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36186-8-II

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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.

REPLY RE PETITION FOR REVIEW

Sheryl Gordon McCloud
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Seattle, WA 98104-2605

Attorney for Petitioner, Daniel Aguirre

ORIGINAL

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I. INTRODUCTION

The state characterizes the trial court's exclusion of defense-proffered evidence as purely discretionary, in an obvious effort to try to downplay the significance of the error. The errors in exclusion of evidence, however, were of constitutional magnitude, because they deprived Mr. Aguirre of the right to present a complete defense and its component right to confront and cross-examine witnesses – a matter that the Response does not even address. Review of such constitutional errors is *de novo*. Even review of the Evidence Rule claim is searching, since the issue presented concerns the interpretation of a Rule rather than its application to particular facts. The state further errs in claiming that the Petition identified no conflict between the appellate court's decision on the exclusion of evidence – particularly the matter that it characterized as “collateral” – and controlling authority. In fact, the appellate court's decision conflicts with not just this Court's decisions but with federal court decisions granting habeas corpus relief on similar facts; the extent of this conflict underscore the importance of this issue. Section II.

The state then claims that the trial court's decision to admit the domestic violence expert's testimony is essentially unreviewable. This time the supposed reason is that Mr. Aguirre did not object. But even the appellate court acknowledged that the defense objection to the admission

of this testimony sufficed. When it comes to the substance of this issue, the state's general comment about petitioner's failure to identify a conflict with controlling authority is especially misguided – since the Petition cited to two decisions of this Court and one decision of the appellate court coming to the opposite conclusion on similar facts. The existence of the arguably contrary decisions cited in the Response actually militates in favor of review – to resolve the underlying conflict – rather than against it.

Section III.

The Response then defends the trial court's definition of "unlawful force" on the ground that the appellate court in this case already approved of it, and that approval is entitled to deference. Not surprisingly, the Response provides no citation for this circular reasoning, and there is none. If there were, it would bar review of every legal issue decided by the intermediate appellate courts. In fact, the only reasoning the Response provides on this issue is: "That instruction [WPIC 17.02] addresses the defense to a charge of second degree assault. This case involves a charge of second degree assault." Response, pp. 10-11. But there is no support for this distinction. In fact, this Court has consistently ruled that the state bears the burden of proving the unlawfulness of the force used by a defendant charged with assault regardless of whether it is listed as an element, in the "to convict" instruction, or as defense, in a separate

instruction. Further, this Court has ruled that the lawfulness of the force used must be evaluated from the defendant's subjective viewpoint. The trial court's supplemental instruction completely omitted that element; the state does not dispute the fact that it omitted that element; and the omission of that element conflicts with controlling authority. Section IV.

Finally, the Response asserts that the trial court's denial of the motion for extension of time to permit representation by retained counsel of choice is unreviewable because it was a discretionary ruling. The trial court's discretion on the counsel of choice subject, however, is limited by the constitutional right to counsel of choice. The appellate court failed to give consideration to this limitation in its balancing test, and that placed the appellate court's decision in conflict with controlling Supreme Court authority. Section V.

II. EXCLUSION OF PROFFERED DEFENSE EVIDENCE THAT THE COMPLAINANT HAD BIAS AND A MOTIVE TO LIE ON AN ISSUE CENTRAL TO THE CASE IS REVIEWABLE UNDER RAP 13.4(b)(1)-(3)

A. The State Errs in Characterizing Exclusion of Proffered Defense Evidence as Insignificant Discretionary Rulings; the Rights to Confrontation and to Present a Defense are Constitutional in Magnitude and Subject to *De Novo* Review

The state tries to downplay the significance of the trial court's

rulings excluding defense-proffered evidence by characterizing them as purely discretionary. Response, pp. 6-8.

