694). By relieving the State of its burden of proof on the recklessness element of second degree assault, the flawed instruction undermines confidence in the outcome.

The defense to second degree assault was that Mason committed a lesser degree of assault. CP 201-06 (lesser included assault instructions);

1RP 593-94. Mason committed third degree assault if he, under circumstances not amounting to assault in the second degree, "[w]ith criminal negligence, cause[d] bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering[.]" RCW 9A.36.031(1)(f). He committed fourth degree assault if, "under circumstances not amounting to assault in the . . . second or third degree, or custodial assault, he or she assault[ed] another." RCW 9A.36.041(1).

Mason was entitled to the lesser offense instructions because substantial evidence supported the conclusion that a rational jury could find he committed only the lesser offense.⁶ See State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000) (jury instruction on inferior degree offense should be given if substantial evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater).

Under the facts of Mason's case, the difference between second degree and third degree assault or fourth degree assault is small. Both Miller Mason and Mason testified Mason pushed her and she hit her head on the wall. 1RP 102-04, 422-24. But Miller Mason testified Mason

⁶ The State did not object to the lesser assault instructions. 1RP 500-09, 528-33.

grabbed her by the throat with both hands and forced her "really so strong and so fast" that she "plunged" her head into the wall. 1RP 102-03.

Mason, in contrast, testified he pushed her in the chest with one hand because she was getting in his way while retrieving his belongings. 1RP 423. Mason also denied punching Miller Mason in the face. 1RP 436. He said she must have received the bruises to her face from the door when he first entered the house. 1RP 417-19, 448. Under these facts, which are open to differing interpretations regarding culpability as to result, a rational jury could find Mason acted with negligence or less rather than recklessness.

There is no question a "wrongful act" occurred here in some general sense of the term. Any result from pushing a person's head into a wall could be considered wrong. And therein lay the critical problem. Instruction 42 allowed the jury an easy way to find guilt based on Mason knowing and disregarding a substantial risk that a "wrongful act" may occur as opposed to holding the State to its more difficult burden of proving Mason knew of and disregarded a substantial risk that "substantial bodily harm" may occur. Reversal of the second degree assault charge is required because there is a reasonable probability the flawed instruction affected the verdict.

2. A TRUE THREAT IS AN ESSENTIAL ELEMENT OF HARASSMENT THAT MUST BE INCLUDED IN THE CHARGING DOCUMENT.⁷

Speech protected by the First Amendment may not be criminalized. State v. Kilburn, 151 Wn.2d 36, 42, 84 P.3d 1215 (2004). If read literally, RCW 9A.46.020, the statute defining harassment, criminalizes pure speech. Id. at 41. To avoid infringement on protected speech, the harassment statute and its threat-to-kill provision must thus be read to prohibit only "true threats."

"A true threat is 'a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of another person.'" State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010) (quoting Kilburn, 151 Wn.2d at 43). The true threat standard "requires the defendant to have some mens rea as to the result of the hearer's fear: simple negligence." Schaler, 169 Wn.2d at 287.

The information charging Mason with harassment fails to allege he made a "true threat." The information provides:

⁷ In State v. Allen (No. 86119-6), this Court granted review of the issue of whether the existence of a "true threat" is an element of felony harassment that must be alleged in the information.

That MAXIMUS DWAYNE MASON . . . without lawful authority, did unlawfully, knowingly threaten C.M. to cause bodily injury, immediately or in the future, to that person or to any other person, and by words or conduct place the person threatened in reasonable fear that the threat would be carried out, and that further, the threat was a threat to kill the person threatened or any other person, thereby invoking the provisions of RCW 9A.46.02 (2)(b)

CP 20-21.

It does not include the required mens rea that Mason be negligent as to the result of the hearer's fear. A charging document is constitutionally defective if it fails to include all essential elements of the crime. U.S. Const. Amend. VI; Wash. Const. Art. 1, § 22; Hamling v. United States, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974); State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

The Court of Appeals has held the "true threat" allegation need not be included in the charging document because it is definitional rather than an essential element. State v. Allen, 161 Wn. App. 727, 753-56, 255 P.3d 784, review granted, 172 Wn.2d 1014 (2011); State v. Atkins, 156 Wn. App. 799, 802, 236 P.3d 897 (2010); State v. Tellez, 141 Wn. App. 479, 484, 170 P.3d 75 (2007).

