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SUPREME COURT OF THE STATE OF WASHINGTON
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NO. 36186-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DANIEL MARSHALL AGUIRRE,

Petitioner.

PETITION FOR REVIEW

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ORIGINAL

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A. IDENTITY OF PETITIONER

Daniel Aguirre, defendant and appellant, asks this Court to review the Court of Appeals decision designated in Section B.

B. COURT OF APPEALS DECISION

A copy of the decision affirming Mr. Aguirre's conviction and sentence is contained in Appendix A.

C. ISSUES PRESENTED FOR REVIEW

The state's theory was that Mr. Aguirre raped his girlfriend, Ms. Laughman, because he was angry, jealous, barring her from contact with peers, and afraid she would leave him. The defense theory was that they had consensual sex; that Mr. Aguirre was the one who broke up with Ms. Laughmann; and hence that she harbored bias, resentment and a motive to lie. No one in the house at the time of the alleged acts could corroborate assault or rape; no forensic evidence corroborated the claims; and Ms. Laughmann made conflicting statements about whether any crime had occurred. Hence, credibility was the key issue.

1. Did the trial court's admission of the "domestic violence" expert's opinion about how Ms. Laughman's actions and conflicting statements fit those of a rape victim, constitute impermissible vouching?

2(a). Did exclusion of evidence that the complainant tried to contact Aguirre through his brother, after the time that she claimed that

she was trying to get away from him, on the ground that it was impeachment on a collateral issue, violate evidence rules and the constitutional right to present a defense?

2(b). Did exclusion of evidence regarding complainant “seeing” another man on the ground that it violated the rape shield statute violate the language of that statute and the constitutional right to present a defense?

2(c). Did exclusion of other evidence challenging the complainant’s credibility, and revealing her bias, violate the constitutional right to present a defense?

3. The court defined “unlawful force” in the instruction on assault as “any force” used without “consent.” Since unlawful force depends on the defendant’s subjective viewpoint, not the victim’s, did this misstate the law?

4. Following *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005), *rev’d on other grounds*, 548 U.S. 212 (2006) – which held that any fact increasing the statutory maximum penalty is akin to an element of the crime – does the state violate double jeopardy protections by charging second-degree assault based on a deadly weapon, plus a deadly weapon enhancement, for the same weapon?

5. Did denial of the motion for a continuance to substitute retained counsel at sentencing deprive Mr. Aguirre of his right to retained counsel of choice?

D. STATEMENT OF THE CASE

1. THE CHARGES

The state charged Daniel Aguirre with two counts of assault and one count of rape for acts allegedly occurring during one night. Count I charged that he intentionally assaulted his girlfriend, Emily Laughman, on August 26-27, 2006, and “recklessly inflicted substantial bodily harm,” in violation of RCW 9A.36.021(1)(a) (and RCW 10.99.020, the domestic violence statute). CP:8. The jury acquitted on that count.

Count II charged second-degree assault with a deadly weapon, under a different portion of that statute (RCW 9A.36.021(1)(c)), on the same dates, for intentional assault “with a deadly weapon,” “a combat knife.” It also alleged a deadly weapon enhancement for that knife. Count III charged second-degree rape in violation of RCW 9A.44.050(1)(a), at the same time, with “forcible compulsion.” CP:9. The jury convicted of those two counts, and on the weapon enhancement.

2. OVERVIEW: CREDIBILITY WAS THE KEY ISSUE

Both Emily Laughman and Daniel Aguirre were in the Army. They were both trained in combat, and they both held difficult jobs

requiring knowledge of the use of force: she was in the military police and had been a guard at both Fort Leavenworth and Guantanamo Bay (2/13/07 VRP:325-26); he had served in Iraq and taught hand to hand combat to soldiers (including Laughman) at the NCO Academy. *Id.*, VRP:327-28.

It was undisputed that the two had sex, and that they had a romantic relationship. She claimed that it was rape and assault causing bruises, and that the rape occurred because he was angry, jealous, and afraid she would leave him.¹ He claimed that they had had consensual sex and consensually engaged in play-fighting so any bruises resulted from that, and that she was reacting negatively because he then tried to break off the relationship.

The key issue at trial was credibility. 2/15/07 VRP:890-902 (state closing, arguing key issue of credibility); *id.*, VRP:926-30 (defense closing, explaining defense theory about complainant's motive to lie because Aguirre broke up with her after consensual sex).

3. TRIAL TESTIMONY

The conflicting testimony of Ms. Laughman and Mr. Aguirre is incorporated by this reference from the Opening Brief, at pp. 6-12. That Brief includes descriptions of the far-ranging testimony that the

¹ *E.g.*, 2/13/07 VRP:459-62 (nurse testimony about bruising).

complainant was allowed to present, from Mr. Aguirre's supposed jealousy and limitations on her contact with peers, as well as threats about what he would do to her if she left him. It includes her explanations of why she failed to report any assault or rape to Mr. Aguirre's roommate, whom she saw after the disputed sex while smoking in the living room, and to explain the fact that she told the officer who inquired about her welfare a day later (following a hang up 911 call) that she was practicing combat moves with him, not fighting. It also includes the domestic violence expert's testimony that such denials are consistent with a rape victim profile.

On the other hand, that Brief shows that the trial court prevented Daniel Aguirre from presenting his side of the story on precisely these topics.

Even with the lopsided nature of the evidence that the trial court admitted and excluded, the jury did not completely believe Ms. Laughman. They acquitted on Count I, the first assault she claimed had occurred that evening.

4. SENTENCING

Mr. Aguirre retained a new lawyer (undersigned counsel) for sentencing. The state opposed the joint motion of Mr. Aguirre, his trial counsel, and newly retained counsel to continue sentencing to enable

retained counsel to represent Mr. Aguirre effectively. *See* Opening Brief, pp. 12-13.

The trial court imposed a standard range sentence of 26 months on Count 2. On Count 3, it imposed a concurrent standard range minimum term of 125 months and a maximum term of life. The deadly weapon enhancement runs consecutively to both. CP:129.