To summarize briefly, the trial court excluded several categories of evidence, most notably, evidence that the complainant tried to contact Mr. Aguirre through his brother after the time that she claimed that she was trying to get away from Mr. Aguirre. This evidence would have directly contradicted the complainant's testimony that she was the one who wanted to leave him, not the other way around; it would have also shown that she had a reason to harbor resentment and bias. The Petition for Review argued that exclusion violated governing Evidence Rules, as well as the constitutional right to present a defense, of which the right to confront and cross-examine witnesses is a component part.

The state fails even to acknowledge the constitutional component of this argument. However, as a question of constitutional law, the arguments about deprivation of the defendant's right to present defense evidence are legal matters subject to *de novo* review.¹

In fact, even the evidentiary issues raised are subject to a more searching standard of review than the state is willing to admit. While the

¹ *State v. Campbell*, 125 Wn.2d 797, 888 P.2d 1185 (1995) (this Court reviews issues of law *de novo*); *McNear v. Rhay*, 65 Wn.2d 530, 398 P.2d 732 (1965) (*de novo* review where constitutional issues raised), *overruled on other grounds*, *State v. Hill*, 132 Wn.2d 641 (1994).

application of an evidentiary rule alone is certainly reviewed for abuse of discretion, the proper construction of such a rule, like the proper construction of a statute, is reviewed *de novo*.² That is exactly what the Petition presented here: the legal question of whether the proffered defense evidence constituted impeachment on a collateral or direct matter.

B. The State Errs in Claiming That the Petition Presented No Conflict With Controlling Authority on the Exclusion of Impeachment Evidence

Further, although the Response argues generally that petitioner presented no conflict with controlling authority sufficient to justify review on any issue, Response, pp. 5-6, it ignores the numerous decisions of this Court and the state appellate courts cited in the Petition for Review on the very definition of “collateral” that is at issue here. *See* Petition for Review, p. 15, citing: *State v. Lubers*, 81 Wn. App. 614, 623, 915 P.2d 1157, *review denied*, 130 Wn.2d 1008 (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

² *See Spokane v. Lewis*, 16 Wn. App. 791, 559 P.2d 581, *review denied*, 99 Wn.2d 1015 (1977).

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).

C. **The Significance of the Issue is Underscored By Recent Federal Court Decisions Granting Habeas Corpus Relief in Similar Cases**

In sum, the Response ignores the constitutional underpinnings of this claim; recites an incorrect standard of review for the claim; and fails to respond to the decisions contradicting the appellate court’s definition of “collateral.” The conflict with those decisions certainly satisfies RAP 13.4(b)(1)-(2)’s prerequisites to discretionary review, that is, the existence of a conflict with a decision of the Court of Appeals or this Court. Given the constitutional nature of the question presented, RAP 13.4(b)(3)’s prerequisite to review – the existence of a significant constitutional question – is also satisfied.

The significance of this constitutional question is underscored by two recent federal habeas corpus decisions. In both of those recent cases, a criminal defendant was convicted of a serious crime and was barred from presenting defense testimony or cross-examination on a point bearing on the most significant state witness's credibility. In both of those cases, the state courts denied relief. In both of those cases, the federal courts treated the exclusion of evidence as a constitutional error and granted the requested relief via petition for writ of habeas corpus. *Slovik v. Yates*, ___ F.3d ___ (9th Cir. Oct. 6, 2008) (06-55867), 2008 U.S. App. LEXIS 21008 (preclusion of cross-examination conflicts with substantial Supreme Court authority on right to present a defense and the right to cross-examine); *Brinson v. Walker*, ___ F.3d ___ (2d Cir. Nov. 13, 2008) (No. 06-0618-pr), 2008 U.S. App. LEXIS 23305 (affirming grant of habeas corpus relief to defendant convicted of robbery and weapons charges on the ground that state court's decision that defendant could not cross-examine defendant on racial bias because it represented "general ill will" rather than "specific hostility towards defendant" conflicted with constitutional right to confront and cross-examine accuser).

Review of the appellate court's exclusion of evidence – particularly, the evidence excluded as "collateral" – is therefore warranted.

