

NO. 343324

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

STATE OF WASHINGTON
PLAINTIFF/RESPONDENT,

V.

DERRICK LYNN BARRETT
DEFENDANT/APPELLANT

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

I. Statement of Facts

The Statement of the Case contained in Appellant's Brief is incomplete and misleading. [*Appellant's Brief*, 1-4] Appellant's Statement of the Case represents only those facts put forward by the defendant at trial and makes no mention of any facts or evidence put forward by any of the State's witnesses, including the victim, K.M., or any of the physical evidence.

The victim, K.M., and the defendant, Derrick Barrett, had dated for a couple months and had lived together. [RP 173] K.M. and Mr. Barrett had broken up a couple weeks prior to the incident in this case, at K.M.'s insistence. [RP 175] Mr. Barrett wanted the relationship to continue. [RP 176] K.M. was working at The Eagles as a bartender when Mr. Barrett came in to the bar. [RP 176] The defendant became extremely intoxicated. [RP 450] K.M. had not consumed any alcohol. [RP 177] Mr. Barrett stayed until closing and asked K.M. for a ride home. [RP 178] Mr. Barrett lived approximately five minutes away. [RP 180]

When they got to Mr. Barrett's house, Mr. Barrett refused to get out of the car so K.M. got out of her own car and was going to walk to town. [RP 180] When K.M. got to the end of the driveway, Mr. Barrett grabbed her from behind and tackled her. [RP 181] The driveway

consisted of dirt and gravel. [RP 140] K.M. struggled to push him off of her. [RP 181]

Eventually, a red pickup truck, driven by Jeanie Barge-Peck, pulled up and K.M. got free. [RP 182] Ms. Barge-Peck testified that when she pulled up to her house, she could hear K.M. screaming hysterically from about two hundred feet away. [RP 337] Ms. Barge-Peck stated that K.M. ran toward her truck yelling for help. [RP 338] K.M. ran to the truck and got inside, though she did not even know whose truck it was. [RP 183]

Mr. Barrett pulled the truck door open, grabbed K.M. by the torso and pulled her out of the vehicle before she could lock the door. [RP 183; 339] Ms. Barge-Peck left in her truck and went to The Junction store in Tonasket to get help where she found Deputy Justin Weigel and told him what had happened. [RP 137; 341]

Mr. Barrett pulled K.M. toward the house and threw her back onto the driveway. [RP 184] Mr. Barrett tried to undo K.M.'s pants while she screamed for help and tried to fight him off. [RP 184] K.M.'s jeans ripped and Mr. Barrett put his fingers inside the tear and inserted his fingers into her vagina. [RP 185] Mr. Barrett told her "I'm going to hurt you worse than you hurt me." [RP 186]

Mr. Barrett pulled K.M. up and forced her to the house. [RP 187] Mr. Barrett's roommate Kenneth "Taylor" Pillow heard the noise, came out and told them to be quiet. [RP 188] Mr. Pillow testified that K.M. got behind him and kept saying "help, help, help." [RP 309] Mr. Pillow told Mr. Barrett to stop and Mr. Barrett threw a punch at Mr. Pillow. [RP 188] K.M. was able to get away when that happened and ran from the house. [RP 189] Mr. Barrett chased her, grabbed her and pulled her back into the house. [RP 190]

Mr. Barrett forced her into the bedroom and demanded she remove her clothes or things were going to get worse. [RP 190] K.M. did not want to take her clothes off but did because she was afraid. [RP 191] Mr. Barrett then made K.M. perform oral sex on him. [RP 192] Mr. Barrett then pulled her into the bathroom where he forced her over the bathroom counter, with her head in the sink, and her hands pressed up against the mirror. [RP 193] The State admitted photos of K.M.'s handprints on the bathroom mirror. [CP 57-60 Exhibits 17-20] Mr. Barrett then inserted his penis into her vagina. [RP 193] Mr. Barrett had intercourse with K.M. for approximately five minutes against her will. [RP 193-194] Eventually Mr. Barrett stopped. [RP 195] K.M. said she would take Mr. Barrett to her house as a way to try to escape. [RP 196]

When K.M. and Mr. Barrett went outside, K.M. tried to unlock her car door with the key fob and accidentally hit the lock button. [RP 196] Mr. Barrett got mad, realizing K.M. was trying to only unlock her side, and he started chasing K.M. around the vehicle. [RP 196] K.M. started running down the driveway to try to get away from Mr. Barrett. [RP 196] That was when Deputy Justin Weigel pulled into the driveway. [RP 196]

Deputy Weigel testified that when he pulled in, he saw the victim running away from the house screaming repeatedly, “help, help.” [RP 139] Mr. Barrett was chasing her. [RP 139] K.M. was covered in dirt, her clothes were askew, and she was running frantically, screaming. [RP 140] Mr. Barrett turned and ran toward the house with Deputy Weigel chasing him telling him to stop. [RP 142] Mr. Barrett ran into the house and locked the door. [RP 143] Deputy Shane Jones arrived with Deputy Weigel and testified to the same observations, saying “I’ve been doing this a long time and I don’t think I’ve ever seen anybody that scared” (referring to K.M.). [RP 345]