E. ARGUMENT IN FAVOR OF REVIEW

1. ADMISSION OF TESTIMONY FROM THE “DOMESTIC VIOLENCE” EXPERT ABOUT HOW MS. LAUGHMAN SUFFERED FROM A CYCLE OF VIOLENCE WITH MR. AGUIRRE CONSTITUTED IMPERMISSIBLE VOUCHING; THE APPELLATE COURT’S DECISION TO THE CONTRARY CONFLICTS WITH *BLACK*² AND DECISIONS BARRING VOUCHING

a. The Domestic Violence Expert’s Testimony, Admitted Over Defense Counsel’s Continuing Objection, and the Appellate Court’s Ruling

Over the defendant’s continuing objection (2/14/07 VRP:538-41), state’s witness Cheryl Stines, Thurston County Sheriff’s Department, testified as an expert in domestic violence. She reiterated Ms. Laughman’s testimony, and explained how each bit of it (though all of it was disputed) – Mr. Aguirre’s supposed jealousy and control; her supposed embarrassment about reporting; and her demeanor – was

² *State v. Black*, 109 Wn.2d 336, 341, 348-50, 745 P.2d 12 (1987).

consistent with Laughman being a victim of domestic violence, and with Aguirre being a perpetrator of violence. 2/14/07 VRP:493-537.

The defense objected and the Court of Appeals agreed that this objection preserved the challenge to admissibility of this testimony for appeal. But it ruled that the expert did not vouch because “she did not directly comment on Aguirre’s guilt or Laughman’s credibility.” *State v. Aguirre*, 2008 Wash. App. LEXIS 2202, at *25.

b. **The Appellate Court’s Decision Conflicts With Controlling and Persuasive Precedent Holding that Testimony Bolstering Credibility is Impermissible Vouching, Even if There is No Direct Statement That The Expert “Believes” the Complainant.**

The appellate court’s decision that the expert did not vouch because she did not directly say she believed the victim conflicts with several lines of authoring.

It conflicts with this Court’s ruling that just such testimony, that a complainant’s demeanor fits a pattern consistent with that of a rape victim, constitutes impermissible opinion testimony, where it implies that the alleged victim is telling the truth. *State v. Black*, 109 Wn.2d 336, 341, 348-50 (social worker’s testimony that alleged victim fit profile of rape victim was impermissible opinion testimony). Contrary to the appellate court below, this Court in *Black* came to that conclusion even though the

expert did not *directly* testify that the complainant was telling the truth – inferences arising from the bolstering sufficed. As this Court stated: “No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, *whether by direct statement or inference.*” *Id.*, at 109 Wn.2d at 348 (emphasis added).

This Court properly relied on prior decisions of this Court for that holding. *Id.* (citing *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1987) and *State v. Haga*, 8 Wn. App. 481, 507 P.2d 159, *review denied*, 82 Wn.2d 1006 (1973) (opinion testimony of ambulance driver that defendant had not shown signs of grief following the murders of his wife and daughter was wrongfully admitted because the jury could infer from this that driver believed defendant was guilty)). The appellate court’s decision thus conflicts with *Garrison* and *Haga* on this point, also.

It is true that since *Black*, *Garrison*, and *Haga*, Washington courts have “made clear that expert testimony generally describing symptoms exhibited by victims may be admissible when relevant and when not offered as a direct assessment of the credibility of the victim.” *State v. Stevens*, 58 Wn. App. 478, 496, 794 P.2d 38, *review denied*, 115 Wn.2d 1025 (1990). *See also State v. Ciskie*, 110 Wn.2d 263, 279-80, 751 P.2d 1165 (1988). This Court, however, has never addressed the lurking conflict between *Black*’s preclusion of such testimony as vouching even if

it bolster's the victim's credibility inferentially, and lower court's later holdings that bolstering may be permissible if it is not direct.

The conflict implicates not just this case law on vouching and on E.R. 702, concerning the admissibility of expert testimony, but also the right to due process and a fair trial. U.S. Const. V, XIV; Wash. Const. art. 1, §3. This is because introduction of expert testimony concerning the implications of Mr. Aguirre's and Ms. Laughman's demeanor – based on Laughman's testimony about their demeanors and rejecting Aguirre's testimony and proffered testimony on that topic – is a personal opinion concerning witness veracity.³ It is most prejudicial in a case like this: “the existence of a dispute in the evidence as to the credibility of a witness – a matter that be definition is for the jury to resolve – makes the prosecutor's placement of his thumb on the scales all the more impermissible.”⁴

³ *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985); *United States v. Weatherspoon*, 410 F.3d 1142 (9th Cir. 2005) (arguing that the officers risk losing their jobs if they lie, so they must have “came in here and told you the truth” impermissible vouching); *United States v. Combs*, 379 F.3d 564, 574-76 (9th Cir. 2004) (same).

⁴ *Weatherspoon*, 410 F.3d 1142, 1148. See *State v. Boehning*, 127 Wn. App. 511, 111 P.3d 899 (2005) (prosecutorial bolstering of witness testimony prejudicial, because “jury's verdict turned almost entirely upon the credibility of the complaining witness and the defendant.”).

2. TESTIMONY THAT DIRECTLY CONTRADICTS THE COMPLAINANT ON THE STATE'S THEORY OF THE CASE IS DIRECT NOT COLLATERAL; EXCLUSION OF THIS AND OTHER EVIDENCE VIOLATES EVIDENCE RULES AND THE RIGHT TO PRESENT A DEFENSE.

a. Precluding Cross-Examination of the Complainant on Her Relationship With Another Man as Violative of the Rape Shield Statute Contradicts the Language of that Statute and Violates the Right to Present a Defense

The judge barred defense counsel from cross-examining the complainant about being in a relationship with another man and about how the impact of that caused Mr. Aguirre to pull back from their relationship, thus refuting the notion that she was the one who wanted to leave him. 2/13/07 VRP:368-71, 372. The judge rejected a detailed offer of proof (2/15/07 VRP:722-27) that Mr. Aguirre be allowed to testify about how he found out that the complainant was seeing someone else, and how that influenced his desire to break things off with her.

The judge reasoned that allowing Mr. Aguirre to give any more than one line about the fact that Ms. Laughman went out with someone else would violate the rape shield statute (2/15/07 VRP:736), even though defense counsel clearly stated he was not going to ask anything about sex – just about the fact that she saw someone else. 2/15/07 VRP:739. The judge also reasoned that defendant's testimony on this topic – of

Laughman dating another man during the time period when Laughman claimed that she was dominated by Aguirre and barred from seeing her peers – had no probative value (2/15/07 VRP:741), even though Ms. Laughman’s credibility, bias, and motive to lie formed the central element in dispute in this credibility case.