**III. ADMISSION OF THE DOMESTIC VIOLENCE
EXPERT'S COMMENTS ON THE
COMPLAINANT'S CREDIBILITY IS REVIEWABLE
UNDER RAP 13.4(b)(1), (2), AND (4)**

**A. The State Errs in Characterizing Admission of
Expert Comments on the Complainant's
Credibility as Unreviewable; Even the Appellate
Court Recognized that the Defense Objection
Sufficed.**

The state claims that the trial court's decision to admit the domestic violence expert's testimony is subject to deferential review. This time the reason is that defendant did not object. Response, pp. 8-9.

Even the appellate court, however, acknowledged that the defense objected to admission of this testimony under not just the Evidence Rules, but also the rule against vouching. *State v. Aguirre*, 2008 Wash. App. LEXIS 2202 at *23 ("the State is incorrect that defense counsel's objection here was too general [The defense] objection was sufficiently specific to preserve for appeal the issue of whether the domestic violence expert commented on the victim's credibility.").

**B. The State Errs in Claiming that the Petition
Presented no Conflict with Controlling
Authority on the Vouching Issue.**

The state's general comment about the Petition's failure to point to a conflict between the appellate court's decision and controlling authority is certainly incorrect when it comes to the vouching issue. On that issue,

the Response identified the following decisions holding that expert testimony that a victim – even a rape victim – fit the profile for that type of victim constitutes impermissible inferential vouching for the victim: *State v. Black*, 109 Wn.2d 336, 341, 348-50, 745 P.2d 12 (1987) (social worker’s testimony that alleged victim fit profile of rape victim was impermissible opinion testimony, even though it did not directly state that the victim was believable; “No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, *whether by direct statement or inference.*”) (emphasis added); *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967); *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).

C. The Significance of the Issue is Underscored By the Arguably Conflicting Decisions Cited in the State’s Response

The conflict with *Black*, *Garrison* and *Haga* satisfies RAP 13.4(b)(1)-(2)’s prerequisites to discretionary review, that is, the existence of a conflict with a decision of the Court of Appeals or this Court. The fact that the Response could identify other, later, decisions arguably coming to the opposite conclusion on similar facts, without overruling

Black or *Haga*, does not militate against review but in favor of it. It shows that the depth and breadth of the conflict, and hence the need for guidance on this point. As such, the existence of those arguably conflicting decisions shows that the petition involves an issue “of substantial public interest that should be determined” by this Court. RAP 13.4(b)(4).

IV. THE TRIAL COURT’S DEFINITION OF “UNLAWFUL FORCE,” WHICH LACKED A SUBJECTIVE COMPONENT, IS REVIEWABLE UNDER RAP 13.4(b)(2)

The Response then defends the trial court’s definition of “unlawful force” on the ground that the appellate court below, in this very case, approved of it, and that such approval is entitled to deference: “It is respectfully submitted that an appellate court’s (referring to the *Aguirre* appellate court) reading of a statute affirming a trial court’s reading deserves great weight.” Response, p. 10. Not surprisingly, the Response provides no citation for this circular reasoning that would bar review of every legal issue decided by the intermediate appellate courts.

In fact, the only reasoning the Response provides on this issue is: “That instruction [WPIC 17.02] addresses the defense to a charge of second degree assault. This case involves a charge of second degree assault.” Response, pp. 10-11.

The distinction drawn by the state is false. In both situations, the

lawfulness or unlawfulness of the force is the same. It is a matter that the state must prove beyond a reasonable doubt – even under WPIC 17.02, when raised as a defense. That is what WPIC 17.02 says, and that statement is supported by case law. WPIC 17.02 (“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.”). As the appellate court recently explained in *State v. Prado*, 144 Wn. App. 227, 247, 181 P.3d 901 (2008), it does not matter whether the definition of lawful force appears in the elements instruction or in a separate instruction listing it as a defense; either way, the state has the burden of proving that the defendant’s use of force was not “lawful.” *Id.* (“This was a self-defense case and Instruction No. 25 contained an incomplete definition of “assault” because the first paragraph defining assault omitted the phrase “with unlawful force” as recommended by the current pattern instructions and case law. However, Instruction No. 35, the court’s self-defense instruction, correctly defined the “lawful” use of force ... and also informed the jury of the State’s burden of proving Mr. Prado’s use of force ‘was not lawful.’ Thus, the self-defense standard was made ‘manifestly apparent’ to the average juror.”).

