

NO. 49058-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD CARL BRUCE, JR.,

Appellant.

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

The Honorable Christine Schaller, Judge

REPLY BRIEF OF APPELLANT

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A. REPLY TO RESPONDENT’S STATEMENT OF THE CASE

1. Respondent’s “Statement of the Case” is misleading.

Respondent’s cursory presentation of facts in the “Statement of the Case” portion of its brief is misleading both because of what is included and because of what is omitted. It is not the “fair statement of the facts and procedures relevant to the issues presented for review, without argument,” specified in RAP 10.3(5).

Respondent, for example, reports, in its “Statement of the Case” that “Bruce was convicted,” but fails to include that he was convicted of second degree assault and an uncontested count of violation of a no-contact order, or that he was acquitted of the first degree burglary charge against him and of interfering with reporting domestic violence. CP 60-61, 91 97; RP 299. In acquitting of the interfering charge, the jury apparently did not find that Bruce meant to take Sanchez’s phone when he left her trailer, as respondent implies he did. Brief of Respondent (BOR) 2. On this point, Sanchez testified at trial that she could not find her phone after Bruce left, but that he came back and returned her phone to her while she was talking to 911. RP 54, 56. Bruce explained, in his testimony, that when he tried to call for a ride home, he saw that he had the wrong phone and returned it to the trailer. RP 195.

For another example, respondent refers to “an altercation” which “turned physical” between Bruce and Sanchez. BOR 1-2. At trial, Sanchez described this incident with Bruce as one which got a “little physical” and “heated.” RP 51-55.

Other details provided by Sanchez – which respondent omits – made what happened during the incident far from clear; at one point in her testimony she even denied her primary accusation that Bruce had his hands around her neck and started to squeeze or choke her. RP 62-64. At that point, Sanchez denied that Bruce ever touched her neck. RP 63. See Opening Brief of Appellant (AOB) 8- 10 (detailed discussion of Sanchez’s testimony).

Instead of providing the details to this Court, respondent asserts that Sanchez’s testimony was “largely” corroborated by her landlord Robert McBride and Thurston County Deputy Sheriff Jordan Potis. BOR 2. McBride, however, testified that he did not see a confrontation nor enter Sanchez’s trailer. RP 72. Deputy Potis testified that when he contacted her Sanchez was upset, had difficulty explaining what happened and declined the chance to give a taped statement. RP 147-151, 155. She wrote a short statement on a form he provided. RP 155. Potis mentioned only a “slight redness” on her neck and shoulders in his report. RP 168, 170.

2. Respondent early reference to Bruce’s prior assault is an attempt to prejudice him.

Respondent’s second sentence in its “Statement of the Case” is:

At the time of the incident, Bruce had been staying with Sanchez in violation of a no-contact order stemming from Bruce’s previous conviction for assaulting Sanchez. CP 163-65.

BOR 1 (emphasis added). This omits that Sanchez went and picked Bruce up from a mutual friend’s house and brought him to her trailer. RP 53-54. And, second, it suggests a misguided attempt by the state to prejudice Bruce in this Court by emphasizing his prior conviction and implying that he committed the prior crime because it is his character to do so.

Bruce set out relevant facts in the “Statement of the Case” portion of his Opening Brief of Appellant. Where necessary, those facts will be discussed in the arguments in reply.

B. ARGUMENT IN REPLY

1. THE TRIAL COURT ERRED IN ORDERING BRUCE TO BE SHACKLED DURING TRIAL AND THIS DENIED HIM HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO THE PRESUMPTION OF INNOCENCE, TO TESTIFY IN HIS OWN BEHALF, AND TO DUE PROCESS OF LAW.

In this appeal, Bruce is challenging the trial court’s allowing the state to shackle him for trial based on a “‘general policy of imposing physical restraints’” on accused persons with a prior conviction because

they “‘may be ‘potentially dangerous.’” State v. Finch, 792 Wn.2d 792 847, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999) (quoting State v. Hartzog, 96 Wn.2d 383, 400, 635 P.2d 694 (1981)). Reliance on such a general policy is a failure to exercise discretion. Id.