Deputy Weigel returned to K.M. who told him that she had been assaulted and held against her will. [RP 144] She had her underwear in her hands. [RP 145] Law enforcement set up containment around the house and eventually Deputy Terry Shrable was able to convince Mr. Barrett to come out of the house, at which point he was arrested. [RP 149]

Deputy Shrable noted that Mr. Barrett had some of K.M.'s hair tangled up in his beard. [RP 273] Mr. Barrett also had scratches on his elbows that were consistent with wrestling on the ground. [RP 284]

Sergeant Tracy Harrison interviewed K.M. at the scene and her statement was admitted as an excited utterance. [RP 369] Her statement to Sgt. Harrison was consistent with the above-stated facts. [RP 369] K.M. was taken to the hospital for a sexual assault examination. [RP 150] She was examined by SANE nurse Paulla Woods. [RP 150] The State admitted photographs taken by Deputy Weigel at the time of the sexual assault examination showing numerous scratches and bruising to her entire body. [RP 152; CP 57-60 Exhibits 1-6] K.M.'s pants from the time of the incident were extremely dirty and had a tear in the crotch area of the pants. [RP 154, 249]

The State admitted photos taken a few days after the incident, showing bruising and scratches along K.M.'s back, shoulders, and lower hip area that K.M. sustained during the struggle in the driveway. [RP 212; CP 57-60 Exhibit 28] They were taken a few days later as bruises take time to develop. [RP 212] The State admitted a photo of a bruise next to K.M.'s vagina that corresponded with the tear in her jeans; K.M. testified that she sustained this bruise when Mr. Barrett inserted his fingers in her

vagina in the driveway. [RP 213; CP 57-60 Exhibit 35] Photos of K.M.'s arms showed bruising. [RP 213; CP 57-60 Exhibit 39]

A photo of the driveway showed an area that was consistent with a struggle. [RP 291; CP 57-60 Exhibit 14] Photos of the mirror in the bathroom showed K.M.'s handprints above the sink. [RP 293; CP 57-60 Exhibits 15-20]

The State called Washington State Patrol forensic scientist, Ethan Smith. [RP 232] Mr. Smith's laboratory report was admitted as evidence. [CP 57-60 Exhibit 11] Mr. Barrett's semen and DNA were found on K.M.'s perineal vulvar, vaginal endocervical, and anal swabs from the sexual assault examination kit. [RP 238] K.M.'s DNA was found on Mr. Barrett's genital swab from the sexual assault examination kit. [RP 241]

Sexual Assault Nurse Examiner (SANE) nurse Paulla Woods testified at trial. [RP 242] The full medical records and sexual assault examination report were admitted at trial. [CP 57-60 Exhibit 10] Ms. Woods testified to a significant bruise next to K.M.'s vagina that corresponded with the tear in her jeans. [RP 249] K.M. had abrasions to both ears, upper ears, her nose, upper lip and her chin. [RP 249] Both of her knees, elbows, tops of her feet, hands and her back all had abrasions. [RP 250] K.M. had debris, likely dirt, on the outside of the labia and a

hair that did not appear to belong to K.M. in the interior of the labia. [RP 251, 263]

Lena Oakes testified that a couple hours prior to Mr. Barrett going to The Eagles, she had spoken with him on the phone. [RP 402] Mr. Barrett told Ms. Oakes that he was going to tell K.M. that “I have a surprise for her at the house and then I’m going to fuck the shit out of her” and then he laughed. [RP 403-404] Multiple other witnesses testified in the State’s case at trial.

Mr. Barrett testified that he had gone to The Eagles and at the end of the night, he and K.M. sat in her vehicle for a while having a conversation. [RP 422] K.M. denied this occurred. [RP 481] He testified that he asked K.M. if she wanted to have sex and she said yes. [RP 423] Mr. Barrett testified that they drove to a church parking lot and had sex in K.M.’s vehicle. [RP 424] However, K.M. testified that she has a small Volvo car and it is not even big enough for her and Mr. Barrett to have sex in, given his larger size. [RP 481] He testified that they had been interrupted so they stopped and proceeded to Mr. Barrett’s house. [RP 426] Mr. Barrett stated that as they walked up to the house the two were arguing about something. [RP 428] He testified that the argument continued inside the house. [RP 435] When Mr. Barrett and Mr. Pillow were fighting, K.M. ran out, he followed her, and then Mr. Barrett and

K.M. mutually fought outside. [RP 438] He then testified that they calmly walked back to the house. [RP 438] Mr. Barrett testified that he and K.M. never had sex in the house. [RP 440]