The Response’s argument that WPIC 17.02’s definition is

irrelevant since there the instructions dealt with a defense and here the instructions deal with an element therefore fails. Whether characterized as an element or a defense, the meaning of lawful force and the state's burden of proving it are the same.

Common sense dictates the same result. The issue is about the meaning of a particular phrase: "unlawful force." That phrase is defined in WPIC 17.02. It was defined completely differently – without its subject element – by the trial court. The state offers no substantive justification for defining the same words, and the same concept, differently, in those two situations.

Finally, this Court's controlling authority compels the same result. This Court has consistently held that the jury must be instructed to consider the defendant's subjective intent in deciding whether the force he used was lawful. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). The trial court's supplemental instruction to the jury in this case on the definition of lawful or unlawful force lacked that component.

The Response's initial, general, claim that the Petition fails to identify a conflict between the decision of the appellate court in this case, and decisions of this Court, thus fails again. The Petition correctly identified a conflict between the decision of the appellate court in this

case, on the one hand, and the decisions of this Court in *Walden* and *LeFaber* on the other hand.

V. THE TRIAL COURT'S DECISION TO DENY MR. AGUIRRE HIS RIGHT TO RETAINED COUNSEL OF CHOICE IS REVIEWABLE UNDER RAP 13.4(b)(1), (3), AND (4)

Finally, the Response cites a single state case in support of its argument that the trial court had virtually complete discretion to deny the continuance requested to enable retained counsel to represent Mr. Aguirre. Response, pp. 11-12. It fails to mention the constitutional right to retain counsel of choice, its application to sentencing as well as trial, and the need to consider this important constitutional right when deciding whether to grant a reasonable continuance to allow retained sentencing counsel to appear. By its silence on this point, the Response essentially takes the position that the defendant's right to counsel of choice is irrelevant when deciding whether to grant a continuance.

Controlling authority, however, compels the opposite conclusion. Decisions of this Court and of the U.S. Supreme Court hold that there are only a few limitations on the qualified right to counsel of choice. A court may deny the defendant the right to retained counsel of choice if it poses the hazard of a conflict of interest. *See Wheat v. United States*, 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). A court may deny the

defendant the right to counsel of choice if the defendant cannot afford the lawyer. *State v. Roberts*, 142 Wn.2d 471, 516, 14 P.3d 713 (2000), *amended* Feb. 2, 2001. A court may deny the defendant the right to retain counsel of choice if the request is made for improper or dilatory purposes. *United States v. Walters*, 309 F.3d 589, 592 (9th Cir. 2002), *cert. denied*, 540 U.S. 846 (2003). The appellate courts of this state have construed this to mean that this constitutional right can be denied if it would pose “undue” delay. *State v. Roth*, 75 Wn. App. 808, 824, 881 P.2d 268 (1994), *review denied*, 126 Wn.2d 1016 (1995).

This Court, however, has never determined what constitutes “undue” delay in this context, or whether and how the *constitutional* nature of the right at issue can be considered in making this decision. It is therefore reviewable under RAP 13.4(b)(3) and (4), providing for review of significant and constitutional issues.

VI. CONCLUSION

For all of the foregoing reasons, the Petition for Review should be granted.

Dated this 19th day of November, 2008.

Respectfully submitted,



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

CERTIFICATE OF SERVICE

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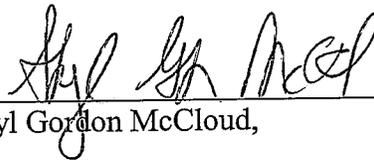
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The undersigned hereby certifies that on the 20th day of NOVEMBER 2008, a copy of the REPLY RE PETITION FOR REVIEW was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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