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NO. 82226-3

SUPREME COURT OF THE STATE OF WASHINGTON

NO. 36186-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

DANIEL MARSHALL AGUIRRE,

Petitioner

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STATE OF WASHINGTON
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ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

The State of Washington, Respondent, respectfully requests that this Court deny the Petition for Review.

B. COURT OF APPEALS DECISION

By a unanimous unpublished decision dated September 3, 2008, Division Two of the Washington State Court of Appeals affirmed a jury verdict convicting Aguirre of second degree assault with a deadly-weapon enhancement and second degree rape. A copy of that decision is contained in Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals properly affirmed the Trial Court's discretionary rulings excluding certain testimony proffered by Aguirre.

2. Whether the Court of Appeals properly affirmed the Trial Court's discretionary ruling allowing the State to present testimony of a qualified domestic violence expert.

3. Whether the Court of Appeals accurately confirmed the Trial Court's definition of "unlawful force" as used in Instruction 12 in response to the jury's request.

4. Whether the Court of Appeals accurately adopted the holding in *State v. Nguyen*, 134 Wn. App. 863, 142 P.3d 1117 (2006), review denied, 187 P.3d 752 (2008) in affirming the Trial Court's ruling that the deadly-weapon sentencing enhancement for the crime of assault with a deadly weapon did not violate double jeopardy.

5. Whether the Court of Appeals properly affirmed the Trial Court's discretionary ruling denying Aguirre's motion made at the scheduled sentencing hearing two months after the jury verdict for

an eight week continuance to allow newly substituted counsel to prepare for the hearing.

D. STATEMENT OF THE CASE

On February 16, 2007 a Thurston County jury convicted Aguirre of assaulting Emily Laughman with a deadly weapon and raping her on the night of August 26-27, 2006. Ms. Laughman met Aguirre at the United States Army NCO Academy in early June 2006 where he was her instructor. VOL. II RP 328. At a party he threw for several of his just graduated students (5-6 of them, Ms Laughman being the only female), their "exclusive dating relationship" began. VOL. II RP 331. When they both returned to Fort Lewis, she had an apartment of her own, but "most of the time I was over at Danny's." VOL. II RP 333. By mid August they were having problems in their relationship which caused her to ask friends to help her move her things out of Aguirre's apartment, but the relationship continued. VOL. II RP 337.

On August 26, he asked her to meet him at his apartment and she complied. He arrived in a bad mood. VOL. II RP 340. Another soldier named Johnson joined them. Aguirre became progressively angrier with her. At one point he grabbed his combat knife from Iraq and waved it around at Johnson telling him he should never break the circle of trust. He came over to Ms

Laughman, sat on her legs and told her the same thing. "And then he ran the knife down my cheek, down my throat and looked at me and said 'How does it feel to date a psychopath?'" Q. "Could you repeat that last?" A. "He said to me, 'How does it feel to date a psychopath?' And he explained to me that he had stopped taking his pills and that I was his pill and that as long as he had me, that was fine." Q. "What's going through your head at this time?" A. "I was scared" VOL. II RP 346-347

She wanted to leave, but couldn't find her keys. He yelled at her to come inside and lie on the bed with him. Thinking he had passed out because he had been drinking lots of beer, tequila and other drinks, she waited a bit, then got up and tried to leave. He grabbed her, threw her on the ground, pulled her pants down and held her down. She yelled at him, tried to kick him off her and tried to squirm out of his grip. However, he was stronger than she and had forcible sex with her. VOL. II RP 350-352.

Aguirre testified at length in his own defense, claiming there was no assault, but only soldier-lovers' play and consensual sex. VOL. IV RP 699-868. The jury reached its verdict on February 16, 2007 convicting him of assault with a deadly weapon and rape. The court ordered a presentence report. Nearly two months later, on April 10, 2007, the parties and counsel appeared for sentencing.

Ms. Laughman, the victim, had flown from the east coast to be present at the sentencing. A new counsel appeared and indicated that she had agreed to represent Aguirre at sentencing, but only if the court would continue the sentencing another two months. After listening to argument, the court declined. Because Aguirre had apparently assumed the continuance would be granted and had told "his people" from the Army not to show up on the scheduled date, the court gave him two more days. RP Continuance Hearing 3-22. On April 12, 2007, the court sentenced Aguirre within the standard range including the deadly weapon enhancement. The state made no request for an exceptional sentence. RP Sentencing Hearing 3-33.

The Appellate Court's written opinion sets forth the facts of the case in more detail. *State v. Aguirre*, 36186-8-II, 2008 WL 4062820 at *1-5 (Wn. App. Div II, Sept. 3, 2008). The State concurs.

E. ARGUMENT

The State respectfully requests this Court to decline review of the decision of the Court of Appeals because a) the decision is well-supported by the trial record and applicable law and b) none of the Considerations Governing Acceptance of Review articulated in RAP 13.4 (b) have been met.