Bruce is also challenging the trial court’s failure to adequately consider less restrictive alternatives such as having an extra security guard in the courtroom or removing the restraints while Bruce testified or while Sanchez was not in the courtroom. These alternatives would have allowed Bruce to walk to the witness stand and not have had to be seated before the jury entered and remained on the stand until after the jury was excused. This would have allowed him to testify without leaving the jury to infer that he could not walk to the stand because he was in leg restraints.

Bruce challenges his unjustified shackling as constitutional error – a compromise of the rights to the presumption of innocence, to the assistance of counsel, to testify on one’s own behalf, and to due process of law. It “‘offends the dignity of the judicial process itself.” Finch, at 844.

a. The trial court improperly based its decision on general policy considerations rather than relevant facts about Bruce.

Respondent asserts, in its brief, that the trial court did not abuse its discretion because the court “‘carefully weighed all relevant factors before ordering the least restrictive form of restraints for Bruce”’; and that, even if

Bruce's shackling was unconstitutional, any error was harmless because (1) the restraints were not visible to the jurors and (2) because the jurors did not likely notice that Bruce – unlike any of the other witnesses -- was seated on the stand before they entered and remained seated there when they left the courtroom. BOR 3-7.

The trial court's findings, however, belie respondent's argument. The trial court considered relevant factors and mostly found reasons not to order restraints. The court found that it knew little about Bruce's temperament or character – essentially a finding that there was nothing about either his temperament or character suggesting a need for restraints; that he was of average build and not unusually tall. RP 24, 29. The court found that there was no evidence of disruptive or self-destructive behavior, and that Bruce had made no threats of harm or threats to engage in disruptive behavior. RP 25-26. The court also specifically found that there was no evidence of outside violence or a planned rescue escape or of a large number of people attending trial. RP 24-28. In other words, the court found that there was nothing actually about Bruce personally or his behavior to suggest he would be disruptive in the courtroom. The basis for allowing restraints was simply that his current charges were serious, a prior charge was “inherently disruptive” and had the same complaining

witness, and that he was not in compliance with DOC supervision¹ – generalized policy reasons based on the existence of a prior conviction and speculation of “potential” danger equivalent to the failure to exercise discretion rejected in Finch. These factors would allow routine shackling of accused persons, a blow to the presumption of innocence and the dignity of the courtroom.

b. The court failed to adequately consider less restrictive alternatives to shackling.

Even assuming, without agreeing, that some extra measure of security was needed, the court gave no consideration to having a third guard present as a means of avoiding restraints or of removing the restraints so that Bruce could walk to the witness stand or allowing the restraints only while Sanchez testified. These alternatives would have avoided the jury’s noticing that Bruce, unlike the other witnesses, was seated before they entered the courtroom and remained seated until the left. Most importantly these alternatives would have preserved the constitutional principle that in Washington, a person accused of a crime is entitled to appear at trial free from bonds and shackles. U.S. Const. Sixth

¹ Respondent, like the court notes that Bruce was on “escape” status. This referred to his non-compliance with DOC supervision, not to any evidence that he planned to escape from the courtroom or had escaped from any facility in the past. BOR 4; RP 22, 24-28. The court expressly found that there was no evidence of a planned rescue escape. RP 24-28.

and Fourteenth Amendments; Const. article I, sections 3 and 22 of the Washington Constitution, except in extraordinary circumstances. State v. Finch, 137 Wn.2d at 842.

Bruce's convictions should be reversed because the trial court abused its discretion in ordering shackling and did not give serious consideration to less restrictive alternatives such as removing the restraints while he testified. If shackling was justified for Bruce, accused persons could be shackled routinely rather than only in extraordinary cases.

2. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE EVIDENCE THAT BRUCE HAD A PRIOR CONVICTION FOR ASSAULTING THE SAME COMPLAINING WITNESS IN HIS TRIAL FOR SECOND DEGREE ASSAULT.