Those decisions cannot be reconciled with Schaler and established precedent. The Schaler Court pointedly declined to determine whether Tellez was correctly decided because the issue of whether a true threat was

an element of harassment was not before it. Schaler, 169 Wn.2d at 289 n.6. The Court stated, however, that "[i]t suffices to say that, to convict, the State must prove that a reasonable person in the defendant's position would foresee that a listener would interpret the threat as serious." Id.

Following Schaler and Kilburn, a "true threat" must be deemed an essential element of felony harassment. The State's information is deficient because it omits the required mens rea that Mason be negligent as to the result of the hearer's fear.

3. THE TRIAL COURT ERRED BY EXCLUDING DEFENSE EVIDENCE BECAUSE IT WAS NOT TIMELY DISCLOSED, WAS NOT RELEVANT, AND PREJUDICED THE STATE.

When a proponent of evidence provides late discovery, "[e]xclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly." State v. Hutchinson, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998), cert. denied, 525 U.S. 1157 (1999). The trial court violated CrR 4.7(h)(7)(i)⁸ by excluding two photographs depicting Miller

⁸ CrR 4.7(h)(7)(i) provides that when a party fails to comply with a discovery rule, the trial 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."

Mason and Mason in a romantic pose after the couple had separated in November 2010.

After the State rested its case, Mason disclosed two photographs (exhibits 62 and 63) to defense counsel, who immediately provided them to the prosecutor. 1RP 379, 382, 384-85. The State objected to their admission because they were not timely provided in discovery and were not relevant. 1RP 379, 382.

As an offer of proof, Mason's counsel explained the photos were time stamped December 20, 2010, which was Mason's birthday. The photos, in fact, were taken during Mason's birthday party. 1RP 380. Counsel maintained the photos were relevant because they tended to rebut Miller Mason's testimony that after separation, she had no interest in getting back together despite Mason's contrary desire. 1RP 380-81. The evidence was also relevant, counsel asserted, as tending to show Mason's entry into Miller Mason's home on May 4, 2011, was not unlawful. 1RP 385.

The trial court excluded the photos for three reasons. First, Mason offered no reasonable explanation for the late disclosure. Second, the remedy of allowing the State to recall Miller Mason as a rebuttal witness to explain the activity on the photos would prejudice the State by sending

the jury a message that the State had hidden the evidence. Third, the photographs were not relevant because they captured activity occurring four-and-a-half months before the May 4 incidents. 1RP 382-84, 386.

This Court reviews the trial court's exclusion of the evidence under CrR 4.7 for an abuse of discretion. State v. Kipp, ___ Wn. App. ___, 286 P.3d 68, 77, petition for review filed, No. 88083-2 (2012). The remedy for late disclosure is generally to continue the trial to give the other party time to address the evidence. Kipp, 286 P.3d at 77.

The Hutchinson Court articulated four factors a trial court should consider when deciding whether to exclude a defense witness for a discovery violation: "(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 prosecution will be surprised or prejudiced by the [evidence]; and (4) whether the violation was willful or in bad faith." 135 Wn.2d at 883.

Mason's case is a far cry from Hutchinson, where defense expert testimony was properly excluded because a less severe sanction would not have been effective. 135 Wn.2d at 881, 883. The defense in that case was diminished capacity, but the defendant refused to be evaluated by the State's expert in violation of the trial court's proper discovery order. Id. at

880. A continuance to allow the State to seek examination would have been fruitless because of the defendant's refusal to cooperate. Id. at 881. Furthermore, the State would have been prejudiced by an inability to counter the defense expert testimony with any affirmative evidence in the absence of an examination. Id. at 883. The discovery violation was willful because the defendant's "continual refusal" to undergo an examination was marked by repeated "defiance." Id.

