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DIVISION II

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STATE OF WASHINGTON
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NO. 36186-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent

v.

DANIEL MARSHALL AGUIRRE,

Appellant

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

The Honorable Anne Hirsch, Judge
Cause No. 06-1-01702-5

BRIEF OF RESPONDENT

George Oscar Darkenwald
Special Deputy Prosecuting Attorney
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 943-3877

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A. STATEMENT OF THE ISSUES

1. Whether the Trial Court properly exercised its discretion in excluding certain testimony proffered by Defendant Aguirre.

Appellant's assignment of error No.1: *The trial court erred in excluding evidence proffered by the defense from: (a) Defendant Daniel Aguirre; (b) his brother Jimmy Aguirre; (c) Officer Wilkinson, concerning Ms. Laughman's prior recantation: and (d) Ms. Laughman herself on cross-examination.*

2. Whether the Trial Court properly exercised its discretion in admitting the testimony of Thurston County Sheriff's Sergeant Cheryl Stines, a qualified expert in domestic violence.

Appellant's assignment of error No.2: *The trial court erred in admitting evidence from the "domestic violence" expert bolstering Ms. Laughman's testimony.*

3. Whether Instruction No. 21 defining a knife with a blade longer than three inches as a deadly weapon for purposes of sentence enhancement was a sufficient and accurate statement of law.

Appellant's assignment of error No.3: *The trial court erred in giving Instruction No. 21, defining "deadly weapon".*

4. Whether the deadly weapon enhancement to Count II, Assault with a deadly weapon, placed Aguirre in double jeopardy.

Appellant's assignment of error No. 4: *The trial court erred in entering judgment on Count II, assault with a deadly weapon, and on the deadly weapon enhancement associated with that count.*

Appellant's assignment of error No. 5: *The state erred in charging assault with a deadly weapon, plus a deadly weapon enhancement, for the same acts; the trial court erred in imposing sentence on both.*

5. Whether the trial court properly exercised its discretion in responding to the jury's request for a definition of "unlawful" force as used in Instruction No. 12 and accurately defined that term.

Appellant's assignment of error No. 6: *The trial court erred in its answer to the jury question about the definition of "unlawful force".*

6. Whether the trial court properly exercised its discretion in denying a motion made at the scheduled sentencing hearing two months after the

jury verdict for a delay of two more months to accommodate a new counsel's request for continuance.

Appellant's assignment of error No. 7: *The trial court erred in denying the motion for continuance to substitute counsel at sentencing.*

Appellant's assignment of error No. 8: *The trial court erred in essentially denying the motion to substitute counsel at sentencing.*

B. STATEMENT OF THE CASE

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

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

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

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

Aguirre testified at length in his own defense claiming there was no assault, but only soldier-lovers' play and consensual sex. VOL. IV RP 699-868. The jury reached its verdict on February 16, 2007 convicting him of assault with a deadly weapon and rape. The court ordered a presentence report. Nearly two months later on April 10 2007 the parties and counsel appeared for sentencing. Ms. Laughman, the victim, had flown from the east coast to be present at the sentencing. A new counsel appeared and indicated that she had agreed to represent Aguirre at sentencing, but only if the court would continue the sentencing another two months. After

listening to argument, the court declined. Because Aguirre had apparently assumed the continuance would be granted and had told "his people" from the Army not to show up on the scheduled date, the court gave him two more days. RP Continuance Hearing 3-22 On April12, 2007, the court sentenced Aguirre within the standard range including the deadly weapon enhancement. The state made no request for an exceptional sentence. RP Sentencing Hearing.3-33

C. ARGUMENT

1. The trial court properly exercised its discretion in declining to allow Aguirre to offer the jury certain proffers of testimony, (Appellant's Assignment of Error No.1 quoted above).