A jury's inadvertently hearing that a person accused a crime of violence had committed a similar prior act of violence is the kind of irregularity that has been deemed too prejudicial to be cured even by an instruction by the court to disregard it. State v. Escalona, 49 Wn. App. 251, 255, 74 P.2d 190 (1987); State v. Hopson, 113 Wn.2d 273, 284, 778 P.3d 1014 (1989); State v. Mack, 80 Wn.2d 19, 490 P.2d 1303 (1971); State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968). Contrary to the argument of respondent, evidence of a prior assault is no less likely to engender unfair prejudice when erroneously admitted by the trial court. BOR 12. This is because of the high likelihood that jurors will convict in the belief that the

accused acted consistently with his character in committing the charged crime. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

Here, prior to trial the court granted a defense motion in limine to exclude evidence of Bruce's conviction for second degree assault, domestic violence, against Sanchez. RP 11-12; CP 19-20. The state agreed that it would not elicit evidence of this prior conviction. RP 12.

Then on direct examination, the prosecutor asked Sanchez if she told the defense investigator that she and Bruce were arguing about her ex-husband at the time of the incident. RP 66. Sanchez affirmed that this was "part of" the argument. RP 66. The prosecutor then asked Sanchez if she recalled "telling the private investigator that you were screaming in the defendant's face?" RP 66. Sanchez answered that they "were both [she and Bruce] screaming in each other's face." RP 88.

On cross-examination, defense counsel elicited that on the day before the argument, Sanchez had been to her ex-husband's before picking up Bruce and that she had been upset. RP 110. Defense counsel then asked Sanchez essentially what the prosecutor had already asked, if she told the defense investigator that she was furious at Bruce, screamed and got in his face. RP 113. Defense counsel asked no questions about the subject of the argument or about any discussion or issue having to do with Sanchez's ex-husband on the day of the argument RP 109-123.

Nevertheless, before re-direct examination, the trial court granted the prosecutor's motion to introduce evidence of the prior assault and ruled that defense counsel opened the door by asking on cross-examination if there was an argument and about the intensity of Sanchez's response – questions first asked by the prosecutor on direct examination. RP 131-133. The court ruled that:

[W]hy she would get so upset and agitated and have such an extreme response is the res gestae, could be admissible with the door being opened.²

RP 131-133. This was a different basis than the prosecutor's claim that defense counsel had opened the door by asking about the substance of the argument. RP 126.

The court limited the prosecution to evidence that they were arguing about the prior crime, but not that it was a second degree assault or other facts about the crime. RP 139. The prosecutor nevertheless elicited that Bruce has said something about possibly beating the prior conviction and that she knew it was for having assaulted her.³ RP 142-

² Respondent declined to address res gestae in its brief. BOR 10-11.

³ Respondent asserts that the "questions at issue in no way implied that Bruce's previous conviction was for assault in the second degree, or provide any facts which could lead a juror to believe that Bruce had committed an identical assault." BOR 19. The testimony was:

Q (prosecutor) And did you know what charge the defendant was referring to.

A Assault against me.

143. It was upsetting, she said, because it was like he did not do anything wrong. RP 143.

a. Defense counsel did not open the door.

On this record respondent argues that defense counsel, through questioning about Sanchez's behavior during the incident, essentially put her on trial and asked a question which implied that her visit with her ex-husband started the argument. BOR 7-8. In so arguing, respondent suggests that this Court should ignore the actual record and defer to the trial court who could observe the effect of counsel's questions on the jury. BOR 9. These arguments ignore the obvious facts – set out above -- that the trial prosecutor asked Sanchez – on direct examination -- if she told the defense investigator that she and Bruce were arguing about her ex-husband and that she was screaming at Bruce and getting in his face. RP 66. And that defense counsel never asked about the reason for the argument or if they were arguing about her ex-husband on the day of the incident – or any other day.

The trial court's ruling to set aside the motion in limine and allow the state to introduce evidence of the prior assault permitted the prosecutor

Q (prosecutor) And was the defendant convicted of that? Thus, while the jurors might not have known the degree of assault, they clearly heard that Bruce was convicted of physically attacking Sanchez – because this is what assault means in non-technical usage.

to sandbag the defense, to open the door to the evidence it agreed not to introduce.