The appellate court upheld the trial court’s decision on the ground that even if the judge excluded testimony about the complainant “seeing someone” else because it was supposedly a “euphemism for having sex,” defense counsel elicited it anyway – so the question of whether the rape shield statute really barred admission of such evidence was not presented. *Aguirre*, 2008 Wash. App. LEXIS 2202, **17-18 & n.4.

It is correct that Mr. Aguirre did testify once that the complainant was seeing another man. But he was not permitted to testify about how that affected their relationship and he was not permitted to cross-examine the complainant about this topic. The trial court excluded the details of that relationship based on the “rape shield” law.

The trial court’s decision contradicts the rape shield law itself. That statute, RCW 9A.44.020, limits admission of certain “past sexual behavior” of the complaining witness – “marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards.” But the defense did not offer “past

sexual behavior.” It offered evidence that Laughman went out with someone else, and how that affected the dynamic with Mr. Aguirre.

The trial judge also stated that she would construe the rape shield statute broadly, to effectuate the legislature’s presumed goals. This contradicts the rule that criminal statutes must be construed under the rule of lenity, not the rule of broad construction.⁵

Even if the rape shield statute did, by its terms, apply, so does the constitutional right to present a defense. A state evidentiary rule, even a longstanding and well-respected one, cannot abridge the right to present a defense. *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (exclusion of defense evidence of third-party guilt, pursuant to a state evidentiary rule, unconstitutional). Thus, numerous jurisdictions have held that evidence of motive and bias is admissible under constitutional standards, regardless of rape shield statutes to the contrary – and the decisions of the courts below conflict directly with these authorities.⁶

⁵ *Ratzlaf v. United States*, 510 U.S. 135, 148, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994); *United States v. Figueroa*, 165 F.3d 111, 119 (2d Cir. 1998).

⁶ *E.g.*, *Boggs v. Collins*, 226 F.3d 728, 737 (6th Cir. 2000), *cert. denied*, 532 U.S. 913 (2001); *Commonwealth v. Black*, 487 A.2d 396 (Penn. 1985) (insofar as rape shield law barred demonstration of witness bias, interest or prejudice, it unconstitutionally infringed upon the defendant’s confrontation clause rights); *Summit v. State*, 697 P.2d 1374 (Nev. 1985) (defendant was denied right to confrontation where prior sexual history of complainant was offered to challenge credibility); *People v. Hackett*, 365 N.W.2d 120, 125 (Mich. 1984) (prior sexual conduct “may not only be relevant, but its admission may

b. **Excluding Testimony that the Complainant Was Trying to Be With Mr. Aguirre, After the Time She Claims the Rape Occurred and She Was Trying to Get Away From Him, as Impeachment on a Collateral Matter, Violates Evidentiary Rules and the Right to Present a Defense**

The trial judge further barred defense counsel from calling Daniel Aguirre's brother Jimmy Aguirre to testify about how Ms. Laughman was trying to chase Daniel Aguirre down, through Jimmy, via MySpace, by asking Jimmy how to locate Daniel and why he was not returning her calls. This was particularly inappropriate, given the fact that Ms. Laughman was allowed to testify that she was not chasing Mr. Aguirre down; that she dumped him and not the other way around; and,

be required to preserve a defendant's constitutional right ... *where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted. ... evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge*") (citations omitted) (emphasis added); *State v. Howard*, 426 A.2d 457 (N.H. 1981); *State v. Pulizzano*, 456 N.W.2d 325 (Wis. 1990) (prior sexual abuse of child victim by other adults material and constitutionally protected). *See Olden v. Kentucky*, 488 U.S. 227, 232, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988) (exclusion of black defendant's evidence about white complainant in kidnap, rape and sodomy trial about her living with boyfriend violated confrontation clause right; relevant to defense claim that sex was consensual and that complainant lied because of fear of her boyfriend). *See also People v. Cobb*, 962 P.2d 944, 951 (Colo. 1998) (evidence of sexual assault victim's prior conduct, relevant to defense theory, not inadmissible under rape shield statute: "While the jury conceivably might have inferred that [the victim] was engaged in an act of prostitution, evidence does not become inadmissible under either Rule 404(b) or the rape shield statute simply because it might indirectly cause the finder of fact to make an inference concerning the victim's prior sexual conduct."); *People v. Golden*, 140 P.3d 1, 4, 5 (Colo. App. 2005), *review denied*, 2006 Colo. LEXIS 568 (2006) (evidence that victim was in "committed romantic relationship" at time of alleged crime admissible despite rape shield statute, because it bore on question of her credibility and possible motive for telling her roommates that she had been sexually assaulted).

specifically, that she did not try to use Jimmy Aguirre to chase the defendant, Daniel Aguirre, down and find out why he was not calling her any more after this alleged rape.⁷

The Court of Appeals upheld preclusion of this evidence as impeachment on a collateral matter. *Aguirre*, 2008 Wash. App. LEXIS 2202, at **12-13. It relied primarily on *State v. Fankhouser*, 133 Wn. App. 689, 693, 138 P.3d 140 (2006), in defining this material as collateral.

The appellate court's decision conflicts with *Fankhouser*, with controlling authority of this Court, and with persuasive authority of other jurisdictions, on what is a collateral matter. *Fankhouser* actually held that exclusion of proposed cross-examination there was error, because it sought to elicit direct evidence of *bias* and *motive to lie*, and that is not collateral; it cited precedent of this court and the appellate courts to the same effect:

Tuttle's testimony did not concern a collateral matter. [I]t was proof that Lukes made a recent false accusation against Fankhouser for the same crime The prior accusation was also the precipitating event that led to Lukes working for the police and performing the controlled buy underlying the current charge. In this situation, proof establishing the falsity of the initial accusation is relevant and admissible to show the accuser's ongoing bias or

⁷ 2/14/07 VRP 588-89 (offer of proof regarding Jimmy Aguirre's testimony on this topic); *id.*, VRP:592 (excluded as impeachment on a collateral issue); 2/13/07 VRP: 429-30 (Ms. Laughman admits putting Jimmy Aguirre on her "friends" list for MySpace but denies trying to contact him repeatedly to find Danny and find out why he was no longer taking her calls).