II. Procedural History

On September 2, 2014, Mr. Barrett's preliminary hearing was held. [RP 3] The State charged Mr. Barrett with three counts of Rape in the Second Degree, Domestic Violence; Unlawful Imprisonment, Domestic Violence; and Assault in the Fourth Degree, Domestic Violence. [CP 259-262] Defense counsel, John Crowley, entered a notice of appearance in the matter prior to arraignment. [CP 249] Mr. Barrett's arraignment was held on September 15, 2014. [RP 9] On November 3, 2014, the trial date was stricken and the case was set on to a series of status conferences at defense counsel's request. [RP 17] Neither the State, nor Mr. Barrett objected. [RP 17-20] Status conference dates were held on December 22, 2014; January 12, 2015; and March 23, 2015 with agreed continuances by both parties. [RP 23-28]

At status conference on April 20, 2015, defense counsel asked that the case be set for trial in late August or early September of 2015. [RP 29]. The State requested a trial setting closer to July of 2015 as there was no reason for such a delay of the trial. [RP 29]. Trial was set for June 2, 2015. [RP 30] On May 18, 2015, defense counsel requested a trial

continuance due to a pre-scheduled trial in another jurisdiction. [RP 32]
The State did not object as there was good cause and the trial was reset at
defense request to August 4, 2015. [RP 33]

On July 27, 2015, defense counsel requested to continue the trial to
September 1, 2015 due to Mr. Barrett's trial being set number sixty on the
list of trials for that day. [RP 36] The State had an unavailable witness so
agreed to the continuance and agreed to move the trial within the current
time for trial date in order to move the case up on the trial priority list.
[RP 36]

On August 24, 2015, defense counsel and the State both declared
ready for trial for the September 1, 2015 trial setting. [RP 39] On August
31, 2015, the parties agreed to move the trial to the following week due to
witness and defense counsel availability. [RP 43] On September 8, 2015,
defense counsel requested to continue the trial another month as defense
counsel had started another trial in a different jurisdiction. [RP 48] The
State indicated it was ready for trial and indicated it was not in agreement
with the continuance as this trial had been set around defense counsel's
availability. [RP 50] The State had its approximately sixteen witnesses
all confirmed and ready for trial to start the next day, some of whom had
come from out of the area. [RP 49] Trial was moved to September 29,
2015 over the State's objection. [RP 51]

On September 21, 2015, the trial was continued at the State's request due to the unavailability of two law enforcement witnesses. [RP 57] Mr. Barrett did not object. [RP 57] Trial was re-set for November 10, 2015. [RP 57] On November 2, 2015, defense counsel requested a trial continuance based on his unavailability. [RP 60] The State did not object as defense counsel had given the State notice. [RP 60] Trial was set for December 1, 2015. [RP 60] On November 30, 2015, the trial was continued again due to other trials going forward that had a sooner time for trial date than Mr. Barrett's case. [RP 64] The State agreed to move the case within the current time for trial date again in order to move it up the trial list. [RP 64] Trial was continued to January 5, 2016. [RP 65]

On December 21, 2015, both the State and defense counsel declared they would be ready for trial January 5, 2016. [RP 68] At readiness on January 4, 2016, the trial was moved to the following week without objection. [RP 71]

On January 4, 2016, six days before trial, defense counsel and the State spoke on the phone and defense counsel indicated that he may have a couple witnesses but he was not sure yet. [RP 88; CP 210-221] The State requested the names of the potential witnesses. [RP 88; CP 210-221] Defense counsel refused to disclose the names of the witnesses because he was not sure if he was going to call them or not. [RP 88; CP 210-221]

The State did not hear anything else about the witnesses until Sunday, January 10, 2016. [RP 88; CP 210-221] Defense counsel indicated he intended on calling the witnesses. [RP 88; CP 210-221] Defense counsel gave the State the names “Wendy Something” and David Barrow, which turned out to be David Barton. [RP 88; CP 210-221] The State asked what they would testify to and was told that Wendy would testify to something to the effect that she had seen the victim hitting herself in the leg a few days after the incident and saying she was trying to make it more convincing. [RP 89; CP 210-221] Mr. Barton would say something similar. [RP 89; CP 210-221] Defense counsel told the State that he would provide a written summary of what their testimony would be. [RP 89; CP 210-221] The State asked for phone numbers of the two individuals and was not provided them. [RP 89; CP 210-221] The State received no written summary and no contact information for either of the defense’s two witnesses. [RP 89; CP 210-221]

On January 11, 2016 both the State and defense counsel declared ready to start the trial on January 12, 2016. [RP 75] On the morning of trial, both the State and defense counsel indicated they were ready to proceed with the trial. [RP 83] The State filed a motion in limine to exclude the anticipated defense witnesses as no full names, contact

information, or complete summaries of statements had been provided.

