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NO. 64726-1-I

85789-0

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GEORGE RYAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD EADIE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether defendant George Ryan made an insufficient offer of proof to preserve a claim on appeal that the trial court improperly limited cross-examination of the victim.

2. Whether the trial court acted within its discretion in limiting cross-examination of the victim.

3. Whether any error in limiting cross-examination of the victim was harmless.

4. Whether Ryan has waived his challenge to the jury instruction on the aggravating circumstance.

5. Whether the court properly instructed the jury to be unanimous before returning a "no" finding on the aggravating circumstance.

6. Whether it is unnecessary to remand for entry of findings of fact and conclusions of law on the exceptional sentence because they have now been entered.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged defendant George Ryan with second-degree assault and felony harassment based upon an incident

occurring on June 17, 2009. CP 115-16. On both counts, Evette White was the victim, and the State alleged the aggravating circumstance that the offense involved domestic violence and there was evidence of a pattern of psychological, physical or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time (hereinafter the "pattern of abuse aggravating circumstance"). Id. On the felony harassment count, the State also alleged that Ryan was armed with a deadly weapon. CP 116.

Trial began occurred in November of 2009. A jury convicted Ryan as charged. CP 84-90. The court imposed an exceptional sentence of 70 months on the second-degree assault conviction and 60 months on the felony harassment conviction. CP 94. This appeal follows.

2. SUBSTANTIVE FACTS.

a. Background.

Ryan and White had two children together, but a very volatile relationship. 2RP 308, 326. They repeatedly broke up and then resumed their relationship. 2RP 333, 382. Ryan frequently

accused White of cheating on him. 2RP 335. Both had substance abuse issues; White used cocaine, and Ryan drank alcohol. 2RP 326.

Over a ten-year period, there were numerous instances where Ryan assaulted White, and the police responded. At the time of trial in this case, White's recollection of the individual incidents was poor and her memory had to be refreshed by her prior statements. 2RP 310-33.

On January 27, 1999, Ryan punched White, who was pregnant, in the face multiple times and strangled her. 2RP 310-15. When White pulled out a hammer to defend herself, Ryan took it away from her and threatened to kill her with it. 2RP 347-50, 387-90, 405. A neighbor called the police. 2RP 310. Ryan was convicted of second-degree assault, and the court issued an order prohibiting Ryan from having contact with White. 2RP 317; Ex. 5.

Later that year, on August 7, 1999, despite the no contact order, Ryan and White were in a cab together, and the two began to argue. 2RP 318-19. After matters got out of hand, the police responded and arrested Ryan. 2RP 319. Ryan was convicted of violating a no contact order. 2RP 319-20; Ex. 8.

On July 10, 2002, after another argument, Ryan became violent and threw a punch past White's face, hitting a cabinet. 2RP 321-22. White called the police. 2RP 322-23.

On April 4, 2003, Ryan and White were arguing about their infant daughter when he threw a bottle at her. 2RP 323-35. When the police arrived, Ryan refused to let go of his daughter, and the police were forced to tase him. 2RP 323-24.

Approximately four months later, on August 4, 2003, Ryan attacked White again, stomping her in the face. 2RP 328-29. A friend intervened and stopped Ryan. 2RP 329. Ryan was convicted of fighting in Seattle Municipal Court. Ex. 12.

Finally, on November 23, 2004, Ryan assaulted White and was subsequently convicted of fourth-degree assault in Seattle Municipal Court. Ex. 13, 15 and 16.

b. The Incident On June 17, 2009.

In June of 2009, Ryan and White were living together in a room in Doris Stelly's house. 2RP 351-52; 3RP 482-86. On or around June 14, 2009, Stelly's son Preston Thomas kicked Ryan out

of the house. 3RP 486. Ryan began sleeping outside, but would still come in the house to eat and to watch television. 2RP 351-52; 3RP 482.

On June 17, 2009, Ryan approached White and asked to talk with her. 2RP 336-37, 353. He had been drinking. 2RP 336. After they were in White's room, Ryan sat down on the bed and pulled out a knife. 2RP 338-40, 353-54. Ryan started crying and insisted that he wanted to stay together. 2RP 336-38. White told him that she did not want to continue the relationship. 2RP 355. In response, Ryan pointed the knife at White, brought it within four inches of her face and stated, "I will cut you right now" and "I will kill you." 2RP 340-42, 355. He said that their daughters would not have a mother. 2RP 342, 406. White did not respond, fearful that Ryan would carry out his threat. 2RP 343, 407-08.