underlying motive for the current accusation. *See State v. Demos*, 94 Wash.2d 733, 736-37, 619 P.2d 968 (1980) (evidence of a prior allegation is irrelevant absent proof of falsity); *State v. Harris*, 97 Wash.App. 865, 872, 989 P.2d 553 (1999) (same), *review denied*, 140 Wash.2d 1017, 5 P.3d 10 (2000); *State v. Mendez*, 29 Wash.App. 610, 630 P.2d 476 (1981) (trial court did not abuse its discretion in refusing to admit prior allegation since the date of the allegation was unknown). Our ruling is consistent with the wide latitude afforded a defendant in a criminal trial to explore fundamental elements such as the motive, bias, and credibility of the State's key witnesses. *State v. Darden*, 145 Wash.2d 612, 619, 41 P.3d 1189 (2002).

Fankhauser, 133 Wn. App. at 694.

Jimmy Aguirre's excluded testimony directly contradicted Laughman's claim that she was not chasing Daniel Aguirre. This is not collateral under the definition cited above, but direct evidence on both sides' theories of the case.

The appellate court's decision therefore conflicts with *Fankhauser* on the definition of "collateral." It also conflicts directly with the following decisions of this Court and the appellate courts holding that extrinsic evidence is admissible to impeach a witness's testimony in circumstances virtually identical to the ones presented here, that is, in a rape case where the complainant's "motive to lie" is "crucial," or in any case where the witness's post-crime conduct is inconsistent with his or her testimony about the crime. *State v. Lubers*, 81 Wn.2d 614, 623, 915 P.2d 1157 (1996) (extrinsic evidence cannot be used to impeach witness on

collateral issue but “Where the credibility of the complaining witness is crucial, her possible motive to lie is not a collateral issue.”); *State v. Petrich*, 101 Wn.2d 566, 574, 683 P.2d 173 (1984) (evidence of victim's inconsistent conduct following incident, that is, failure to promptly report sexual contact, not merely collateral, and witness may be impeached on it with extrinsic evidence); *State v. Kritzer*, 21 Wn.2d 710, 713-15, 152 P.2d 967 (1944) (in prosecution for assault with a gun, where defendant admitted owning shotgun but denied possessing any other gun, state could impeach by introducing testimony that shortly after assault he had a rifle in his home); *State v. Brown*, 48 Wn. App. 654, 660, 739 P.2d 1199 (1987) (trial court erred in excluding extrinsic evidence that prosecutrix in rape case had taken LSD at point in time close to the rape, because it was relevant direct evidence concerning “the central contention of a valid defense,” *i.e.*, her ability to perceive and relate events).

The appellate court’s decision also conflicts with authority from numerous other jurisdictions holding that a subject is collateral only if it is not related to the witness’s direct testimony.⁸ It conflicts with authority

⁸ *United States v. Negrette-Gonzales*, 966 F.2d 1277, 1280 (9th Cir. 1992) (defense witness takes responsibility for cocaine and exonerates defendants, but refuses to answer government’s question on cross-examination to reveal the names of her suppliers due to fear of reprisal; Ninth Circuit holds, “identity of her source was collateral to the issues at trial and to her testimony on direct,” so striking testimony was reversible error); *United States v. Lord*, 711 F.2d 887 (9th Cir. 1983) (defense witness in cocaine conspiracy trial bolsters entrapment defense but, on cross-examination, refuses to name suppliers; striking

holding that a subject is collateral if it is designed to test credibility generally, rather than by specific reference to the issues concerning the case.⁹ It conflicts with authority holding that a subject is collateral if it concerns “other crimes” or acts about which there was no direct testimony.¹⁰ Whether Aguirre was forcing himself on Laughman or vice versa was the central issue here.

The right to present witnesses is especially strong where they would *rebut* evidence introduced by the government.¹¹ Since the

her testimony was error, because a court “may apply this sanction only when the question asked pertains to matters directly affecting the witness’s testimony; the judge may not use the sanction when the privileged answer pertains to a collateral matter”).

⁹ See *United States v. Sturgis*, 578 F.2d 1296, 1300 (9th Cir.), *cert. denied*, 439 U.S. 970 (1978) (question is “whether the questions propounded are designed to test sincerity and truthfulness or are ‘reasonably related’ to the subject covered on direct.”).

¹⁰ *United States v. Yip*, 930 F.2d 142, 147 (2d Cir.), *cert. denied*, 502 U.S. 868 (1991) (no error in district court’s refusal to strike government witness’ testimony “when witness refused on cross-examination to answer questions -- claiming his Fifth Amendment privilege -- regarding a check cashing and kickback scheme he was allegedly involved in The scheme was not the subject of direct examination, and it was therefore a collateral matter bearing solely on [the witness’] credibility.”); *United States v. Zapata*, 871 F.2d 616, 624-25 (7th Cir. 1989) (prosecution witness’s invocation of Fifth Amendment on cross-examination was permissible, because “all of the unanswered questions did not go to the exculpation of Mr. Zapata from the July transaction with which he was charged, but rather, were directed at [witness’s] prior involvement in drug trafficking in Miami and Chicago.”); *United States v. Williams*, 626 F.2d 697, 699-702 (9th Cir.), *cert. denied*, 449 U.S. 1020 (1980) (lead government witness in robbery case testifies that she and the defendant robbed bank and she pled guilty; on cross-examination she asserts the Fifth Amendment in response to questions about whether she committed other, prior burglaries; no error in trial court’s failure to strike testimony because this was “collateral”).