[CP 210-221]

On the morning of trial, during motions in limine, defense counsel handed to the Court, and gave to the State, a defense witness list. [RP 83] The State moved in limine to exclude the two defense witnesses, Wendy Pillow and David Barton based on late disclosure and failure to comply with discovery rules. [RP 88; CP 210-221] The State argued that exclusion was the proper remedy because the case had been pending for approximately fifteen months, the witnesses were being disclosed formally the morning of trial, the State would have no time to interview the witnesses as counsel would be in trial and it would cause delay, and the State would have no time to find impeachment or rebuttal evidence to respond to the witnesses' testimony. [RP 89; CP 210-221]

Defense counsel argued that he had just heard a week prior from "a source" that these two individuals may be favorable witnesses and the delay was caused by him not being able to contact them. [RP 89] During counsel's argument, he fully disclosed the witnesses' anticipated testimony which would be that the day or so after the incident, the witnesses saw the victim striking herself in the thigh and when asked what she was doing, she responded that she was trying to make the bruises look

more convincing. [RP 91] Defense counsel requested a continuance rather than exclusion. [RP 91]

The State responded in argument that defense counsel's argument to the court was the first time the State had even heard the full extent of the anticipated defense witness testimony. [RP 93] The testimony would involve time frames, alleged changes in injury, and the State simply had no time to find rebuttal evidence to these witnesses. [RP 93]

The trial court cited the defendant's discovery obligations under CrR 4.7, including the names and addresses of persons the defense intends to call at trial, together with any statements. [RP 95] The court referenced that the case was approximately seventeen months old. [RP 96] The witnesses had known that the defendant had been standing trial and these witnesses had never been brought up until a week before this trial, especially when the case had been scheduled for trial on previous dates. [RP 96] No contact information was ever given to the State for either of the witnesses until the morning of trial. [RP 96]

The trial court ruled that disclosure of the names or partial names on Sunday, January 10 at the earliest, the day before trial, constituted a surprise to the prosecution. [RP 96] The late disclosure affected the ability to talk with the victim about the testimony, to prepare, and to confirm other issues. [RP 96] The trial court did not find defense

counsel's violation as a "willful" violation or that it was made in bad faith. [RP 96] The trial court then stated that the record was just too incomplete to determine whether it was willful or not because defense did not provide information about how the witnesses were discovered or who the "source" was. [RP 97]

The trial court ruled that because the testimony of both defense witnesses pertained to something that happened a day or two after the incident, the evidence becomes more speculative and unclear. [RP 99] The evidence that would be presented would include statements, excited utterances, photos, and a sexual assault examination kit from the time of the incident. [RP 98] An allegation that a couple days after the incident the victim wanted to make the injuries look worse is speculative and it "seems to relate to something that occurred after the event and not the event itself." [RP 99] The court found that the intent of the evidence was to show the victim's desire to make the injury look more severe than it was which is not significantly probative enough to diminish the evidence that may or may not come in from the hospital, sexual assault kit, observations of officers at the time of the incident or what the victim may testify to. [RP 102] Evidence that there may be additional bruising from the victim striking her leg would not diminish the evidence of whether this incident occurred or not. [RP 103]

The trial court precluded both defense witnesses from testifying. [RP 99, 100] However, the court did seem to suggest that the court may reconsider the witnesses as rebuttal for defense if the evidence were to show a significant increase in bruising when the officer went back for a follow up interview. [RP 101] The trial court indicated that “For now, I’m going to exclude both witnesses” because of late disclosure. [RP 101]

The trial court did not feel there was any less effective sanction that could be imposed to avoid the surprise and prejudice to the State. [RP 101] The State had its sixteen witnesses ready to go for trial, many of which had come from out of the area, and the court was logistically ready for trial. [RP 103] A continuance would have disrupted the efficiency of the proceedings. [RP 103] The evidence that would have been put forward by the defense witnesses was of limited probative value given it pertained to an alleged event a couple days after the incident and the substance of the testimony would not have diminished the evidence about whether the incident actually occurred or not. [RP 103]

ARGUMENT

A. The exclusion of witnesses was within the sound discretion of the trial court.

Appellant asserts that the trial court erred when it excluded two potential defense witnesses as a discovery sanction. CrR 4.7 governs criminal discovery. *State v. Blackwell*, 120 Wn.2d 822, 826 (1993).

“[T]he defendant shall disclose to the prosecuting attorney the following material and information within the defendant’s control no later than the omnibus hearing: the names and addresses of persons whom the defendant intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witness.” CrR 4.7(b). There is a continuing duty to disclose. CrR 4.7(h)(2). A party shall promptly notify the other party of the existence of new discoverable material. CrR 4.7(h)(2).

“[I]f 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.” CrR 4.7(h)(7)(i). The “deems just” language gives a trial court discretion to

exclude a defense witness as a sanction for a discovery violation. *State v. Venegas*, 155 Wn.App. 507, 520 (Div. 2, 2010), review denied, 170 Wn.2d 1003 citing *State v. Hutchinson*, 135 Wn.2d 863, 881-884 (1998). Exclusion of a defense witness does not violate the Sixth Amendment. *State v. Hutchinson*, 135 Wn.2d 863, 881 (1998) citing *Taylor v. Illinois*, 484 U.S. 400, 412-413 (1988).