Aguirre does not even challenge the *sufficiency* of the evidence in the record supporting the jury's verdict of guilty of the crimes of second degree assault while armed with a deadly weapon and rape in the second degree. The Court of Appeals accurately set forth the applicable Standards for Review, "abuse of discretion" for the trial court's exclusion of evidence and "manifest abuse of discretion" for the trial court's relevancy determinations. *State v Aguirre*, 36186-8-II, 2008 WL 4062820, at *5 (Wn. App. Div II, Sept. 3, 2008). In light of applicable law, the Court of Appeals carefully analyzed Aguirre's claims of error and properly rejected them. His petition here repeats the same arguments made to the Court of Appeals. None of them rise to the level of being persuasive in clear and concrete terms such that the considerations set forth in RAP 13.4 "*compel* (emphasis added) review", the standard set forth in the Editorial Commentary to Rule 13.4. He does not even argue the existence of any issue of substantial public interest RAP 13.4(b)(4). None of the constitutional issues raised are *significant* (emphasis added) in the sense that they are issues "of first impression" or have not been repeatedly addressed in similar contexts by our Appellate Courts and this Court. RAP 13.4(b)(3). The decision of the Court of Appeals is not in conflict with a decision of the

Supreme Court or another decision of the Court of Appeals. RAP

13.4(b)(1)(2). The Rule in pertinent part reads as follows:

RAP RULE 13.4 -DISCRETIONARY REVIEW OF DECISION
TERMINATING REVIEW

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution Of the State of Washington or of the United States is involved; or (4) If the Petition involves an issue of substantial public interest that should be determined by the Supreme Court.

1. The Court of Appeals properly affirmed the Trial Court's discretionary rulings excluding certain testimony proffered by Aguirre.

a) The Court of Appeals affirmed the trial court's refusal to let Aguirre's brother testify that the victim (Laughman) had tried to contact him on "Myspace" after the assault/rape in an attempt to send Aguirre a message thereby contradicting the victim's testimony that she had not set messages to Aguirre's brother. The Court reasoned that this offer of testimony went to impeachment on a collateral matter and was not relevant to the issues of the case; it did not make it more or less probable that Aguirre had raped and assaulted Laughman. *Aguirre* at *5. As authority the Court cited *In re Welfare of Shope*, 23 Wn. App. 567, 568-569, 596 P.2d

1361(1979) (not cited by Aguirre) and *State v. Fankhouser*, 133 Wn. App. 689, 693, 138 P.3d 140 (2006). As Aguirre correctly points out, the Court's primary reliance was on *Fankhouser*. He argues that this reliance was in conflict with *Fankhouser*. Petition for Review pg. 14. This is a puzzling argument. *Fankhouser*, like this case, was a Division Two case. One judge, Judge Penoyar, signed both decisions. One may safely presume that the panel which decided *Aguirre* understood *Fankhouser*.

b) The Court of Appeals affirmed the trial court's limitation of the extent to which Aguirre would be allowed to testify about his belief that the victim (Laughman) had been in a relationship with another man. With the concurrence of Aguirre's counsel, it did allow him to testify that he believed she had, but did not allow him to use the phrase "seeing someone" because it was a euphemism for having sex. Nevertheless, that is precisely what he did say on the stand. The "bell was rung". He was not allowed to testify about a letter he had found with a man's name on it because he could not show how the letter was relevant to his defense or affected his theory at trial. *Aguirre* at *6-7. In support of his argument that he was denied a meaningful opportunity to present a complete defense, Aguirre cites *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). In support of its affirmance,

the Court of Appeals cited to the same case, specifically *Holmes*, 547 U.S. 319, 326-327. In ruling that the trial court did not abuse its discretion in excluding reference to the letter, it also cited to *State v. Gregory*, 158 Wn.2d 759 at 786 n.6, 147 P.3d 1201 (2006) (quoting *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983), neither of which are cited by Petitioner. *Aguirre* at *7.

c) The Court of Appeals also affirmed the trial court's ruling prohibiting Aguirre from asking investigating officer Wilkinson whether the victim (Laughman) had told him she was recanting a statement to another officer investigating earlier that she and Aguirre had simply been "play fighting". The trial court pointed out that the prosecutor and Aguirre's counsel had stipulated before trial that this was inadmissible hearsay. *Aguirre* at *19. Because the victim herself testified to this effect and other evidence established the difference between her statement to the first officer ("play fighting") and to Officer Wilkinson (assault and rape), the Court of Appeals properly found there had been no prejudice to Aguirre's defense by the agreed-to exclusion of the hearsay. *Aguirre* at *8

2. The Court of Appeals properly affirmed the Trial Court's discretionary ruling allowing the State to present testimony of a qualified domestic violence expert.