¹¹ *Fankhauser*, 133 Wn. App. at 695 (“Even initially inadmissible evidence should be allowed if it is necessary to explain or contradict inadmissible evidence offered by the opposing party. *State v. Avendano-Lopez*, 79 Wn. App. 706, 714, 904 P.2d 324 (1995),

proffered evidence would have rebutted Laughman's testimony on who broke up with whom, the right to present this proffered evidence must be considered especially strong.

c. **Excluding Other Testimony Also Violated the Right to Present a Defense**

The judge barred defense counsel from eliciting not just the Jimmy Aguirre testimony and background about the complainant's relationship with another man. She also excluded evidence that the complainant had previously recanted and barred the defendant from giving the most effective testimony – that is, details – about how he felt towards Laughman after learning that she had another boyfriend, and why it was he who wanted to break up. Opening Brief, at 14-21. Exclusion violated the constitutional right to present a complete defense regardless of evidentiary rules to the contrary. *Holmes v. South Carolina*, 547 U.S. 319, 324.

review denied, 129 Wn.2d 1007 (1996).”). See also *United States v. Whitman*, 771 F.2d 1348, 1351 (9th Cir. 1985); *United States v. Armstrong*, 621 F.2d 951, 953 (9th Cir. 1980).

3. THE APPELLATE COURT RECOGNIZED THAT A CHALLENGE TO THE DEFINITION OF UNLAWFUL FORCE CAN BE RAISED FOR THE FIRST TIME ON APPEAL. UPHOLDING THE INSTRUCTION DEFINING “UNLAWFUL FORCE” AS ANY UNCONSENTED TOUCHING, HOWEVER, CONFLICTS WITH THE RULE THAT THE FOCUS MUST BE ON THE DEFENDANT’S SUBJECTIVE VIEWPOINT.

a. The Jury’s Question; the Trial Court’s Answer; and the Appellate Court’s Ruling.

On Friday, Feb. 16, 2007, during deliberations, the jury asked: “Define ‘unlawful force’ as used in Instruction #12.” CP:61.¹² “Unlawful force” had not been previously defined in the instructions. The court answered: “Unlawful force as used in Instruction #12 refers to any force alleged to have occurred that was not consented to and that otherwise meets the definition of assault as contained in Instruction #12.” CP:61. The appellate court reviewed the challenge to this instruction raised for the first time on appeal because of its “constitutional magnitude.” It ruled, however, that the instruction was correct. *Aguirre, id.* at **27-29 & n.6.

b. The Appellate Court Erred in Ruling that Unlawful Force Could be Defined as Unconsented Touching.

“Unlawful force” is *not* any force “not consented to.” It is a much narrower category.

¹² Three Jury Questions were included on the Designation of Clerk’s Papers (CP:2), however, the Index to Clerk’s Papers does not differentiate between the three. Undersigned counsel is assuming that the Jury Notes are in sequential order.

First, the definition of “unlawful touching” provided by the court was wrong under the WPIC’s. WPIC 17.02 defines lawful force and unlawful force. It states:

It is a defense to a charge of assault in the second degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who *reasonably believes* that he is about to be injured and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

WPIC 17.02 (emphasis added). It focuses on the defendant’s reasonable belief, and the state’s burden in proving that the defendant’s belief was not reasonable. WPIC 17.04 continues this definition by focusing on the fact that it is the defendant’s subjective intent that matters, and not whether the alleged victim subjectively consented, or whether another, different, observer would objectively think that she had consented:

A person is entitled to act on appearances in

defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

WPIC 17.04.

The trial court's supplemental instruction on the definition of "unlawful force" did not contain the subjective element required by these instructions. It was an incorrect definition of "lawful force" under the WPIC's.

It was also incorrect under *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997) and *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) – since those decisions confirm the need to focus on the defendant's subjective intent in deciding whether his force is lawful.

The judge's answer even conflicted with the rationale for the WPIC on lawful and unlawful force. As the Comment to WPIC 35.50, defining "assault," explains, the definition of assault-battery (the one at issue here) focuses on the fact that "a bodily contact is offensive if it offends a reasonable sense of personal dignity." RESTATEMENT (SECOND) OF TORTS, § 19 (as quoted in WPIC 35.50 Comment). The contact "must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity. It must, therefore, be a contact which is unwarranted by the *social usages* prevalent at the time and place

at which it is inflicted.” *Id.*, § 19 Comment (a) (as quoted in WPIC 35.50 Comment) (emphasis added).

The “social usage[.]” in this case – according to Mr. Aguirre – was play-fighting based on combatives. That is a pretty rough “social usage.” It is far different from, and involves a much higher standard of proof than, the unconsented-touching standard in the supplemental instruction.

c. **It Was Also Error to Provide This Definition in a Supplemental Instruction, After the Parties Had Argued and the Jury Had Retired.**

It was also error to provide a supplemental instruction on this important topic after the case had already been argued and the jury had retired. The appellate court’s decision to the contrary conflicts with the general rule that supplemental instructions “should not go beyond matters that either had been, or could have been, argued to the jury.” *State v. Ransom*, 56 Wn. App. 712, 714, 785 P.2d 469 (1990).¹³

4. THE APPELLATE COURT UPHELD CONVICTIONS OF SECOND-DEGREE ASSAULT WITH A DEADLY WEAPON PLUS A DEADLY WEAPON ENHANCEMENT FOR THE SAME WEAPON. IN LIGHT OF *BLAKELY* AND *RECUENCO*, THIS VIOLATES DOUBLE JEOPARDY CLAUSE PROTECTIONS.

¹³ See also *Stanley v. Allen*, 27 Wn.2d 770, 781-82, 180 P.2d 90 (1947) (reversing judgment for defendant in auto accident case where belated, changed, instruction added the word “negligently,” and thereby improperly elevated the plaintiff-pedestrian’s burden); *State v. Hobbs*, 71 Wn. App. 419, 859 P.2d 73 (1993) (reversible error to modify instruction after jury begins deliberating by eliminating element).

Mr. Aguirre was convicted of both second-degree assault with a deadly weapon and a deadly weapon enhancement for use of that same weapon. In the past, the Washington courts have rejected double jeopardy challenges to the charging of both a substantive crime having use of a deadly weapon as an element, as well as a deadly weapon enhancement.¹⁴ Those challenges, however, have always been rejected on the ground that the underlying, substantive, statute was considered a crime containing the element of unlawful use of a weapon, but the deadly weapon enhancement statute was only a matter in enhancement of penalty – not an element.¹⁵

That logic does not survive *Apprendi*,¹⁶ *Blakely*, and *Recuenco*. In those cases, the courts made clear that any fact that increases the maximum penalty that may be imposed upon a criminal defendant is akin to an element of the crime, in that it must be proven to the jury beyond a reasonable doubt. The aggravating factor now acts as the *functional equivalent of an element* that must be charged in the Information. RCW 9.94A.602 increases the maximum sentence that might be imposed over

¹⁴ E.g., *State v. Caldwell*, 47 Wn. App. 317, 320, 734 P.2d 542, review denied, 108 Wn.2d 1018 (1987) (robbery); *State v. Pentland*, 43 Wn. App. 808, 811, 719 P.2d 605, review denied, 106 Wn.2d 1016 (1986) (rape).