The scope of criminal discovery is within the trial court's discretion. *Blackwell*, 120 Wn.2d at 826. A reviewing court will not disturb a trial court's discovery decision absent a manifest abuse of that discretion. *Id.* See also *State v. Gregory*, 158 Wn.2d 759 (2006); *State v. Hamlet*, 83 Wn.App. 350 (1996), *aff'd*, 133 Wn.2d 314; *State v. Norby*, 122 Wn.2d 258 (1993); *State v. Yates*, 111 Wn.2d 793 (1988). A manifest abuse of discretion arises when "the trial court's exercise of discretion is 'manifestly unreasonable or based upon untenable grounds or reasons.'" *State v. Lile*, 398 P.3d 1052, 1060 (2017); *State v. Darden*, 145 Wn.2d 612, 619 (2002). The reviewing court need not agree with the trial court's decision in order to affirm the decision. *Lile*, 398 P.3d at 1060. The Court must merely hold the decision to be reasonable. *Id.*

The principals underlying CrR 4.7 have been stated as follows:

In order to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements

of due process, discovery prior to trial should be as full and free as possible consistent with protections of persons, effective law enforcement, the adversary system, and national security.

Yates, 111 Wn.2d at 797 citing Criminal Rules Task Force, *Washington*

Proposed Rules of Criminal Procedure 77 (West Pub'g Co. ed 1971).

Guidance in constructing the criminal discovery rule is also found in CrR

1.2 which states:

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, effective justice, and the elimination of unjustifiable expense and delay.

Yates, 111 Wn.2d at 797.

The United States Supreme Court has stated that “[t]he adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played.”

Williams v. Florida, 399 U.S. 78, 82 (1970).

The factors to be considered in 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 prosecution will be surprised or prejudiced by the witness’s testimony; and (4) whether the violation was willful or in bad faith. *Hutchinson*, 135 Wn.2d at 883.

This situation has been previously addressed in *State v. Kipp*, 171 Wn.App. 14 (Div. 2, 2012), overruled on unrelated Privacy Act grounds in *State v. Kipp*, 179 Wn.2d 718 (2014). In *Kipp*, the defense first disclosed the name of the defense witness six days before trial. *Id.* at 31. The substance of the witness' testimony was disclosed on the first day of trial. *Id.* at 32. The defense stated that the late disclosure was based on the fact that the witness had been deployed with the Navy; however, he had been home for two weeks prior to defense disclosing him as a witness. *Id.* at 32. The State argued that it would be prejudiced by the witness because the substance of the testimony had not been disclosed and there was no time to find a rebuttal witness. *Id.*

The trial court excluded the witness based on the lateness of the disclosure, the duplicative nature of the testimony, and the fact that the proceedings would need to be halted for half a day or more to allow the State to speak with its witnesses. *Id.* The trial court ruled “[the witness] was disclosed too late to provide an orderly trial process....” *Id.* at 33.

The Court of Appeals held that the trial court's decision to exclude the witness was not an abuse of discretion under *Hutchison*. *Id.*

As to the first *Hutchinson* factor, “the effectiveness of less severe sanctions,” the court found that a continuance of a half day or more would be effective. But as to the second

factor, “the impact of witness preclusion on the evidence at trial and the outcome of the case,” the trial court found that the impact of excluding [the witness] would be low because [the witness’] testimony duplicated that of other witnesses. As to the third *Hutchinson* factor, “the extent to which the prosecution will be surprised or prejudiced by the witness’s [sic] testimony,” the trial court found that the prosecution would be prejudiced by [the witness’] testimony based on the extra time needed to interview the other witnesses so close to trial, or to halt trial to prepare rebuttal testimony. And as to the fourth *Hutchinson* factor, “whether the violation was willful or in bad faith,” the trial court found that [the defendant] could have avoided the late disclosure of [the witness].

Kipp, 171 Wn.App. at 33. As the court stated in *Kipp*, “nobody needs to be preparing for trial any more than necessary on the eve of trial.” *Id.* at 32.

The current case is analogous to *Kipp*, and the late disclosure is even more flagrant. In *Kipp*, the witness’ name was disclosed six days before trial and the substance of the testimony was disclosed the morning of trial. In this case, the names of the witnesses were disclosed in part, the day before trial, but not in totality until the morning of trial.