In contrast, a short continuance to permit the State to address the photos and contact Miller Mason for possible rebuttal testimony would have been an effective remedy. See State v. Linden, 89 Wn. App. 184, 195, 947 P.2d 1284 (1997) (continuance to allow defendant time to decide how to respond to late-disclosed impeachment evidence, rather than mistrial, proper remedy), review denied, 136 Wn.2d 1018 (1998). The trial court had already permitted the State to recall Miller Mason for additional testimony after she had left the stand,⁹ so permitting the State to do so again would have resulted in only a brief additional delay. Even where a party fails to timely disclose a witness – a far more serious violation than the one here -- the appropriate remedy is typically

⁹ Miller Mason concluded her testimony on February 29. 1RP 174. The court permitted the State to recall her on March 5 to provide additional testimony regarding the felony harassment count.

continuing trial to give the nonviolating party time to interview the witness. Hutchinson, 135 Wn.2d at 881.

Second, the impact of excluding the evidence was significant. As counsel explained, the status of the relationship post-separation was important because Miller Mason testified that the separation was at her behest, and that when she permitted Mason to stay with her for about two weeks in April 2011, she still wanted to live without him in her house. 1RP 80-82. The photographs would have suggested otherwise, thereby generally impeaching Miller Mason and casting doubt on her testimony that she never gave Mason a key to her house. 1RP 84-85.¹⁰ Such evidence, combined with Miller Mason's admission that Mason slept with her in April 2011, would have provided jurors additional relevant information to determine whether Mason's May 4 entry into Miller Mason's home was unlawful as required to find criminal trespass.

Conversely, the evidence would have lent credence to Mason's testimony he had a key to the house that he used on May 4. 1RP 396-97, 415. The evidence would also have bolstered Mason's testimony that during the time the couple lived together in April, they often argued "about

¹⁰ The jury clearly did not believe all of Miller Mason's testimony, as evidenced by its findings Mason was not guilty of rape, unlawful imprisonment, or felony harassment.

the back-and-forth of the relationship, what are we going to do, if we're going to do it or not going to do it[.]" 1RP 402.

The third Hutchinson factor also favors admission of the photos. While the timing of the disclosure may have surprised the prosecutor, the content of the photos would have certainly not surprised Miller Mason. And contrary to the trial court's reasoning, the State would not have been prejudiced. Defense counsel could have easily dispelled any notion the State tried to hide the photos by simply asking Mason where he got them.

As for the fourth factor, there is no evidence the late disclosure of the evidence was willful or in bad faith. Indeed, although the trial court found Mason gave no reason for the late disclosure, it did not conclude Mason acted in bad faith. Further, given the ease with which Miller Mason could have explained the photos, there would have been little to gain by holding them back.

Finally, the trial court's conclusion the evidence was not relevant is incorrect for the same reasons the impact of excluding the evidence was significant under the Hutchinson test. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. "[T]he threshold for relevance is

extremely low under ER 401[.]" City of Kennewick v. Day, 142 Wn.2d 1, 8, 11 P.3d 304 (2000). This Court reviews a relevance determination for abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 176, 163 P.3d 786 (2007).

The excluded photos tended to cast doubt on Miller Mason's testimony about her relationship with Mason. The evidence also tended to support Mason's testimony he had a key to the home and that the relationship was more "back-and-forth" than Miller Mason suggested. The photos were taken four-and-one-half months before the incident, but after the couple separated at Miller's Mason's request. The trial court abused its discretion by finding the evidence not relevant.

In summary, the Fourteenth Amendment guarantees that criminal defendants be given a meaningful opportunity to present a complete defense. State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994). Excluding evidence relevant to the defense vitiates this fundamental right. It is also a drastic remedy for a discovery violation, and a remedy that was not necessary here. This Court should reverse Mason's convictions and remand for a new trial.

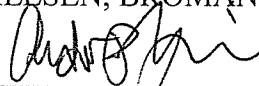
D. CONCLUSION

For the reasons stated, this Court should reverse the convictions and remand for a new trial.

DATED this 13 day of December, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 43235-8-II
)	
MAXIMUS MASON,)	
)	
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 13TH DAY OF DECEMBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MAXIMUS MASON
 DOC NO. 356713
 STAFFORD CREEK CORRECTIONS CENTER
 191 CONSTANTINE WAY
 ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF DECEMBER 2012.

x *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

December 13, 2012 - 2:51 PM

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