¹⁵ See, e.g., *State v. Claborn*, 95 Wn.2d 629, 628 P.2d 467 (1981) (first-degree assault); *State v. Husted*, 118 Wn. App. 92, 95, 74 P.3d 672 (2003), review denied, 151 Wn.2d 1014 (2004) (same); *State v. Woods*, 34 Wn. App. 750, 755.

¹⁶ *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

and above the *Blakely* statutory maximum – *i.e.*, the standard Guidelines range – for the crime. Hence, following *Blakely*, *Apprendi*, and *Recuenco*, the enhancement statute is the functional equivalent of an element of the crime. Prior decisions holding that there is no double jeopardy problem because there is no duplication of elements between the underlying crime and the weapon enhancement must be reconsidered.

We acknowledge that this argument has been rejected, *e.g.*, *State v. Nguyen*, 134 Wn. App. 863, 142 P.3d 1117 (2006), *review denied*, 163 Wn.2d 1053 (2008). But the issue remains undecided by this Court.

5. DENIAL OF THE MOTION TO CONTINUE TO ALLOW SUBSTITUTION OF COUNSEL DEPRIVED MR. AGUIRRE OF HIS RIGHT TO COUNSEL OF CHOICE.

a. The Motion for a Continuance and to Substitute Counsel for Sentencing, and the Court’s Ruling.

Mr. Aguirre retained new counsel (undersigned counsel) to represent him at sentencing. The state opposed the joint motion of Mr. Aguirre, his trial counsel, and newly retained counsel to continue sentencing to enable the newly retained lawyer to represent Mr. Aguirre effectively. Counsel explained that in order to present mitigating evidence concerning the characteristics of the defendant and the circumstances of the crime, it was necessary to obtain and review the transcripts of the trial and to prepare a social history of the defendant for the sentencing court.

The Opening Brief's explanation of counsel's motion and the court's ruling, at pp. 41-49, is incorporated by this reference.

b. **The Appellate Court's Decision Upholding Denial of the Motion for a Continuance to Enable Substitution Violated the Right to Counsel of Choice.**

A criminal defendant has a constitutional right to *retain* counsel of choice.¹⁷ *State v. Roberts*, 142 Wn.2d 471, 516. This right applies to the sentencing proceeding. *See State v. Bandura*, 85 Wn. App. 87, 98, 931 P.2d 174, *review denied*, 132 Wn.2d 1004 (1997).

There are only a few limitations on the qualified right to counsel of choice. "A defendant may not insist on representation by an attorney he cannot afford or who, for other reasons, declines to represent the defendant." *State v. Roberts*, 142 Wn.2d 471, 516. The motion to substitute counsel cannot be done for improper or dilatory purposes. *United States v. Walters*, 309 F.3d 589, 592 (9th Cir. 2002), *cert. denied*, 540 U.S. 846 (2003). And a court may deny counsel of choice if it poses a conflict. *Wheat v. United States*, 486 U.S. 153, 164. Finally, the motion can be denied if it would cause *undue* delay. *State v. Roth*, 75 Wn. App. 808, 824, 881 P.2d 268 (1994), *review denied*, 126 Wn.2d 1016 (1995).

¹⁷ *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988); *State v. Roberts*, 142 Wn.2d 471, 516-17, 14 P.3d 713 (2000), *as amended*, 14 P.3d 713 (2001).

There was no conflict posed by the request to retain counsel, and Mr. Aguirre could obviously afford the lawyer whom he hired.

Counsel did request a continuance. But it was the *first* request for a continuance of sentencing; the defendant was incarcerated; and the continuance request was not made for dilatory improper purposes. Instead, the record clearly shows that it was made to give the court reporter time to prepare a transcript of the trial for new counsel to review. Under the authority cited above, denial of the request to retain a lawyer, where retaining that lawyer posed no conflict, was not done for the *purpose* of delay, and did not cause any *undue* delay, was constitutional error.

The appellate courts have developed the following test for determining whether a defendant's rights are violated by denial of a continuance to obtain counsel of choice for trial: "(1) whether the court had granted previous continuances at the defendant's request; (2) whether the defendant had some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation; (3) whether available counsel is prepared to go to trial; and (4) whether the denial of the motion is likely to result in identifiable prejudice to the defendant's case of a material or substantial nature." *Roth*, 75 Wn. App. at 825.

Most of the decisions on this subject, however, have arisen in the

trial context. In that context, there is also the rule that once a case has been set for trial, a lawyer may not withdraw without “good and sufficient reason shown.” CrR 3.1(e). The focus on delay is therefore likely more stringent in the trial setting, than it need be at sentencing.

Even under this trial-stage test, however, the continuance requested here was reasonable: it was a first continuance request; there were no previous continuances or even requests to continue sentencing; the defendant had lost confidence in trial counsel and wanted his appellate counsel to substitute in as soon as possible, partly in order to help preserve issues for appeal; and newly retained counsel was competent and able to proceed with sentencing following review of the transcript and sought only enough time to have the reporter prepare the transcript, to read it, and to prepare a social history and mitigation packet for sentencing.

Of particular importance is that the factors focusing on delay do not make delay itself impermissible; they ask whether the right to retain counsel of choice would “delay the proceedings unduly,” not whether there would be justifiable and limited delay. *Roth*, 75 Wn. App. at 824. The question for this Court is whether the trial court’s decision that an eight-week delay in sentencing was “undue,” when it was undisputed that this amount of time was necessary to obtain and review the transcripts and present a social history of the defendant, was an abuse of discretion.

Given the fact that this was a first request for continuance, where the defendant was incarcerated, there was no evidence or tactical advantage that the state would have lost, *and no evidence that the victim could not have attended at the later date*, there is nothing about this delay that could be considered "undue." It was an inconvenience that should have counted less, in the balance, than the defendant's constitutional right.

F. CONCLUSION

For the foregoing reasons, review should be granted.