Appellant cites to multiple cases defining the word “promptly” in the context of CrR 4.7 as “the moment of discovery or confirmation.” *Appellant’s Brief*, 9. However, Appellant’s own definition undercuts their argument that the disclosure was “prompt.” Defense counsel was aware of the witnesses more than a week before trial but refused to disclose the

names to the State. [RP 88; CP 210-221] Instead, defense counsel withheld the names of the individuals until the night before trial. [RP 88; CP 210-221] This was a Sunday and it was only because the prosecutor was working over the weekend that the State even got any information from defense counsel. Even at that point, defense counsel did not disclose the actual identities of the witnesses. Counsel disclosed the name of “Wendy something” and David “Barrow” as a possible last name. [RP 88; CP 210-221] The State was provided no contact information to attempt to contact these witnesses the night before trial despite defense counsel saying he would provide it. [RP 89; CP 210-221] Even had full names been provided, the information is meaningless if the State is given no contact information to contact the witnesses.

The trial court’s ruling excluding the witnesses addressed all of the *Hutchinson* factors. The trial court found that the violation was not willful or in bad faith under the fourth *Hutchinson* factor. [RP 96] However, the trial court then said that there simply was not enough information provided for the court to determine if the late disclosure was willful or not. [RP 97] Respondent asserts that defense counsel’s late disclosure was willful and was in bad faith. Defense counsel knew of the witnesses a week before trial and refused to disclose the names to the State when the State requested the names. On the night before trial, defense counsel did

not even make an attempt to give the proper names, instead giving the name of “Wendy Something” and David Barrow instead of Barton. Furthermore, defense counsel did not disclose contact information for the two witnesses the night before trial, even though counsel had the information. This is both willful and in bad faith.

The trial court found that the late discovery constituted both surprise and prejudice to the State under the third *Hutchinson* factor. [RP 96] The State had not been given the names until the night before trial and no contact information until the day of trial. [RP 96] The late disclosure affected the State’s ability to talk with the victim about the testimony and to prepare any rebuttal or impeachment evidence. [RP 96]

The trial court made a clear ruling on the second *Hutchinson* factor. The court ruled that because the proffered testimony of the two witnesses pertained to something that happened after the incident, it became speculative and unclear. [RP 99] The testimony would pertain to something that occurred after the event, not the event itself. [RP 99] The intent of the defense witness testimony would be to show the victim’s desire to make the injury look more severe, which is not significantly probative enough to diminish the other evidence that may come in. [RP 102] Evidence that there may be additional bruising from the victim striking her leg would not diminish the evidence of whether this incident

occurred or not. [RP 103] The trial court therefore found that there would be very little impact on the outcome of the case.

The court felt there was no less effective sanction that could be imposed under the circumstances under the final *Hutchinson* factor. [RP 101] The case had been pending for approximately seventeen months and the defense witnesses had known about the case the whole time. [RP 96] The State had its sixteen witnesses ready to start the trial, many of which had come from out of the area. [RP 103] The logistics of a trial can be complicated, and the court was ready to start the trial. [RP 103] A continuance would have disrupted the efficiency of the proceedings. [RP 103] Given the limited probative value of the defense witnesses' testimony, the surprise to the State, the late disclosure, and the disruption a continuance would have caused, the trial court felt no less effective sanction could be imposed under the circumstances. [RP 101]

What is also relevant to this issue, is that the trial court's ruling suggested that if evidence was admitted at trial that showed K.M. did have significant bruising to her thigh a few days after the incident, defense may be able to call Ms. Pillow and Mr. Barton as rebuttal witnesses. [RP 101] Given that the evidence did not show such bruising, the witnesses were not called.

The trial court has discretion on matters of evidence and the trial court exercised that discretion in this case. The trial court addressed all of the factors laid out in *Hutchinson* and felt that exclusion was appropriate. The only question for this Court on review is whether that decision was based on reasonable grounds. *Lile*, 398 P.3d at 1060. Given the trial court's lengthy analysis, the court's decision was reasonable and there was no manifest abuse of discretion.

B. If the exclusion of defense witnesses was error, that error was harmless.

A defendant cannot avail himself of error as a ground for reversal unless it has been prejudicial. *State v. Cunningham*, 93 Wn.2d 823, 832 (1980) citing *State v. Rogers*, 83 Wn.2d 553 (1974).

Appellate courts long ago rejected the notion that reversal is necessary for any error committed by a trial court. Our judicial system is populated by fallible human beings, and some error is virtually certain to creep into even the most carefully tried case. The ultimate aim of the system, therefore, is not unattainable perfection, but rather fair and correct judgments When a court blindly orders reversal of a judgment for an error without making any attempt to assess the impact of the error on the outcome of the trial, the court encourages litigants to abuse the judicial process and bestirs the public to ridicule it As a practical response to the realities of the trial process, therefore, appellate courts have developed a series of doctrines for analyzing whether error in various types of cases was harmless. The fundamental premise of this sort of analysis is that a defendant is entitled to a fair trial but not a perfect one.

5 Wash. Prac., Evidence Law and Practice § 103.24 citing *US v. Blevins*, 960 F.2d 1252 (1992).

A prejudicial error may be defined as one which affects or presumptively affects the final results of the trial. When the appellate court is unable to say from the record before it whether the defendant would or would not have been convicted but for the error committed in the trial court, then the error may not be deemed harmless, and the defendant's right to a fair trial requires that the verdict be set aside and that he be granted a new trial. But, where the defendant's guilt is conclusively proven by competent evidence, and no other rational conclusion can be reached except that the defendant is guilty as charged, then the conviction should not be set aside because of unsubstantial errors.