Finally, respondent's underlying legal argument appears to be that defense counsel cannot properly elicit information on cross-examination if it might cause the jurors to doubt the credibility or memory of the complaining witness: "It is an all too common defense technique to put the victim on trial in a domestic dispute." BOR 7 (no citation to authority). And then respondent implies that the trial court may or should monitor the jury's reaction to defense evidence, which was admitted without objection, and admit otherwise inadmissible evidence to even things up. BOR 7-9. No authority is cited for this proposition either. Here – to perhaps belabor the point -- the argument is particularly ironic given that it was the prosecutor who elicited testimony from Sanchez on direct examination that part of the argument was about her ex-husband and that she was yelling an in Bruce's face. RP 66, 88.

b. The trial court entered the fray.

Respondent argues that the trial court did not enter the fray because the court based its ruling on the argument presented by the prosecutor. BOR 13-14. The record shows, to the contrary, that the trial prosecutor claimed erroneously that defense counsel asked Sanchez;

about the substance of the argument prior to the assaultive acts,

specifically that Ms. Sanchez was unhappy about her husband and that she was discussing that with the defendant and that she became upset and he became upset.

RP 126. This, the prosecutor argued, left out a “critical phase” where the discussion turned to the previous incident involving Bruce. RP 126. The prosecutor then discussed the res gestae exception, citing State v. Lillard, 122 Wn. App. 422, 93 P.3d 969 (2004), for the proposition that the state should not be forced to present a fragmented version of events. RP 127.

The trial court admitted the evidence on different grounds -- to show why Sanchez would be so upset and have such an extreme reaction; the reason she was so upset was part of the res gestae of the crime.⁴ RP 131-133. In finding a different basis than the one offered by the state for finding that door was open, the trial court entered the fray and assumed the role of prosecutor. State v. Ra, 144 Wn. App. 688, 175 P.3d 609 (2008). The court entered the fray by allowing the prosecutor to agree to by-pass a timely ER 404(b) analysis; the analysis done by the court was based on testimony which had already been elicited by the state.

c. The prejudice outweighed the probative value.

Even if the evidence of Bruce’s prior conviction for assault was part of the res gestae of the crime and the trial court did not improperly enter the

⁴ And if they had heard only part of the basis for the argument that is because the prosecutor elicited the information. RP 66.

fray, the unfairly prejudicial impact of the evidence far outweighed its probative value. Admitting the evidence should require reversal of Bruce's conviction. The prosecutor elicited that Sanchez said she was yelling and in Bruce's face, presumably because it was relevant with or without delving into the substance of the argument. Further, the fact of the prior conviction had little to do with explaining Sanchez's anger; she certainly was well aware of it when she went and picked Bruce up and took him home with her. Whatever probative value the prior assault added was insufficient to overcome the almost-certain likelihood that the jury would use it for the improper purpose of finding Bruce guilty because it was his character to assault Sanchez. The motion in limine was properly granted and the door was not open to the evidence of the prior assault.

3. THE PROSECUTOR'S MISCONDUCT IN VIOLATING THE COURT'S RULING THAT ONLY THE PRIOR CONVICTION AND NO OTHER FACTS ABOUT IT WOULD BE ADMITTED AND IN COMMENTING ON BRUCE'S INVOCATION OF HIS RIGHT TO REMAIN SILENT DENIED BRUCE A FAIR TRIAL.

a. The prosecutor improperly elicited details about the prior conviction from Bruce.

Respondent argues that the trial prosecutor properly asked Bruce if he was upset that he had been convicted of the prior crime, and then asked a series of questions about his actions related to the prior crime: "And you

were upset with her because she had reported the previous incident to the police, isn't that true?"; "And you tried to ask her to not cooperate with the police, didn't you?"; and "You never asked her not to talk to the police?" RP 215.

These questions were not, as respondent argues, evidence to show why Sanchez would be so upset during the incident and have such an extreme reaction at that time. They were questions asked to portray Bruce as the kind of person who would assault Sanchez and then try to persuade her not to cooperate with the police. Respondent admits this: "Bruce was upset that he had been convicted. If Sanchez had not cooperated with law enforcement, there would not have been a previous conviction. Thus, when asking if Bruce was upset, it was a logical extension to determine if he blamed Sanchez for previously cooperating with law enforcement." BOR 19, n.8.