Aguirre appears to argue at pg. 14 of his brief that he was unduly limited in his cross examination of Ms. Laughman, referring to VOL. II RP 368-372. There, in a colloquy outside the presence of the jury, his counsel, without being specific, discussed with the court comments in Ms. Laughman's testimony about two prior instances of jealousy. (His brief does not cite to the Record.) About one instance she had apparently given some detail, so the court said she would allow him to ask about it on cross. VOL II RP 372.23-25 Regarding the other instance about which she had given no detail, the court simply said that counsel would have to wait to see whether the door opened on cross. VOL. II RP 373. It is difficult to construe this as an improper denial of a specific offer of relevant testimony.

The offer of testimony from Aguirre appears to be his responses to counsel's questioning outside the presence of the jury recorded at VOL. IV RP 722-731. In addition to saying he wasn't in a long term relationship with Ms. Laughman, had started to see someone else, and wasn't jealous, he apparently wanted to say he had found in his kitchen a letter to her from a female named Aaron mentioning a male named Aron. VOL.IV RP 726 The relevance is not particularly clear. Extensive discussion and argument ensued. (This included the applicability of the Rape Shield Statute RCW 9A.44.020 which contains statutory procedures and process for introduction of evidence which the court noted had not been followed, (VOL IV RP 745). The court ruled as follows:

> "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, that's going to be the extent of what he can say about that"
>
> Mr. Steele (Aguirre's counsel): "*For the record, the Defense can live with that*".
> (emphasis added) VOL. IV RP 754

The offer of testimony from Jimmy Aguirre, defendant Aguirre's brother, appears at VOL.III RP 588-599. Apparently he wanted Jimmy to testify he had received some message from Ms. Laughman on his "MySpace" list, whereas she had denied any message. The record does not disclose the content of the message, if indeed there was one, or how it could be relevant to any issue in the case. It is not surprising that the court ruled the offer an attempt to impeach on a collateral matter. VOL. III RP 58.

Aguirre also claims that proferred testimony from Detective Wilkinson was improperly restricted. When Aguirre attempted to pursue a line of questioning with Detective Wilkinson about a statement from Ms. Laughman, the trial court's response was as accurate as it was succinct. She had earlier prohibited the Prosecutor from going into the details of this same statement and so, not surprisingly, denied Aguirre's request to do the same thing. VOL. III RP 480.

A trial court has broad discretion in ruling on such requests. Our Supreme Court recently reiterated the long standing rule in affirming this Division's affirmance of the trial court's discretionary decision excluding testimony as irrelevant.

> "A criminal defendant has no constitutional right to have irrelevant evidence admitted... A trial court's decision to exclude evidence will be reversed only where the trial court has abused its discretion....The determination of whether testimony is admissible rests within the sound discretion of the trial court." State v. Lord, 161 Wn.2d 276, 294 (Aug.2007) (citations omitted).

The court then went on to point out that even if the trial court had erred, the evidence excluded would easily have met the harmless error standard.

> "Washington uses 'the overwhelmingly untainted evidence test...Under this test, if the untainted, admitted evidence is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless." (citations omitted) Lord, *supra* at 295.

Ms. Laughman's testimony could hardly have been clearer or more graphic. He put the knife to her throat. Then he raped her. The jury believed her. It did not believe Aguirre. That is how our system works.

2. The trial court properly exercised its discretion in allowing the jury to hear the testimony of Sheriff's Sergeant Cheryl Stines, a qualified expert on domestic violence.
(Appellant's assignment of error No.2)

It is important to note that Aguirre's counsel did not even question the qualifications of Sergeant Stines as an expert in working with victims of domestic violence. VOL III RP 539 The prosecution convincingly established her credentials. VOL III RP 493-508.

"The admission of relevant evidence is within the sound discretion of the trial court and will not be reversed absent a manifest abuse of that discretion." State v. Mak, 105 Wn.2d 692, 715, 718 P.2d 407 (1986), *cert. denied,* 479 U.S. 995 (1986)

Aguirre's argument on appeal appears to be to the general nature of her testimony. At page 26 of his brief he refers to a "standing objection" of his trial counsel when Sergeant Stines began her testimony. This was a very vague and general objection to the entire line of questioning as *possibly (*emphasis added) having an impact of essentially *indirectly* (emphasis added) offering an opinion on the victim's credibility, VOL III RP 539. In effect he argued that the expert should not be allowed to testify about the subject matter of her expertise. In State v. Carlson, 61Wn. App. 865, 870, 812 P.2d. 536 (1991) the court addressed and found wanting a similar objection, "Carlson's only objection was non-specific and general,' I'm going to object to this line of questioning.'" It has long been the rule that objections must be on particular grounds if they are to be preserved for appellate review.