State v. Jamison, 93 Wn.2d 794, 800-801 (1980) citing *State v. Martin*, 73 Wn.2d 616 (1968). Exclusion of witnesses is subject to harmless error review. *Jones v. City of Seattle*, 179 Wn.2d 322, 356 (2013).

If the error is of a constitutional nature, the error will be deemed harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *State v. Watt*, 160 Wn.2d 626, 636 (2007). A constitutional error does not require reversal when it is clear beyond a reasonable doubt that the jury verdict is unattributable to the error. *Id.* citing *Neder v. US*, 527 U.S. 1, 19 (1999). The appellate court looks at the untainted evidence to determine if the untainted evidence is so overwhelming that it

necessarily leads to a finding of guilt. *Id.* citing *State v. Guloy*, 104 Wn.2d 412 (1985).

If the error is not of a constitutional magnitude, the error is not prejudicial unless, “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Cunningham*, 93 Wn.2d at 832 citing *Rogers*, 83 Wn.2d 553; *State v. Rhoads*, 35 Wn.App. 339, 343 (Div.3 1983), *aff’d*, 101 Wn.2d 529 (1984).

In the current case, if the exclusion of Ms. Pillow and Mr. Barton was error, it was harmless error as their testimony would not have changed the outcome of the trial. First, the evidence of Mr. Barrett’s guilt was overwhelming, and second, the proffered testimony by the two witnesses would have been rebutted by evidence admitted at trial.

During motions in limine, defense counsel informed the trial court what the substance of the witnesses’ testimony would be:

Ms. Pillow is apparently the roommate of the complaining witness and that the first full day after the alleged incident happened...they were both up to the house and that the young woman that’s making accusation against [Mr. Barrett] was coming out her room, striking herself in the thighs. And when asked by Ms. Pillow what she was doing, she said that she’s trying to make it more convincing. [RP 91-92]

This testimony would have been problematic for multiple reasons. Any testimony by either Ms. Pillow or Mr. Barton as to what K.M. said would

be inadmissible as hearsay under Rules of Evidence 801, 802, or would at least have been limited in scope as to what the jury could consider it for.

What is also significant, is that the State admitted photos taken of K.M. both on the day of the incident and a few days after the incident. [RP 212; CP 57-60 Exhibits 1-9, 25-40] None of the photos admitted at trial showed any signs of significant bruising to K.M.'s thighs that would have corresponded to her hitting herself in the thighs. [Exhibits 1-9, 25-40] There was also no other form of evidence put forward by either the State or Appellant that K.M. had any bruising to her thighs that would have corresponded to the proffered testimony of the defense witnesses. Therefore, had Ms. Pillow and Mr. Barton been allowed to testify that K.M. had been hitting herself in the thigh to attempt to make her injuries look worse (which would be speculation anyway), the photographic evidence shows that there was no bruising to that area of her thigh. This would show either that Ms. Pillow and Mr. Barton are not credible, or that K.M. was not actually hitting herself hard enough to increase the bruising. The end result is the same; that the bruising contained in the photographs is from the night of the incident. The testimony of Ms. Pillow and Mr. Barton would have no real effect on the outcome of the case.

The evidence in this case was overwhelming of Mr. Barrett's guilt. K.M. testified in detail about what had occurred. [RP 173-196] K.M.'s

excited utterance was admitted and was consistent with her testimony.

[RP 369] The sexual assault examination report was admitted as evidence and Nurse Woods testified to injuries on K.M. and the presence of dirt on her labia. [RP 242, 251, 263, CP 57-60 Exhibit 10] This dirt could only have gotten there when Mr. Barrett digitally penetrated K.M.'s vagina in the driveway through the tear in her jeans. K.M. had a significant bruise next to her vagina that corresponded with the tear in her jeans. [RP 249] She had significant abrasions and bruising over her arms, feet, back, elbows, hands and legs. [RP 250] Mr. Barrett's DNA was found on K.M.'s vaginal swabs and K.M.'s DNA was found on Mr. Barrett's genital swabs. [RP 238]

Photos admitted at trial showed an area of the driveway consistent with a struggle. [RP 291; CP 57-60 Exhibit 14] Mr. Barrett testified that there was no sexual intercourse in the house; however, photos of the mirror in the bathroom showed K.M.'s handprints above the sink, consistent with K.M.'s testimony. [RP 293; CP 57-60 Exhibits 15-20]

Ms. Oakes testified that a couple hours prior to Mr. Barrett going to the Eagles, he told her that he was going to tell K.M. that he had a surprise for her at the house and then he was going to "fuck the shit out of her" while laughing. [RP 403-404] This was said after Mr. Barrett and K.M. had been broken up for a while at K.M.'s insistence. [RP 175]

Ms. Barge-Peck testified, as a completely independent witness, that she could hear K.M. screaming frantically and that K.M. had run to her vehicle screaming for help and jumped inside. [RP 337-338] She testified that Mr. Barrett pulled the truck door open, grabbed K.M. by the torso and pulled her out of the truck while K.M. tried to hold on and stay inside. [RP 339] This happened prior to the sexual assault.