Dated this 31 day of October, 2008.

Respectfully submitted,



Sheryl Gordon McCloud, WSBA No. 16709
Attorney for Petitioner, Daniel Aguirre

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____ DEPUTY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 3rd day of October, 2008, a copy of the PETITION FOR REVIEW was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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Sheryl Gordon McCloud

APPENDIX A

LEXSEE 2008 WASH. APP. LEXIS 2202

The State of Washington, *Respondent*, v. Daniel Marshall Aguirre, *Appellant*.

No. 36186-8-II

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

2008 Wash. App. LEXIS 2202

May 20, 2008, Argued
September 3, 2008, Filed

NOTICE: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

SUBSEQUENT HISTORY: Reported at State v. Aguirre, 2008 Wash. App. LEXIS 2311 (Wash. Ct. App., Sept. 3, 2008)

PRIOR HISTORY: [*1]

Appeal from Thurston Superior Court. Docket No: 06-1-01702-5. Judgment or order under review. Date filed: April 12, 2007. Judge signing: Honorable Anne Hirsch.

COUNSEL: Counsel for Appellant(s): *Sheryl Gordon McCloud*, Law Offices of Sheryl Gordon McCloud, Seattle, WA.

Counsel for Respondent(s): *Carol L. La Verne*, Thurston County Prosecutor's Office, Olympia, WA; *George Oscar Darkenwald*, S Puget Sound Comm College, Olympia, WA.

JUDGES: Authored by J. Robin Hunt. Concurring: Marywave Van Deren, Joel Penoyar.

OPINION BY: J. Robin Hunt**OPINION**

¶1 Hunt, J. -- 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 [*2] 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**

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

¶3 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." ¹ Report of Proceedings (RP) (Feb. 13, 2007) at 347.

At [*3] 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.

¶4 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.

¶5 The next day, Aguirre contacted Laughman; he told her that he was sorry and that he was taking [*4] 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.

¶6 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."

¶7 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 [*5] to go to Madigan Army Medical Center.

¶8 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

¶9 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

¶10 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 [*6] 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."

¶11 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

¶12 Defense counsel made [*7] an offer of proof that Aguirre's brother would testify (1) that Laughman had tried to contact him on "Myspace" ² 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.

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

3. Aguirre's testimony and offer of proof

¶13 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 [*8] 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.

¶14 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.

¶15 The trial court ruled,

I think the issue is here, which is that, from my hearing of the argument [*9] 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.

¶16 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.

¶17 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 [*10] 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.

¶18 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

¶19 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 con-

tinue 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 [*11] prepare for sentencing. The trial court offered Aguirre a one-week continuance, which substituted counsel rejected.

¶20 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.

¶21 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.

¶22 Aguirre appeals.

ANALYSIS

I. Exclusion Of Testimony

¶23 Aguirre first argues that the trial court violated his constitutional right to confront witnesses by excluding testimony [*12] 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

¶24 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.*

¶25 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.

B. Relationship Break

¶26 Aguirre argues that the trial court erred when it barred his brother, Jimmy Aguirre, "from testifying about who was chasing whom," because [*13] 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.

¶27 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.

¶28 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 [*14] participate in homosexual activity is not pertinent here." *In re Welfare of Shope*, 23 Wn. App. 567, 568-69, 596 P.2d 1361 (1979):

¶29 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

¶30 Aguirre next argues that the trial court erred when it (1) "barred defense counsel from cross-examining Ms. Laughman about [*15] 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

¶31 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

¶32 Aguirre also [*16] 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.

¶33 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 [*17] 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.³

3 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.

¶34 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*." RP (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.

4 Because Aguirre testified that Laughman [*18] 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.

¶35 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).

¶36 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 [*19] (quoting *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)).

¶37 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

¶38 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.

¶39 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 [*20] 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.

¶40 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)).

¶41 Here, Aguirre has not shown actual prejudice that makes [*21] 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.

¶42 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

¶43 Aguirre next argues that the State's domestic violence expert's [*22] 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

¶44 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

¶45 The State argues that defense counsel's objection to the domestic violence expert's testimony was nonspecific and, therefore, did [*23] 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).

¶46 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

¶47 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 [*24] 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).

¶48 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" ⁵ 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 [*25] interview.

5 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.

¶49 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 evi-

dence, 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, [*26] (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

¶50 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

¶51 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.

B. Trial Court's Answer to Jury Question

¶52 Aguirre argues that the trial court erred [*27] in defining "unlawful force" in response to the jury's question because (1) the definition was an incorrect statement of the law, and (2) the trial court cannot supplement the jury instructions after the jury has begun deliberations. The State counters that (1) Aguirre cannot raise this issue for the first time on appeal, particularly when defense counsel agreed to the "unlawful force" definition; and (2) the trial court's answer to the jury's question was a correct statement of the law. We agree with the State that the definition was a correct statement of the law. ⁶

6 Although Aguirre's counsel did not object to the "unlawful force" definition at trial, we review for the first time on appeal the alleged misstatement of the law because it could affect an essential element of the assault conviction and the al-

leged error, therefore, is of constitutional magnitude. *See State v. Goble*, 131 Wn. App. 194, 203, 126 P.3d 821 (2005).

1. Correct statement of the law

¶53 After deliberations began, the jury asked the trial court to "DEFINE 'UNLAWFUL FORCE' AS USED IN INSTRUCTION # 12." Clerk's Papers (CP) at 61. The trial court met with the prosecutor and defense counsel; all agreed on an answer to [*28] give to the jury. The trial court then instructed the jury: "Unlawful force as used in Instruction # 12 refers to any force alleged to have occurred that was not consented to and that otherwise meets the definition of assault as contained in Instruction # 12." CP at 61.

¶54 Instruction 12 stated:

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive. regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

An act is [*29] not an assault, if it is done with the consent of the person alleged to be assaulted.

CP at 86 (emphasis added).

¶55 Aguirre argues that the trial court's "unlawful force" definition was a misstatement of the law because it failed to include the State's burden of proving a defendant's intent during an assault and that the assault "would offend the ordinary person." The trial court's "unlawful force" definition states that it must meet "the definition

of assault as contained in Instruction # 12." Instruction 12 stated that assault "is an intentional touching or striking of another person" that "would offend an ordinary person." Thus, the trial court instructed the jury on the correct definition of "unlawful force."