> "The party seeking review has the burden of perfecting the record so that the court has before it all of the evidence relevant to the issue...Matters not in the record will not be considered by the Court of Appeal.
> "State v Rienks, 46 Wn. App. 537, 545, 731 P.2d 1116 (1987).

Although Aguirre observes at page 27 of his brief that "her" (meaning the Sergeant) description of traits that matched a cycle of violence fit Mr. Aguirre and her description of traits that matched a rape victim fit Ms. Laughlan to a "T", that is *his* observation. He cannot and does not point to any place in the record where Sergeant Stines made any such observation. In the context of the court's explanation of its ruling on the objection, the candid admission of his own counsel is enlightening. "Sergeant Stines was also very quick to point out at least two times during her answers to Mr. Skinder's question that *everybody is different* VOL III RP 539, 21-24. The court recognized that the expert's testimony was deliberately very general in nature and not focused in any way on Ms. Laughman.

> "She testified extensively as to her experience, her education and her training, and she did not make any statements about the ultimate issue, and the state did not ask her to do so." VOL III RP 541,17-21.

The cases cited by Aguirre are distinguishable. In State v. Haga, 8 Wn.App. 481, 507 P.2d159, review denied, 82 Wn.2d 1006 (1973), an ambulance driver's testimony allowed a jury to infer he believed the particular defendant on trial **to be** guilty. In State v. Black, 109 Wn.2d 336, 341, 348-50, 745 P.2d.12 (1987), a social worker was impermissibly allowed to testify that the defendant on trial fit the profile of a victim of

domestic violence. Sergeant Stines gave no such focused individualized opinion about Aguirre.

3. Instruction No.21 was an accurate statement of the law sufficient to allow the jury to find that Aguirre was armed with a deadly weapon for the purpose of the imposition of an enhanced sentence.
(Appellant's assignment of error No.3 quoted above)

Aguirre criticizes Instruction No.21 because it did not say the jury had to find he was "armed" with the knife and that the knife had a "nexus" to the crime. This argument fails on both legal and factual grounds. The actual instruction reads as follows:

> "For purposes of a special verdict the State must prove beyond a reasonable doubt *that the defendant was armed with* (emphasis added) 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."

His comment at page 35 of his opening brief, "It said nothing about the state having to prove that the defendant was 'armed with' the deadly weapon…" is puzzling. The instruction says the State had to prove exactly that. The "nexus" argument is just as puzzling. This case is not in the class of those where the weapon was simply somewhere in the room or otherwise "available" for use. The very essence of this crime was that Aguirre ran his Iraq combat knife up and down Ms. Laughman's cheek and throat. V II RP 346-347.

It is respectfully submitted that a recent Supreme Court holding is dispositive. Aguirre asked for no jury instruction of his own on the issue now raised on appeal, and the evidence clearly established nexus.

> "...for purposes of the sentencing enhancement, the State must prove that a weapon was easily accessible and readily available for use and that there was a nexus or connection between the defendant, the crime, and the weapon. (citations omitted) But we have not vacated sentencing enhancements merely because a jury was not instructed that there had to be such a nexus. There is another principle that bears on our review: whether any alleged instructional error could have been cured at trial. We have found that the defendant's failure to ask for the nexus instruction generally bars relief on review on the ground of instructional error. (citations omitted). In *this case* (emphasis added) the defendant did not seek a nexus instruction. We have reviewed the record, and there was sufficient evidence to find a connection between the crime, the defendant, and the gun..." State v. Eckenrode, 159 Wn.2d 488, 491, 150 P.3d 1116 (2007)

See also this division's recent opinion rejecting appellant's argument that he could challenge an instruction not objected to at trial because it was constitutionally infirm. State v. Powell, 139 Wn. App. 808, 822, 162 P.3d 1180 (2007)

4. The deadly weapon enhancement to Count II, assault with a deadly weapon, did not place Aguirre in double jeopardy. (Appellant's assignments of error No.4 and No. 5 quoted above).