Aguirre raised no objections to the trial court's determination that Officer Stines was a qualified domestic violence expert. He

argues here that the Court of Appeals should have reversed the trial court's determination that her testimony was admissible because it was not improper bolstering of the victim's credibility nor was it an opinion on Aguirre's guilt. In support of this argument that the Court of Appeals was in error, his primary authority is *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987). Petition for Review pg. 7. The Court of Appeals itself cited to *Black. Aguirre* at *9. But it also cited to later cases addressing the same issue, all affirming the trial court's admission of similar evidence, none of them cited by Aguirre. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007) applied the "abuse of discretion" standard in affirming the admission of evidence. *Aguirre* at *8. In *Seattle v. Heatley*, 70 Wn. App. 573, 577-580, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 658 (1994), the officer was allowed to give his opinion that the defendant was intoxicated because it was based on the defendant's physical characteristics. *Aguirre* at *9. In *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001), this Court laid out the factors to be considered, among others, in determining whether statements are impermissible opinion testimony: 1) the type of witness involved 2) the specific nature of the testimony 3) the nature of the charges 4) the type of defense 5) the other evidence before the trier of fact.

It is respectfully submitted that since in both *Demery* and *Kirkman* this Court reversed Division II and affirmed the trial court's admission of evidence, the *Aguirre* panel gave particularly careful consideration to its analysis and holding.

3. The Court of Appeals accurately confirmed the Trial Court's definition of "unlawful force" as used in Instruction 12 in response to the jury's request.

The Court of Appeals accurately held that the trial court clearly had discretion to respond to the jury's request for help with a definition of a term used in the jury instructions. "Aguirre argues that it was improper for the trial court to answer the jury's questions after deliberations began. We disagree". The Court cited to *State v. Ng*, 110 Wn.2d 32, 42, 750 P.2d 632 (1988) (not cited by Aguirre). *Aguirre* at *11.

Aguirre argues that the instruction was a misstatement of the law. The Court of Appeals carefully analyzed this argument and disagreed, agreeing with trial court's interpretation of the statute. *Aguirre* at *10. It is respectfully submitted that an appellate court's reading of a statute affirming a trial court's reading deserves great weight. Aguirre's argument based on WPIC 17.02 at pg. 20 of the Petition for Review is simply misplaced. That instruction addresses the *defense* to a charge of second degree assault. This case

involves a *charge* of second degree assault. Self defense was simply not an issue in this case.

4. The Court of Appeals accurately adopted the holding in *State v. Nguyen*, 134 Wn. App. 863, 142 P.3d 1117 (2006), review denied, 187 P.3d 752 (2008) in affirming the Trial Court's ruling that the deadly-weapon sentencing enhancement for the crime of assault with a deadly weapon did not violate double jeopardy.

Aguirre acknowledges that his argument has been rejected by our Appellate Courts. Petition for Review pg. 24. The Court of Appeals adopted *Nguyen* in rejecting his argument. This Court denied review of *Nguyen*. Aguirre advances no argument supporting reconsideration of that denial.

5. The Court of Appeals properly affirmed the Trial Court's discretionary ruling denying Aguirre's motion, made at the scheduled sentencing hearing two months after the jury verdict, for an eight week continuance to allow newly substituted counsel to prepare for the hearing.

Four days before a sentencing that had been scheduled two months earlier, new counsel appeared on the scene and asked for another two month delay. The trial court offered a week. Counsel declined and sentencing proceeded with trial counsel representing Aguirre. *Aguirre* at *12. In his argument that the trial court abused its discretion, he cites as primary authority *State v. Roth*, 75 Wn. App. 808, 824, 881 P.2d 268 (1994), review denied, 126 Wn.2d 1016 (1995). See Petition for Review citing *Roth* at pgs. 25-27. In its decision affirming the trial court's exercise of discretion, the

Court of Appeals cited to *Roth* five times. *Aguirre* at *12. It is respectfully submitted that the Court's interpretation of *Roth* carries more weight than *Aguirre*'s. This Court denied review of *Roth*. *Aguirre* advances no argument supporting reconsideration of the denial.

F. CONCLUSION

For the reasons set forth above, particularly because of the lack of arguments rising to the level of being persuasive in clear and concrete terms that the considerations set forth in RAP 13.4 *compel* review, the State respectfully requests that the Petition for Review be denied.

Dated this 14th day of November, 2008

Respectfully submitted,

for *Carol Culver* 19229
George Oscar Darkenwald, WSBA # 3342
Special Deputy Prosecuting Attorney for Thurston County
Attorney for Respondent

APPENDIX A

Not Reported in P.3d

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Not Reported in P.3d, 2008 WL 4062820 (Wash.App. Div. 2)

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington, Division 2.

STATE of Washington, Respondent,

v.

Daniel Marshall AGUIRRE, Appellant.

No. 36186-8-II.

Sept. 3, 2008.

Appeal from Thurston Superior Court; Honorable Anne Hirsch, J.

Sheryl Gordon McCloud, Law Offices of Sheryl Gordon McCloud, Seattle, WA,
for
Appellant.

Carol L. La Verne, Thurston County Prosecutor's Office, George Oscar
Darkenwald,
S. Puget SoundComm College, Olympia, WA, for Respondent.

UNPUBLISHED OPINION

HUNT, J.