In sum, the prosecutor did not inquire about the details of the prior conviction to explain Sanchez's state of mind at the time of the incident; the prosecutor inquired to explain Bruce's alleged anger and character in committing the charged crime. The court's ruling was clear and clarified further. RP 139-140. The prosecutor's misconduct violating the ruling was deliberate and therefore "flagrant and ill-intentioned." The misconduct denied Bruce a fair trial.

b. The prosecutor improperly commented on Bruce's invocation of his right to remain silent as substantive evidence of guilt.

It is undisputed that the prosecutor not only impeached Bruce with his exercise of his right to remain silent, the prosecutor asked the jury to find him guilty because he exercised those rights. The prosecutor asked Bruce if, after receiving the warnings, he had waived the opportunity to tell Deputy Potis that Sanchez had a seizure, how he needed to get out of the house because she was angry and needed to calm down, or how he walked around, not trying to hide. RP 221. Then, the prosecutor made it completely clear that these questions were meant as substantive evidence of guilt, "And the reason you did that [waived the opportunity] is because you knew that you had strangled her." RP 221. In closing, the prosecutor, after saying that it was "totally fine" for Bruce to have done so because everyone had the right to remain silent, argued that it was important because "you don't know what account he would have given." RP 265-266.

Respondent asserts, however, that the prosecutor's comments during cross-examination and in closing on the exercise of the right to remain silent should be excused because defense counsel opened the door by asking Bruce if Potis had given him the opportunity to make a statement before arresting him and if he thought that his side of the story

wasn't going to matter to Potis. RP 197-198. The cases cited by respondent, however, do not support this conclusion.

In United States v. Robinson, 485 U.S. 25, 30-34, 108 S. Ct. 864, 99 L. Ed. 2d 23 (1988), the case relied on by respondent, the United States Supreme Court held that while the prosecutor may refer to a defendant's opportunity to testify at trial in response to a claim made by the defense that the defendant was unable to tell his side of the story, but that the prosecutor may not use the exercise of the right to remain silent as substantive evidence of guilt:

In Baxter v. Palmigiano, 425 U.S. 308, 319, 96 S.Ct. 1551, 47 L. Ed. 2d 810 (1976), we stated that "Griffin [v. California [380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965)]] prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt." See also, Lakeside v. Oregon, 435 U.S. 333, 338, 98 S. Ct. 1091, 55 L. Ed.2d 319 (1978). In the present case it is evident that the prosecutorial comment did not treat the defendant's silence as substantive evidence of guilt, but instead referred to the possibility of testifying as one of several opportunities which the defendant was afforded, contrary to the statement of his counsel, to explain his side of the case.

Robinson, at 32 . State v. Jones, 111 Wn.2d 249, 759 P.2d 1183 (1983), the other primary case cited by respondent, does not hold that the prosecutor may ask the jury to use the exercise of the right to remain silent as substantive evidence of guilt.

The prosecutor's questioning and argument were constitutional error.

As noted by the court in State v. Charlton, 90 Wn.2d 657, 663, 585 P.2d 142 (1975), where a prosecutor comments in violation of a well-established rule of law, the comment is flagrant and ill intentioned.

c. The misconduct was not harmless.

Respondent argues that the prosecutor's misconduct was harmless because Bruce's defense was not believable. BOR 22-23. The jurors must, however, have had doubts about state's evidence because they acquitted Bruce of both the burglary and interference with reporting charges. The jury convicted only of the conceded violation of a no-contact order charge and the assault charge. The prosecutor's misconduct in using the prior assault as proof that Bruce committed the charged assault and Bruce's invocation of his right to silence as substantive evidence contributed to that guilty verdict.

The introduction of the prior conviction was prejudicial in the extreme for the assault count, and the prosecutor's use of that prior conviction to introduce other evidence of bad character virtually assured that the jury would consider that Bruce was acting consistently with that character in committing the charged assault. The jury likely also considered Bruce less credible because he did not tell Deputy Potis the things he testified to on the witness stand. The prosecutor's deliberate misconduct denied Bruce a fair trial and should result in the reversal of his

assault in the second degree conviction. The errors were constitutional and not harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (the error in admitting the testimony would not be harmless unless shown by the state to be harmless beyond a reasonable doubt).