Aguirre argues that enhancing his sentence for possession of a deadly weapon when use of a deadly weapon was an element of the crime charged, assault with a deadly weapon, constitutes double jeopardy. He acknowledges at page 40 of his brief that this argument has been rejected in recent appellate cases, notably State v. Nguyen, 134 Wn. App. 863, 142 P.2d 1117 (2006). Division I recently rejected it again.

> In *Nguyen*, we first noted that it 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. State v. Tessema,139 Wn. App. 483,493 (May 2007)

5. The trial court properly responded to the jury's request for a definition of unlawful force as used in Instruction No.12. (Appellant's assignment of error No.6 quoted above)

During deliberations at 10:00 a.m. on Feb.16, 2007 the jury submitted the following note to the trial court. "Define unlawful force as used in instruction No. 12". The court summoned counsel. Having met in chambers to discuss a response, "*counsel have agreed* (emphasis added) that the Court should answer that question as follows:

> "Unlawful force as used in instruction number 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 number 12"* (emphasis added)
>
> "Is that counsel's understanding?
> Mr. Steele (Aguirre's counsel): "Yes, your Honor"
> Mr. Skinder (Prosecutor): "Yes, your Honor"
> VOL V RP 952-953

Instruction 12 was a comprehensive definition of the crime of assault. By agreement it was submitted. No alternative instruction was requested.

> 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 not an assault, if it is done with the consent of the person alleged to be assaulted."

Aguirre argues at page 30 of his brief that the Court's response to the jury's question, a response concurred in by his own counsel, was both "flat wrong" and "totally wrong". His argument is based on WPIC 17.02.This instruction was not requested by Aguirre and is not relevant to this case. It is concerned with justification, the affirmative defense of self defense, reading in pertinent part as follows:

> 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* (emphasis added) and when the force is not more than is necessary.

Aguirre made no claim before trial nor in his testimony that he put the knife to Ms. Laughman's cheek and throat because he was afraid of her. Nor did his attorney argue or submit an instruction on self defense.

6. <u>The trial court properly exercised its discretion in denying a motion argued on the scheduled day of sentencing (two months after verdict) to continue sentencing another two months to allow a new counsel to prepare for sentencing.</u> (Appellant's assignments of error No. 7 and No. 8 quoted above)

Page references below are to the Verbatim Report of Proceedings April 10, 2007

<u>Record:</u> The jury returned its verdict on Feb. 16, 2007. Sentencing was scheduled for April 10, 2007. The Presentence Investigation was received March 28, 2007. (pg.13) Ms Laughman, still in the Army, arranged to fly from Pennsylvania to attend the scheduled sentencing hearing and arrived on April 9, 2007. (pg.11). Although Ms. McCloud had

been retained several days earlier (pg 13) and filed her motion to substitute/continue sentencing on April 4 (CP 113-119), both the court and prosecutor were prepared to proceed with the long scheduled sentencing, and indicated some surprise and concern at the motion to delay sentencing another two months. (pg.3). Ms. McCloud made it clear that her motion to substitute for sentencing was contingent on such a delay. (pg.15). She then advised the court that, to her surprise, Aguirre had assumed the continuance motion would be granted and advised his chain of command not to come. (pg. 17-18). The court set the matter over two days to allow his requested military witnesses to be present. Mr. Steele continued to represent Aguirre at sentencing on April 12, 2007. The prosecutor made no request for an exceptional sentence. As Aguirre's counsel pointed out, "...the only thing we are deciding is at what point does the Indeterminate Sentence Review Board take over to determine what time he will be released," (RP Sentencing pg. 14). He was referring to the fact that Count III, Rape, carried a maximum term of life imprisonment.