*1 Daniel M. Aguirre appeals his second degree assault and second degree rape jury convictions and sentences. He argues that (1) the trial court violated his right to confront witnesses when it excluded testimony during cross-examination of the victim, during cross-examination of an officer, and during Aguirre's direct-examination testimony; (2) the State's domestic violence expert improperly commented on Aguirre's guilt and the victim's credibility; (3) the trial court misstated the law when it defined "unlawful force" to the jury; (4) the trial court erred when it defined phrases in response to the jury's question after deliberations

began; (5) the deadly weapon sentence enhancement jury instruction failed to instruct the jury on the "nexus" element; (6) the deadly-weapon sentence enhancement on his second degree assault conviction violates double jeopardy; and (7) the trial court violated his right to choose counsel when it denied his potential new counsel's request for a two-month continuance at the sentencing hearing.

We affirm.

FACTS

I. Crimes

In June 2006, Emily Laughman met Daniel Aguirre, her instructor at the United States Army Noncommissioned Officer Academy. At the graduation party Aguirre gave for his students, he and Laughman began a relationship. Their relationship encountered problems in August.

On August 26, Aguirre asked Laughman to meet him at his apartment. Laughman arrived first. When Aguirre arrived, Laughman "was in a bad mood." Aguirre grabbed his combat knife, sat on Laughman's legs, and told her that she should never break the circle of trust and never leave him. Aguirre then ran his knife down Laughman's cheek and throat and asked her, "How does it feel to date a psychopath?" And he told her that "he had stopped taking his pills and that [Laughman] was his pill and that as long as he had [Laughman], that was fine." FN1 Report of Proceedings (RP) (Feb. 13, 2007) at 347.

FN1. At trial, Laughman testified that Aguirre had been taking medication for anger problems. Aguirre testified that he was taking medication for post traumatic stress syndrome, from which he suffered from after returning from Iraq.

Laughman stepped outside, wanting to leave, but she was unable to find her car keys. Aguirre yelled at Laughman to come back inside and told her to lie down on the bed next to him in his bedroom. Laughman complied. After a couple of minutes, Laughman thought Aguirre might have passed out from the tequila and beer he had been drinking, and she tried to leave. But Aguirre grabbed Laughman, threw her to the ground, pulled her pants down, and held her arms down while he had forcible sexual intercourse with her. Laughman yelled at Aguirre to stop, tried to kick him, and tried to squirm out of his grip. During this struggle, Aguirre bruised Laughman's left rib, upper left arm, right arm, right inner thigh, and right calf. Aguirre then lay back down on his bed. Laughman went back outside, then

returned and slept on the couch. The next morning, Laughman found her keys and left.

The next day, Aguirre contacted Laughman; he told her that he was sorry and that he was taking his medication again. Although she was angry with Aguirre, Laughman still cared about him, and she agreed to meet him later that day at his apartment. During the meeting, Aguirre became angry, took Laughman's car keys, and told her that he had thrown them into the bushes next to his apartment. Laughman searched for her keys in the bushes. When it started getting dark and she still could not find her keys, Laughman called 911 and told the operator that she and Aguirre had been in a fight and that he had thrown her car keys in the bushes. When Aguirre saw Laughman on the phone, he held her keys up in his hand. Laughman took her keys and left.

*2 Deputy Carla Carter stopped Laughman as she was driving home. Laughman told Carter that she had been "play fighting" with Aguirre but that Aguirre had not assaulted her. Laughman did not tell Carter that Aguirre had raped her. Laughman declined to go with Carter to give a statement. According to Laughman, she did not feel comfortable talking to Carter, and she felt that Carter was "really rude."

The next morning, Laughman went to work at Fort Lewis. When Laughman's supervising officer saw the bruises on her body, the officer told Laughman she needed to go to Madigan Army Medical Center.

Laughman later gave a statement to Deputy Jeffrey Wilkinson about the rape and assault. She told Wilkinson that (1) Aguirre had forced her to have sexual intercourse "against her will"; and (2) she wanted to "recant" her earlier statement to Deputy Carter that Aguirre had not assaulted her. While taking Laughman's statement, Wilkinson noticed that she had bruises on her legs, her arms, and the bridge of her nose.

II. Procedure

The State charged Aguirre with two counts of second degree assault and one count of second degree rape, alleging a deadly weapon sentence enhancement for one of the second degree assault charges.

A. Trial

1. Laughman's testimony

After Laughman's direct examination, Aguirre's attorney asked the trial court for permission to inquire on cross-examination about the instances of jealousy that

Aguirre had shown during the relationship. After hearing argument from defense counsel and the prosecutor, the trial court ruled,

Well, with respect to the testimony that the witness has given about, it's the Court's recollection that she testified to two prior instances of jealousy, I think is the term she used, and she described one. I think it's appropriate on cross-examination that the defendant be allowed to go into that in whatever appropriate way that he wants to. Certainly, there needs to be limits with what you do, [defense counsel], and I think you are well aware of what the requirements are with respect to what you can inquire as to the witness.

RP (Feb. 13, 2007) at 371-72. For clarification, defense counsel asked the trial court,

As concerning any kind of alternate relationship that occurred between [Laughman] while [Aguirre] and [Laughman] were both absent from Fort Lewis. So I understand the Court's ruling, I can ask about the second instance of jealousy?