4. THE TRIAL COURT ERRED IN DENYING THE DEFENSE REQUEST FOR A ONE-COURT-DAY CONTINUANCE SO THAT THE DEFENSE INVESTIGATOR COULD TESTIFY AT TRIAL; THIS DENIED BRUCE THE RIGHT TO PRESENT A DEFENSE AND THE EFFECTIVE ASSISTANCE OF COUNSEL.

In this appeal, Bruce is challenging the trial court's denial of a continuance so that he could present the testimony of an important witness. Respondent argues in its brief that "the only thing that prevented Matthew's testimony was defense counsel's initial belief that his [Matthews's] testimony would be unnecessary, not a court ruling to exclude him." BOR 30. In fact, Matthews's testimony would have been available had the trial court granted a one-court-day continuance or explored other possibilities such as allowing the witness to testify by telephone or Skype. If, however, the fault were to lie with defense counsel then Bruce was denied the effective assistance of counsel which the state and federal constitution guarantee him.

The rights to appear and defend at trial and present witnesses in

one's own behalf are fundamental and Bruce was denied those rights for no adequate reason. The trial court was unwilling to even investigate the availability of jurors if trial were continued, and made no efforts to find an alternate means of obtaining Matthews's testimony, such as by telephone or Skype.

The court denied the continuance because counsel had not raised the issue at the start of trial, because jurors had been told the deliberations would start by Friday and because the defense had not ensured their witnesses would be available. RP 179-180.

As defense counsel explained, however, counsel believed until mid-afternoon on Friday that trial would not be held the following week, and, when he learned that it would start on Tuesday of that following week, he didn't want to ask for a continuance before he knew how critical Matthew's testimony would be. RP 173. Bruce himself had not learned of Matthew's unavailability until shortly before the requested continuance. RP 174, 180-181.

The court's reasons for denying the continuance, particularly in light of defense counsel's explanation does not constitute a compelling basis for denying the continuance. "[N]o state interest can be compelling enough to preclude its [relevant defense evidence] introduction consistent with the Sixth Amendment and Const. art, I, Section 22." Cayetano-

Jaimes, at 298 (quoting State v. Jones, 168 Wn.2d 713,723-724, 230 P.3d 576 (2010) (quoting State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983) (holding that the trial court’s refusal to allow the defendant to present the testimony of the victim’s mother by telephone violated his constitutional right to present a complete defense)).

a. Matthews’s testimony was relevant and important to the defense

The testimony of investigator Dave Matthews was relevant to the defense. Sanchez testified extensively on direct, cross, and redirect examination about what she said or had not said in her interview with Matthews. RP 65-66, 109-119. On cross-examination, Sanchez denied telling Matthews matters which were critical to the defense: that Bruce walked to the front of the trailer to avoid conflict with her, that he acted like he was going to hit her but didn’t, that she “threw an elbow” at him, and that she told Matthews that she had a seizure and when, and that Bruce had put his coat under her head to protect her during the seizure. RP 113-130.

Respondent asserts that these denials were insignificant because Sanchez acknowledged that her statements to Mathews were not consistent with her trial testimony. BOR 27-28. What the record reflects, however, is that Sanchez’s acknowledgements implied that she could not

really confirm that she said the things Matthews reported her as saying:

Q (about what she told Matthes)

A. I guess I did.

...

Q You may have thrown an elbow in a backwards motion?

A No, I don't – no – it all happened – I guess, yes.

...

Q. You don't recall . . .

A No—I don't recall, but if I did, I did.

RP 114-115. This kind of equivocal response from Sanchez and the state's challenge to Matthew's methods, his integrity and the reliability of the interview because it was not recorded or approved by Sanchez, made Matthew's testimony imperative RP 142.

The failure to grant the continuance or explore other alternatives should, as in Cayetano-Jaimes, result in reversal of Bruce's second degree assault conviction.

b. The denial of a continuance denied Bruce the effective assistance of counsel guaranteed by the state and federal constitutions.

According to respondent the "trial court made it clear that by the time Sanchez had testified, it was too late to request a continuance." RP 171-182. No authority is cited to support this as an adequate ruling and it would appear to be contrary to the routine presentation of rebuttal witnesses and the obvious fact that there was nothing in the record to support a ruling that a continuance could not simply have been granted.