After explaining her reasons, the court exercised her discretion to concur with the presentence recommendation and sentenced Aguirre to the high end of the sentencing range: 26 months on Count II, Assault with a deadly weapon plus the 12 month deadly weapon enhancement; 125 months on Count III, Rape, plus the required enhancement for a total of 137 months, (RP Sentencing pg.21-25).

Argument: Pursuant to RCW 7.69.030 the victim Ms. Laughman had a right to be present at the sentencing. Having arranged her military schedule, she exercised that right and flew across country to be present at the sentencing. Although there is no specific discussion in the record about this, it is not unreasonable to assume her military assignments might not have permitted her presence several months later.

Aguirre does not even suggest incompetence on the part of his trial counsel. He argues, rather, that he had an absolute right to substitute counsel at sentencing despite the delay and inconvenience that might cause. The Supreme Court's en banc decision he cites does not support this argument.

> "Thus, while the right to select and be represented by one's preferred attorney is comprehended by the 6th amendment, the essential aim of the amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer he prefers." State v. Roberts, 142 Wn.2d 471,516, 14 P.3d 713 (2000)

Nor is there support in this Division's decision in a case where error was found in forcing a defendant to proceed to sentencing pro se. The facts in that case are not analogous, but the rationale clearly applies.

> "This is not to say that a trial court must delay a previously scheduled trial or hearing whenever a defendant demands new counsel. If a demand for new counsel is untimely, or otherwise unwarranted, the court has discretion to require that present counsel remain and that the case proceed as scheduled. Here, Bandura's request for new counsel was certainly untimely and very possibly unwarranted." State v. Bandura, 85 Wn.App.87, 98, 931 P.2d 174, review denied ,132 Wn.2d 1004 (1997)

Bandura wanted to fire his trial counsel, but clearly demanded new counsel for sentencing. The trial court could have forced current counsel to remain and appointed new counsel. Instead it relieved current counsel and forced Bandura to proceed pro se. That is what abridged defendant's right to counsel there. That is not what happened here.

As Aguirre himself admits, motions for continuance are within a trial court's discretion and will not be reversed by an appellate court absent abuse of that discretion. State v. Roth,75 Wn. App. 808, 881 P.2d 268 (1994),review denied,126 Wn.2d 1016 (1995) There the trial court granted Roth a continuance to the following Monday so that lead counsel who was currently in another trial could participate in voir dire. When he couldn't appear then, the court directed voir dire to proceed with well experienced co-counsel with whom Roth at no time expressed any dissatisfaction. (It should be noted that Aguirre expressed no dissatisfaction with trial counsel; and it may be reasonably argued that under our determinate sentencing system the role of counsel is more limited and less critical than it is during voir dire.) After a detailed review of Federal and State authorities Division I, just before listing the criteria cited by Aguirre at page 46 of his brief, explained its decision affirming the trial court's discretionary call as follows:

> "In general, broad discretion is granted to trial courts on motions for continuances sought to preserve the right to counsel: 'Only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the defendant's right'...The trial court must balance the defendant's interest in counsel of his or her

choice against the public interest in prompt and efficient administration of justice."(citations omitted) Roth, *supra* at 825

D. CONCLUSION

Because the factual record does not support a claim that the trial judge in any way abused her discretion and because the authorities cited do not support Aguirre's legal position, the State respectfully requests that this Court affirm the jury's verdict and the Trial Court's sentencing.

Respectfully submitted this 10th of December, 2007.

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

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, No. 36186-8-II on all parties or their counsel of record on the date below as follows:

- [x] US Mail Postage Prepaid
- [ ] ABC/Legal Messenger
- [ ] Hand delivered by

_____

TO:

SHERYL GORDON MCCLOUD
LAW OFFICES OF SHERYL GORDON MCCLOUD
710 CHERRY ST
SEATTLE, WA 98104-1925

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BY _____
DEPUTY

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 10th day of December, 2007, at Olympia, Washington.

TONYA MAIAVA