RP (Feb. 13, 2007) at 372. The trial court replied, "Yes."

During cross-examination, defense counsel asked Laughman about the "several instances" of jealousy that Aguirre had during their relationship. In response to defense counsel's question, Laughman recounted Aguirre's anger and jealousy when she tried to remove some of her personal items from his apartment. But defense counsel did not ask Laughman about whether Aguirre had become jealous because she had a relationship with another man.

2. Aguirre's offer of proof for his brother's testimony

*3 Defense counsel made an offer of proof that Aguirre's brother would testify (1) that Laughman had tried to contact him on "Myspace" FN2 in an attempt to send Aguirre a message through his brother, and (2) that Aguirre's brother knew that Laughman was trying to contact Aguirre after the rape. Defense counsel argued that this testimony was relevant because it would contradict Laughman's testimony that she had not sent messages to Aguirre's brother on "Myspace." Based on this offer of proof, the trial court excluded this testimony because it was impeachment on a collateral matter.

FN2. "Myspace.com" is a social networking Internet site.

3. Aguirre's testimony and offer of proof

Aguirre testified in his own defense. After some direct examination, the trial court allowed the defense to make an offer of proof. During this hearing, Aguirre stated that after becoming intoxicated and spending the night at Laughman's apartment, he had looked around her kitchen after she left for work the next morning. In the kitchen, Aguirre had found a letter that referred to a male named "Aron"; Aguirre did not testify further about the letter's contents. Based on this letter, Aguirre believed that Laughman was having a relationship with another man. Aguirre told the trial court, "I do not agree I was jealous at all. I had no grounds to be jealous."RP (Feb. 15, 2007) at 729.

Based on this offer of proof, defense counsel asked the trial court for permission to ask Aguirre about Laughman's "seeing somebody else" during their relationship. Defense counsel acknowledged that (1) Aguirre was still married to his wife, (2) he had also started seeing another woman during his relationship with Laughman, and (3) evidence of other relationships was a "double-edged sword." Nonetheless, defense counsel argued that "we should be allowed to tell our side of the story as to why the relationship started changing, started growing apart."RP (Feb. 15, 2007) at 735. The prosecutor responded, "[I]t is fair for the defendant to say that he believed or that he suspected that [Laughman] was not being faithful to him," but under the rape shield statute, it would be inappropriate for defense counsel to admit evidence of the victim's sexual relationship with another man that allegedly occurred before the charged rape. RP (Feb. 15, 2007) at 736-37, 741.

The trial court ruled,

I think the issue is here, which is that, from my hearing of the argument and the offer of proof, what the defense is trying to do is to introduce evidence of the alleged victim's past sexual behavior.

....

However, I do think that the defendant is entitled to say that he believed that she was seeing someone else and that that caused him to, in his mind, change his view of the relationship, and he didn't want to be in a relationship anymore. But, frankly, I think under the purpose of the rape shield statute and under the specific terms of 9A.44.020(3), he can't testify about that letter, period.

RP (Feb. 15, 2007) at 745-46.

*4 The trial court stated that (1) defense counsel was offering evidence of Laughman's sexual relationship with another man by using the term "seeing someone"; (2) "the term 'seeing someone' is a euphemism for having sex. I think it is one in the same"; and (3) the contents of the letter were hearsay and defense counsel had not shown any hearsay exceptions making the letter's contents admissible. RP (Feb. 15, 2007) at 753-54.

The trial court further ruled,

There needs to be some ability for the defendant to present his version of this matter to the jury, and it needs to be in a meaningful way, at the same time balancing the need for the Court to make sure that the proceeding is fair to everybody.

I'm going to allow the defendant to testify that he found out that Ms. Laughman, Sergeant Laughman, had been seeing-had seen someone else while he was in Georgia, and that's going to be the extent of what he can say about that.

RP (Feb. 15, 2007) at 754. Defense counsel responded, "For the record, the Defense can live with that." RP (Feb. 15, 2007) at 754.

On February 16, 2007, the jury found Aguirre guilty of second degree rape and one count of second degree assault. The jury returned a special verdict finding that Aguirre committed the second degree assault while armed with a deadly weapon.

B. Substitution of Counsel and Motion to Continue Sentencing

The trial court set sentencing for April 10, 2007, giving counsel approximately two months to prepare. On April 4, four business days before the scheduled sentencing hearing, a different attorney filed a motion to continue the sentencing hearing and to become Aguirre's counsel of record. At the sentencing hearing, the trial court granted Aguirre's motion for substitution of counsel. But substituted counsel stated that she would not substitute as counsel unless she had eight weeks to prepare for sentencing. The trial court offered Aguirre a one-week continuance, which substituted counsel rejected.

The State argued that Laughman was present, had traveled from Pennsylvania, and was opposed to having sentencing "dragging on." After hearing argument from Aguirre's former and substitute counsel about the reasons for an eight-week continuance, the trial court denied their motion for an eight-week continuance. Thus, Aguirre's former defense counsel represented him at sentencing. At

Aguirre's request, the trial court did continue sentencing for two days to April 12 to allow Aguirre to have his "chain of command" present at the sentencing hearing.