Ryan backed off, rubbed the knife against his jeans and accidentally cut his leg. 2RP 339-40. Ryan then left the room, and, as he exited the house, he encountered Preston Thomas, who was working on his truck. 2RP 343-44; 3RP 482-83. Thomas saw that Ryan was holding a knife, and Ryan accused Thomas of having a relationship with White. 3RP 483-84.

White called the police. 2RP 362. They arrived in seconds and spoke with White. 2RP 296, 345, 362.

After conducting a K-9 track, the police found Ryan a block away, hiding under a tarp in a vacant lot. 2RP 251-54, 297-99, 431-35. Ryan appeared to be intoxicated and had a cut on his leg. 2RP 254-58, 300. After being advised of his Miranda[1] rights, Ryan stated he had not been involved in an incident and that for the last three days he had not been inside Stelly's house. 2RP 301-02. During a search, the police found the folding knife on Ryan. 2RP 302-03.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY LIMITED CROSS-EXAMINATION.

Ryan claims that the trial court erred in not allowing him to cross-examine White about whether she had stabbed him several years earlier. This Court should reject this claim. First, the claim of error is not preserved because Ryan never made an offer of proof specifying the testimony that he expected to elicit by cross-examining White on the subject; he never interviewed her about the

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

incident and did not know how she would answer any questions about it. Even if the claim is preserved, the trial court acted within its discretion in limiting cross-examination given Ryan's failure to articulate an appropriate basis to allow inquiry into the area. Finally, given the evidence of Ryan's guilt, there should be no doubt that any error was harmless beyond a reasonable doubt.

a. Relevant Facts.

Prior to trial, Ryan obtained records from the Seattle Police Department about an incident on May 24, 2007 between White and Ryan where it was alleged that White stabbed Ryan. 1RP 44; Supp. CP __ (Sub No. 44 at 21). Neither White nor Ryan cooperated in the investigation, and no charges were ever filed. 1RP 44; Supp. CP __ (Sub No. 44 at 21). Ryan's attorney conducted an extensive pretrial interview of White, but never asked her about this incident. Pretrial Ex. 1.

During pretrial motions, the State moved to exclude evidence relating to this incident. 1RP 45; Supp. CP __ (Sub No. 44 at 21). The prosecutor noted that, based upon her review of the records, White had a colorable self-defense claim. 1RP 44. In response, defense counsel argued that cross-examination of White

on the incident was appropriate because (1) it was relevant to whether White reasonably feared Ryan or (2) White might open the door to the subject in direct examination. 1RP 45. The court did not rule on the matter and asked defense counsel to raise the issue before proceeding to cross-examination on the topic. 1RP 48.

During a break during cross-examination of White, defense counsel sought permission to cross-examine White on the subject. 2RP 370. She argued that it was relevant because (1) it established a motive for White to curry favor with the State, (2) White opened the door by testifying that she was unable to physically do much to Ryan, and (3) it was probative of whether White actually feared Ryan. 2RP 370-71, 376-77.

In response, the prosecutor questioned how the alleged stabbing incident was relevant to a motive to fabricate, given that the State declined to file charges in 2007 and that no prosecutor had ever spoken to White about it. 2RP 373. The prosecutor observed that it was uncertain how White would answer if questioned about the incident; she might state she acted in self-defense or that it never happened. 2RP 374. The prosecutor noted that White's right against self-incrimination might be implicated by questioning about whether she had stabbed Ryan,

and that counsel would need to be appointed to advise her as to whether to answer questions about the incident. 2RP 374.

The court denied the motion to cross-examine White about the alleged stabbing incident. 2RP 377-79. The court concluded that it was not a matter of impeachment but an attempt to introduce evidence that White was engaged in misconduct in the past. 2RP 377.

Defense counsel then sought to clarify the court's ruling:

> DEFENSE COUNSEL: I just want to make sure I'm clear so I don't violate the Court's ruling. The questions I would ask were, "Were you arrested in 2007 for stabbing M[r.] Ryan?"
>
> THE COURT: Okay.
>
> DEFENSE COUNSEL: And the Court is saying I cannot ask that question?
>
> THE COURT: That's right.

2RP 380.

b. Ryan Failed To Make An Adequate Record To Preserve The Issue For Appeal.

Ryan seeks reversal of his conviction on the basis that the trial court improperly limited his cross-examination of White about the 2007 alleged stabbing incident. However, Ryan did not make

an offer of proof specifying the nature of the testimony that he expected to elicit through cross-examination of White. He never interviewed White about the incident, and he had no idea how she would answer any questions about it. He therefore failed to provide an adequate record for review.