2. Answering jury questions after deliberation begins

¶56 Aguirre argues that it was improper for the trial court to answer the jury's question after deliberations began. We disagree.

¶57 Generally, a trial judge has discretion to give further instructions to the jury after deliberations have started. *State v. Ng*, 110 Wn.2d 32, 42, 750 P.2d 632 (1988). But a trial judge should not give supplemental instructions that "go beyond matters that either had been, or could have been, argued to the [*30] jury." *State v. Ransom*, 56 Wn. App. 712, 714, 785 P.2d 469 (1990). In *Ransom*, the court held that the trial court's addition of an accomplice instruction in response to a jury's question after deliberation began was error where the State had not elected to pursue an accomplice liability theory and defense counsel had no chance to argue the issue. 56 Wn. App. at 714.

¶58 In contrast, here, the trial court gave the jury a brief answer to its question of "unlawful force" and referred the jury to instruction 12. "Unlawful force" was part of instruction 12 and defense counsel had a chance to argue the meaning of the phrase to the jury. Because the trial court's answer to the jury's question was not a new theory or element, and defense counsel had a chance to argue the issue, the trial court did not abuse its discretion.

C. Deadly Weapon Sentence Enhancement Instruction

¶59 Aguirre argues that the deadly weapon sentence enhancement instruction failed to instruct the jury that a defendant is armed with a deadly weapon if there is a nexus between the weapon and the crime. The State responds that (1) Aguirre cannot raise this issue for the first time on appeal, and (2) the instruction was a proper statement [*31] of the law. We agree with the State.

¶60 Jury instruction 21 stated:

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime in Count II. A knife having a blade longer than three inches is a deadly weapon.

CP at 95.

¶61 The State is correct that we do "not vacate[] sentencing enhancements merely because a jury was not instructed that there had to be such a nexus [between the crime and the weapon]." *State v. Eckenrode*, 159 Wn.2d 488, 491, 150 P.3d 1116 (2007). Generally, a defendant's failure to ask for the nexus instruction "bars relief on review on the ground of instructional error." *Eckenrode*, 159 Wn.2d at 491 (see *State v. Willis*, 153 Wn.2d 366, 374, 103 P.3d 1213 (2005)). Additionally, there is sufficient evidence in the record to find a connection between the crime, Aguirre, and the knife. Accordingly, we affirm the deadly weapon sentence enhancement.

IV. No Double Jeopardy for Deadly Weapon Sentence Enhancement

¶62 Aguirre argues that (1) *Blakely*⁷ changes our double jeopardy analysis, and (2) the deadly weapon sentence enhancement on his second degree assault conviction violates [*32] double jeopardy. His arguments fail.

⁷ *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

¶63 In *Nguyen*, Division I of our court addressed identical arguments. *State v. Nguyen*, 134 Wn. App. 863, 142 P.3d 1117 (2006), review denied, 187 P.3d 752 (2008). The *Nguyen* court held that "*Blakely* does not implicate double jeopardy but rather involves the procedure required by the *Sixth Amendment* for finding the facts authorizing the sentence." 134 Wn. App. at 868 (citing *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)).

¶64 Adopting *Nguyen*, we hold that *Blakely* does not apply to Aguirre's double jeopardy sentence enhancement argument. Because "[i]t is well settled that sentence enhancements for offenses committed with weapons do not violate double jeopardy even where the use of a weapon is an element of the crime," we hold that Aguirre's deadly weapon enhancement on his second degree assault conviction does not violate double jeopardy. *Nguyen*, 134 Wn. App. at 866.

V. Motion to Continue and Substitute Counsel

¶65 Finally, Aguirre argues that the trial court violated his right to have counsel of his choice when it denied his request for an eight-week [*33] continuance at the sentencing hearing. Again, we disagree.

¶66 Generally, a criminal defendant who can afford to retain counsel has a qualified right to obtain counsel of his choice. *State v. Roth*, 75 Wn. App. 808, 824, 881 P.2d 268 (1994) (quoting *United States v. Wash.*, 797 F.2d

1461, 1465 (9th Cir. 1986)), review denied, 126 Wn.2d 1016 (1995). A defendant's right to retain counsel of his choice does not "include the right to unduly delay the proceedings." *Roth*, 75 Wn. App. at 824 (quoting *United States v. Lillie*, 989 F.2d 1054, 1056 (9th Cir. 1993)). "The trial court must balance the defendant's interest in counsel of his or her choice against the 'public's interest in prompt and efficient administration of justice.'" *Roth*, 75 Wn. App. at 824-25 (quoting *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982)). A trial court's denial of a criminal defendant's motion to continue "sought to preserve the right to counsel" violates the defendant's right only if it is "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." *Roth*, 75 Wn. App. at 824 (quoting *Morris v. Slappy*, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983)).

¶67 After [*34] the jury returned a verdict finding Aguirre guilty, the trial court set the sentencing hearing for April 10, giving counsel approximately two months to prepare. A different attorney filed a motion to continue the sentencing hearing and to become counsel of record on April 4, only four business days before the sentencing hearing. At the sentencing hearing, the trial court granted Aguirre's motion to substitute defense counsel. Counsel stated that she would not substitute as counsel unless she had eight weeks to prepare for sentencing. The trial denied Aguirre's motion for an eight week continuance, but offered him a one-week continuance to prepare. Substitute counsel rejected this offer. Because the trial court was not willing to give an eight-week continuance, former defense counsel represented Aguirre at sentencing.

¶68 Because Aguirre's right to counsel of his choice does not "include the right to unduly delay the proceedings," the trial court did not violate Aguirre's right to choose counsel. *Roth*, 75 Wn. App. at 824 (quoting *Lillie*, 989 F.2d at 1056). Defense counsel's eight-week continuance request on the day of sentencing would have unduly delayed the proceedings. Furthermore, the [*35] trial court carefully balanced Aguirre's "interest in counsel of his [] choice against the 'public's interest in prompt and efficient administration of justice.'" *Roth*, 75 Wn. App. at 824-25 (quoting *Linton*, 656 F.2d at 209). Accordingly, the trial court did not abuse its discretion.

¶69 We affirm.

¶70 A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J., and Penoyar, J., concur.