On April 12, the trial court sentenced Aguirre to a standard range sentence of 26 months' confinement for the second degree assault conviction and a standard range sentence of 125 months for the second degree rape conviction, to run concurrently. The trial court also imposed a 12-month deadly weapon sentence enhancement to run consecutively with the conviction sentences.

Aguirre appeals.

ANALYSIS

I. Exclusion of Testimony

*5 Aguirre first argues that the trial court violated his constitutional right to confront witnesses by excluding testimony about the details of (1) Aguirre's allegedly breaking off his relationship with Laughman, (2) Laughman's alleged relationship with another man, and (3) Laughman telling an officer that she was recanting her prior statement that Aguirre had not assaulted her. Aguirre's arguments fail.

A. Standard of Review

We review a trial court's exclusion of evidence for an abuse of discretion. *State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007). The trial court's balancing of the danger of prejudice against the probative value of the evidence is a matter within the trial court's discretion, which we will overturn "only if no reasonable person could take the view adopted by the trial court." *Id.*

Additionally, we review a trial court's relevancy determinations for manifest abuse of discretion. *State v. Gregory*, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006). A trial judge, not an appellate court, is in the best position to evaluate the dynamics of a jury trial and, therefore, the prejudicial effect and relevancy of evidence. *Posey*, 161 Wn.2d at 648.

A. Relationship Break

Aguirre argues that the trial court erred when it barred his brother, Jimmy Aguirre, "from testifying about who was chasing whom," because his testimony

"would have rebutted Ms. Laughman's testimony on the critical issue of who broke off the relationship." Br. of Appellant at 20-21. We disagree.

During trial, defense counsel made an offer of proof: Counsel stated that Aguirre's brother would testify that Laughman had tried to contact him on "Myspace" in an attempt to send Aguirre a message, thereby contradicting Laughman's testimony that she had not sent messages to Aguirre's brother. The trial court ruled that this testimony would be improper impeachment on a collateral matter.

Neither the State nor the defendant may impeach a witness on a collateral issue. *State v. Fankhouser*, 133 Wn.App. 689, 693, 138 P.3d 140 (2006). "An issue is collateral if it is not admissible independently of the impeachment purpose. Put another way, a witness may be impeached on only those facts directly admissible as relevant to the trial issue." *Id.* (internal citations omitted). In *Shope*, Division One of our court upheld the trial court's exclusion of offered testimony because it "would not have affected the result. Whether at another time and place the victim acted in a manner from which a trier of fact might infer that he would initiate or participate in homosexual activity is not pertinent here." *In re Welfare of Shope*, 23 Wn.App. 567, 568-69, 596 P.2d 1361 (1979).

Here, the trial court properly excluded Aguirre's brother's testimony as improper impeachment on a collateral matter because it did not make it more or less probable that Aguirre had raped and assaulted Laughman. See *Fankhouser*, 133 Wn.App. at 693. Although the offered testimony might have refuted Laughman's claim that she had not sent Aguirre's brother a message on "Myspace" after the rape, it would not have impeached Laughman on her other testimony: Laughman had already testified that she did contact Aguirre after the rape and assault and that she had wanted to see him because she did not initially comprehend the gravity of what had happened. Thus, the offered testimony went to impeachment on a collateral matter and was not relevant to the issues of the case. Accordingly, the trial court did not abuse its discretion in barring Aguirre's brother's testimony about the Myspace message.

C. Laughman's Alleged Relationship with Another Man

*6 Aguirre next argues that the trial court erred when it (1) "barred defense counsel from cross-examining Ms. Laughman about seeing another man and about how that caused Aguirre to pull back from their relationship" and (2) prevented him from testifying about details of Laughman's relationship with another man. Br. Of Appellant at 9, 18, 21. Aguirre argued at trial and reiterates on appeal that Laughman's alleged relationship with another man was relevant to

his defense because he broke off his relationship with Laughman based on this discovery, which allegedly led to Laughman fabricating the rape and assault. Aguirre's arguments fail.

1. Cross-examination of Laughman

Defense counsel asserts that the trial court "barred defense counsel from cross-examining Ms. Laughman about seeing another man and about how that caused Aguirre to pull back from their relationship." Br. of Appellant at 9. But the record does not support this assertion. Contrary to Aguirre's argument on appeal, the trial court granted defense counsel's request to cross-examine Laughman about seeing another man during her relationship with Aguirre. Because the trial court did not bar Aguirre from cross-examining Laughman about an alleged relationship with another man, Aguirre's argument fails.

2. Aguirre's offer of proof and testimony

Aguirre also argues that the trial court erred when it barred him from testifying "about the details causing him to want to break up with Ms. Laughman." Br. of Appellant at 21. But Aguirre does not specify what "details" the trial court barred him from testifying about or what "details" he believes the trial court should have allowed.