When law enforcement got to the scene, two different officers testified that K.M. was running from the house screaming for help, looking terrified, and that Mr. Barrett was chasing after her. [RP 139, 345] When he saw law enforcement, he turned and ran to the house, barricading himself inside. [RP 143]

Mr. Barrett testified that they had consensual sex in K.M.'s car on the way to his house. [RP 424] However, K.M. testified that her car is not even big enough to have sex in, given Mr. Barrett's size. [RP 481] Mr. Barrett's testimony was contradictory to almost all of the physical and photographic evidence, as well as the statements of other witnesses. The photographic evidence, physical evidence, and testimony of all the witnesses was consistent with K.M.'s testimony.

Any rational jury would have found Mr. Barrett guilty as charged, regardless of whether or not the defense witnesses had been allowed to testify. The defense witnesses' testimony would have been limited by the

rules of hearsay and would have been contradicted by the photo evidence. Furthermore, as the trial judge put it, K.M.'s alleged attempt to make her injuries look worse does little to diminish the other evidence about whether the event itself occurred. Therefore, if any error is found by the Court, such error was harmless error.

C. The defendant's offender score was properly calculated.

Appellant next asserts that his offender score was miscalculated, claiming the concurrent Unlawful Imprisonment charge should only be counted as one point, rather than two, as the trial court scored it. A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. RCW 9.94A.525(1). Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589. RCW 9.94A.525(1).

Whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score. RCW 9.94A.589(1)(a). This shall not apply to any offenses that are deemed same criminal conduct. RCW 9.94A.589(1)(a).

Therefore, under RCW 9.94A.589, all other current offenses are scored as though they are “prior convictions.” Under RCW 9.94A.525(21), if the present conviction is for a felony domestic violence offense where domestic violence was plead and proven, two points are counted for each felony domestic violence conviction of crimes listed in RCW 9.94A.525(21)(a). Domestic Violence Unlawful Imprisonment is listed in RCW 9.94A.525(21)(a).

Appellant’s argument has already been addressed by the Supreme Court in *State v. Jones*, 110 Wn.2d 74 (1988). *Jones* addressed the question of how other current offenses were to be scored under the former version of RCW 9.94A.400(1)(a) which stated- “[W]henver a person is convicted of two or more offenses, the sentence range for each offense shall be determined by using all other current and prior convictions as criminal history.” *Id.* at 81. The prior version of the statute was silent on how to actually score other current offenses. *Id.* *Jones* discussed how prior convictions can be scored as either half a point, one point, or even two or more points depending on the charges, but there was no guidance as to whether other current offenses are scored the same as prior convictions or whether they are scored differently. *Id.*

The statute was then amended in 1986 to reflect the Legislature’s intent that other current offenses be scored like prior convictions. *Id.* at

82. The Legislature added the language that “the sentence range for each current offense shall be determined *by using all other current and prior convictions as if they were prior convictions* for the purpose of the offender score.” *Id.* Therefore, other offenses are to be scored as if they were prior convictions. *Id.*

Domestic Violence was pled and proven in the controlling Rape in the Second Degree charge(s) and in the Unlawful Imprisonment charge at issue. [CP 13-25] Unlawful Imprisonment was not considered same criminal conduct as any other offenses. Therefore, when scoring the Rape in the Second Degree charge, where domestic violence was plead and proven, the court is to score all current offenses as though they were prior offenses. Since domestic violence was plead and proven on the Unlawful Imprisonment charge and Unlawful Imprisonment is listed in RCW 9.94A.525(21)(a), two points must be scored for that offense.

Appellant’s score was properly calculated as a seven on the controlling charge(s) of Rape in the Second Degree, Domestic Violence.

CONCLUSION

The trial court has discretion in evidentiary matters and the trial court’s ruling to exclude the two defense witnesses was not a manifest abuse of discretion as it was based on reasonable grounds. If the trial court did abuse its discretion, the error was harmless given the

overwhelming evidence of Mr. Barrett's guilt. The trial court also properly counted the concurrent Unlawful Imprisonment, Domestic Violence conviction as two points in Mr. Barrett's offender score. Respondent requests this court affirm the trial court's rulings.

Dated this 13th day of September, 2017

Respectfully Submitted:



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PROOF OF SERVICE

I, Shauna Field, do hereby certify under penalty of perjury that on the 13th day of September, 2017, I provided email service to the following by prior agreement (as indicated), a true and correct copy of the Brief of Respondent:

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September 13, 2017 - 11:36 AM

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