Defense counsel informed the court of his erroneous decision to wait to determine whether Matthews testimony would be critical in time for the trial court to correct counsel's error. RP 172-173. Defense counsel made it clear to the court that counsel would be ineffective if the continuance were not granted, that Matthew's testimony was critical to the defense. RP 174. Nevertheless, if counsel's actions justified the court's denial of a continuance and denial of Bruce's fundamental constitutional right to present a defense at trial, then Bruce was denied the effective assistance of counsel to which he was entitled.

As held by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2053, 80 L.Ed.2d 674 (1984), "the proper standard for attorney performance is that of reasonably effective assistance." The Court held, more specifically, that to sustain a claim of ineffective assistance of counsel the accused need only make two showings:

First, the defendant must show that counsel's performance was deficient Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland, 466 U.S. at 487. The Strickland test requires a showing that counsel's representation fell below an objective standard of reasonableness judged by "prevailing professional norms." Strickland, 466 U.S. at 687-688. In determining the prejudice of defense counsel's deficient performance, the defendant need only show a "reasonable probability" that counsel's

performance prejudiced the outcome; the defendant “need not show that counsel’s deficient conduct more likely than not altered the outcome of the case.” *Id.*, at 695.

Here, by counsel’s own admission, Matthews’s testimony was critical to the defense, and counsel felt he could not effectively represent Bruce without it. Within reasonable probabilities this deficient performance altered the outcome of trial. The resolution of the case depended on the jury’s assessment of the credibility of Sanchez and Bruce; what Sanchez told Matthews was important to that determination. In the interview, it appears from the questions asked, that she admitted her own aggressive behavior, RP 115, 123, that Bruce never restricted her breathing or hit her, RP 116, and that he had helped her when she had a seizure during the incident, RP 117. Had Matthews been available to confirm this and answer the state’s implicit allegations that he had not properly memorialized Sanchez’s statements, the outcome of trial might have been different. The jury acquitted of two of the three contested charges and may well have acquitted of the second degree assault charge too had Matthews been available to clarify what Sanchez said during the interview.

Bruce’s conviction for second degree assault should be reversed because he was not provided with the effective assistance of counsel guaranteed by the Sixth Amendment.

5. CUMULATIVE ERROR DENIED BRUCE A FAIR TRIAL.

As set out in the Opening Brief of Appellant, the errors in Bruce's case individually and certainly cumulatively denied him a fair trial.

C. REQUEST FOR RULING ON APPELLATE COSTS

Bruce is asking this Court, in the event that he is unsuccessful on appeal, to exercise its discretion and not impose costs. Appellate courts have this discretion. RCW 10.73.160(1), State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). The court can direct that costs not be awarded in its decision terminating review. State v. Nolan, 161 Wn.2d 620, 626, 8 P.3d 300 (2007).

Costs should not be imposed where the appellant lacks the ability to pay. Sinclair, at 389-390. While not the only relevant factor, entry of an order of indigency creates a presumption that indigency continues throughout the appellate review. Sinclair, at 393 (citing RAP 15.2(f)).

Here, the trial court, at sentencing, declined to impose a discretionary \$115 domestic violence assessment because the court "did not find that you will have the funds to pay the expense now or likely to have the money to pay in this [sic] the future once you are released."

RP(sentencing) 14. The trial court also granted a Motion for Indigency

allowing Bruce to appeal at public expense. See Confidential Clerk's Papers at 147-150.

At sentencing, both Sanchez and defense counsel spoke of Bruce's military service and the resulting emotional trauma and need for treatment. RP(sentencing) 5-9. This factor, too, should be considered when deciding whether to impose costs.

While respondent includes a paragraph on the virtue of not having the taxpayer pay for an unsuccessful appeal, the same can be said of the taxpayer having to pay the state's expense for a successful appeal or a new trial. BOR 37.

Bruce will be more likely to be successful once he leaves prison without a debt that he has not resources to pay.

D. CONCLUSION

Appellant respectfully submits that his conviction for second degree assault should be reversed and remanded for a new trial.

DATED this 3rd day of January, 2017.

Respectfully submitted,

_____/s/_____
RITA J. GRIFFITH
Attorney for Appellant

GRIFFITH LAW OFFICE

January 03, 2017 - 11:00 AM

Transmittal Letter

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