Aguirre contends that the trial court barred him from testifying about how Laughman's alleged relationship "influenced his desire to break things off with her." On the contrary, the record shows that the trial court allowed Aguirre to testify that he wanted to break up with Laughman because he believed that she was having a relationship with another man. Aguirre testified, and the jury heard, that (1) Aguirre "found out that [Laughman] had been seeing someone else"; (2) Aguirre ended the relationship with Laughman because of Laughman's relationship with someone else; (3) Aguirre had "play wrestle[d]" with Laughman, but had not assaulted her; (4) Aguirre had consensual sex with Laughman after they "play wrestled"; (5) Aguirre and Laughman discussed the status of their relationship after the alleged "play wrestle" and consensual sex; and (6) Aguirre did not believe his relationship with Laughman was "serious." Thus, the trial court did not prohibit Aguirre from testifying about his relationship with Laughman, whether he believed she was seeing someone else, or his reasons for breaking up with Laughman.FN3

FN3. We also note that defense counsel agreed with the trial court's ruling that Aguirre could testify about his belief that Laughman was

in a relationship with another man, but could not testify directly or insinuate that Laughman was having sex with another man.

The trial court did, however, bar Aguirre from referring to Laughman's alleged relationship with this other man as "sexual"; the court did not want Aguirre to use the phrase "seeing someone" because this phrase "is a euphemism for having sex."RP (Feb. 15, 2007) at 753. Despite the trial court's ruling, Aguirre did testify that he "found out that [Laughman] had been seeing someone else." FN4RP (Feb. 15, 2007) at 761 (emphasis added). Furthermore, the only detail in Aguirre's offer of proof about Laughman's alleged relationship with another man that the trial court excluded was Aguirre's discovery of the letter containing a male name, in Laughman's kitchen.

FN4. Because Aguirre testified that Laughman was "seeing someone else," and the jury heard this statement, we do not further address the trial court's ruling that the rape shield statute excludes this phrase as a euphemism for sex.

*7 On appeal, Aguirre argues that the trial court should have allowed him to testify about the letter because his right to confront witnesses "trumps" any evidence or statutory rules that would otherwise make testimony about the letter inadmissible. Contrary to Aguirre's argument, his right to confront witnesses is not absolute, and it does not allow him to present inadmissible or legally excludable evidence. See *Holmes v. South Carolina*, 547 U.S. 319, 326-27, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (the Constitution permits judges to exclude evidence that is repetitive, marginally relevant, or poses an undue risk of harassment, prejudice, or confusion of the issues).

Aguirre has not shown how the proffered testimony about the letter was relevant to his defense or how it affected his defense theory at trial. Because Aguirre "has no constitutional right to have irrelevant evidence admitted in his [] defense," the trial court did not abuse its discretion in excluding reference to the letter. *Gregory*, 158 Wn.2d at 786 n. 6 (quoting *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)).

The trial court allowed Aguirre to testify extensively about his relationship with Laughman and about his belief that she was seeing someone else. Thus, the trial court gave Aguirre "a meaningful opportunity to present a complete defense." *Holmes*, 547 U.S. at 324 (internal quotation marks omitted).

D. Laughman's Statement to Officer Wilkinson

Aguirre also argues that the trial court erred when it prohibited defense counsel from asking Officer Wilkinson if Laughman had told him "that she was recanting her prior statement about what had happened." Br. of Appellant at 15. This argument also fails.

Before Officer Wilkinson testified, the prosecutor and defense counsel told the trial court that they agreed that Laughman's specific statements to Officer Wilkinson were inadmissible hearsay and that neither the prosecutor nor defense counsel would ask Wilkinson about Laughman's specific statements. But while cross-examining Officer Wilkinson, defense counsel asked,

Would it be correct to say that-I recalled from your report that you indicated that one of the first things she told you she wanted to recant an earlier version of what she said?

RP (Feb. 13, 2007) at 479. Wilkinson replied, "Correct." The State objected to the question based on the earlier agreement that Laughman's statements to Officer Wilkinson were inadmissible hearsay. The trial court sustained the objection and instructed the jury to disregard Wilkinson's answer. During trial, defense counsel did not object to the trial court's ruling prohibiting him from asking Wilkinson whether Laughman had told Wilkinson that she was recanting her previous statement.

Generally, we will not consider issues raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); RAP 2.5(a). The exception is when a defendant raises a claim of error for the first time on appeal that is a manifest error affecting a constitutional right. Id.; RAP 2.5(a)(3). "The defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. It is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review." *Kirkman*, 159 Wn.2d at 926-27 (quoting *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

*8 Here, Aguirre has not shown actual prejudice that makes the alleged error "manifest," allowing appellate review without having preserved the error below. Both Laughman and Deputy Carter testified that Laughman told Carter that Aguirre had not assaulted her and that they had been "play fighting." Laughman also testified that she contradicted this first statement to Carter when she told Officer Wilkinson that Aguirre had raped and assaulted her. When defense counsel cross-examined Laughman extensively about the differences between the

two statements, Laughman admitted that she had recanted her earlier statement to Carter when she gave her statement to Wilkinson.

Other evidence, including testimony from both officers, also established the differences between Laughman's two statements. Thus, Aguirre has not shown prejudice from the trial court's exclusion of Wilkinson's testimony-that Laughman told him she was recanting her earlier version that Aguirre did not rape her-particularly where Wilkinson nonetheless testified about the details of Laughman's "recant." Accordingly, we hold that the trial court did not abuse its discretion in its evidentiary rulings.

II. Opinion Testimony

Aguirre next argues that the State's domestic violence expert's testimony was inadmissible because it was improper bolstering of the victim's credibility and it was an opinion on Aguirre's guilt. The State responds that (1) defense counsel's nonspecific and general objection to the domestic violence expert's testimony at trial does not preserve this issue for appeal, (2) defense counsel mischaracterizes the expert's testimony on appeal, and (3) the expert's testimony was general in nature and was not an opinion on the victim's credibility or Aguirre's guilt. We agree with the State that the expert's testimony was not an opinion on the victim's credibility or Aguirre's guilt.

A. Standard of Review

A witness's "[i]mpermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury." Kirkman, 159 Wn.2d at 927. We review a trial court's decision to admit expert testimony for abuse of discretion. *Id.* We find no such abuse here.

B. Issue Preserved for Appeal

The State argues that defense counsel's objection to the domestic violence expert's testimony was nonspecific and, therefore, did not preserve this issue for appeal. *Br. of Resp't* at 7-8. The State is correct that a nonspecific objection at trial does not preserve an issue for appeal. See *State v. Carlson*, 61 Wn.App. 865, 869-70, 812 P.2d 536 (1991) (attorney's objection "I'm going to object to this line of questioning" was nonspecific and did not preserve hearsay issue on appeal), review denied, 120 Wn.2d 1022 (1993).

But the State is incorrect that defense counsel's objection here was too general to preserve the issue of an opinion on the victim's credibility. Although defense counsel made the general objection that he "object[ed] to the entire line of questioning," he also stated that the expert's testimony was "indirectly offering an opinion as to whether the victim was believable."RP (Feb. 14, 2007) at 539. This objection was sufficiently specific to preserve for appeal the issue of whether the domestic violence expert commented on the victim's credibility.

C. Permissible Domestic Violence Testimony

*9 In determining whether witness statements are impermissible opinion testimony, we consider the circumstances of the case, including the following factors: "(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact." State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (internal quotations omitted).

Here, Detective Stines specialized in domestic violence cases and had extensive experience and training in domestic violence. Stines testified about (1) "the cycle of domestic violence" FN5 that she has seen in her investigations over the past 20 years; (2) a typical victim's reaction after domestic violence occurs; (3) the numerous reasons a domestic violence victim may stay in a violent relationship, including having children, not having any other financial support, the love she may feel for the other person, and fear of the other person; and (4) the potential reasons that victims may be reluctant to report the domestic violence, including feeling responsible or guilty for what happened, feeling that they have do not have control over their lives, and feeling alone. Stines also testified that when she had interviewed Laughman, she observed that Laughman was reserved and initially did not want to talk to her. Stines also thought that Laughman seemed upset during a second interview.

FN5. Detective Stines testified that the cycle of domestic violence is like a rotating circle. She explained that the violence is followed by the apology, the forgiveness, and the honeymoon phase, and then the cycle starts over. Stines testified that the aggressor uses manipulation and the victim's guilt to continue the cycle and to gain power over the victim.

Generally, no witness, lay or expert, may give a direct opinion about the defendant's innocence or guilt or about a victim's credibility. State v. Black, 109

Wn.2d 336, 348, 745 P.2d 12 (1987). But if the testimony does not directly comment on the defendant's guilt or veracity, helps the jury, and is based on inferences from the evidence, it is not improper opinion testimony. See *Seattle v. Heatley*, 70 Wn.App. 573, 577-80, 854 P.2d 658 (1993) (officer could give his opinion that defendant was intoxicated because it was based on the defendant's physical characteristics), review denied, 123 Wn.2d 1011 (1994). Here, Stines testimony was not improper opinion testimony because she did not directly comment on Aguirre's guilt or Laughman's credibility. Stines did not testify that she believed (1) Laughman was telling the truth, (2) Laughman was suffering from domestic violence, or (3) Aguirre had committed any type of crime or domestic violence. Accordingly, the trial court did not abuse its discretion in allowing Stines to testify about the domestic violence cycle and domestic violence situations.

III. Jury Instructions

Aguirre further argues that (1) the trial court's "unlawful force" definitional jury instruction was erroneous, and (2) the deadly weapon sentence enhancement jury instruction omitted essential elements. Again, we disagree.

A. Standard of Review

We review challenged jury instructions de novo, examining the effect of a particular phrase in an instruction by considering the instructions as a whole and reading the challenged portions in the context of all the instructions given. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996). Jury instructions are sufficient if they allow the parties to argue their theories of the case and, when read as a whole, properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). Such is the case here.