Generally, a party cannot argue on appeal that the trial court wrongly excluded evidence unless the party makes an offer of proof before the trial court. ER 103(a)(2). When the objection is made during cross-examination, the party should make an offer or proof as to the expected testimony and its relevance. State v. Dixon, 159 Wn.2d 65, 73-77, 147 P.3d 991 (2006). The offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review. State v. Ray, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991).

Here, the record does not reveal the substance of the testimony that Ryan expected to elicit if allowed to cross-examine White on the 2007 alleged stabbing incident. He never questioned her about the incident during her pretrial interview. Among the many possibilities, White might have replied that (1) she did not

stab Ryan; (2) she stabbed him in self-defense after he first attacked her; or (3) she would not have answered any questions based on her right against self-incrimination. Had White asserted her Fifth Amendments rights, Ryan would have been prohibited from questioning her on the topic in front of the jury.[2]

Instead of making an offer of proof as to White's expected testimony, Ryan made one witness statement part of the record. Pretrial Ex. 10. According to the statement, this unidentified person was not present at the time of the alleged stabbing, but apparently overheard White make some remarks indicating that she had stabbed Ryan. Id. However, Ryan never indicated or argued that he was entitled to call any witnesses about the incident, and this statement was not an offer of proof as to the substance of White's expected testimony. Accordingly, without knowing the specific nature of the excluded evidence, this Court cannot address Ryan's claim of error.

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[2] See State v. Smith, 74 Wn.2d 744, 758-59, 446 P.2d 571 (1968), vacated in part on other grounds, 408 U.S. 934 (1972), overruled on other grounds by State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975) (a witness' invocation of his or her Fifth Amendment rights is not evidence and counsel is forbidden from questioning a witness for the sole purpose of eliciting such a response).

c. The Trial Court Did Not Abuse Its Discretion In Limiting Cross-Examination.

If this Court addresses the merits of Ryan's claim, it should hold that the trial court acted within its discretion in limiting cross-examination about the 2007 alleged stabbing incident.

The right to cross-examine adverse witnesses is not absolute. Chambers v. Mississippi, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). A trial court may, in its discretion, reject cross-examination where the circumstances only remotely tend to show bias or prejudice of the witness, where the evidence is vague, or where the evidence is merely argumentative and speculative. State v. Classen, 143 Wn. App. 45, 58, 176 P.3d 582 (2008). The United States Supreme Court has explained:

> [T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based upon concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. And as we observed earlier this Term, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.

Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (emphasis in original).

Under ER 611(b), the trial court has the discretion to determine the scope of cross-examination. Specific instances of a witness's conduct, introduced for the purpose of attacking his or her credibility, may not be proved by extrinsic evidence, but may "in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness ... concerning the witness' character for truthfulness or untruthfulness." ER 608(b). "In exercising its discretion, the trial court may consider whether the instance of misconduct is relevant to the witness's veracity on the stand and whether it is germane or relevant to the issues presented at trial." State v. O'Connor, 155 Wn.2d 335, 349, 119 P.3d 806 (2005). The appellate court reviews a trial court's limitation of cross-examination for manifest abuse of discretion. State v. Aguirre, 168 Wn.2d 350, 361-62, 229 P.3d 669 (2010).

Here, the trial court did not abuse its discretion in restricting cross-examination about the 2007 alleged stabbing incident. Though Ryan claims that his right to confront White was violated, the scope of that right does not extend to the introduction of otherwise inadmissible evidence. Aguirre, 168 Wn.2d at 362-63. Ryan has failed to establish a basis entitling him to cross-examine White about the 2007 stabbing incident.

First, Ryan claimed that cross-examination was relevant to show that White had a motive to curry favor with the State. Ryan speculated that White might believe that unless she testified in the current action against Ryan, she might face charges from the earlier 2007 incident. The problem with this theory was that Ryan offered no evidence to support it and it was based upon pure speculation. Ryan never asked White about the incident during her pretrial interview, and he offered no evidence that White had any concern that she might be charged with a crime based upon that incident. The alleged stabbing incident occurred two years earlier, no charges were ever filed, and the prosecutor observed that White had a likely self-defense claim. The prosecutor represented that she had never talked to White about the incident. Given this record, Ryan failed to show how cross-examination into this area was relevant in establishing a motive for White to lie about the current charges.

Second, Ryan argued that White opened the door to cross-examination about the alleged 2007 stabbing by a comment that she made during her direct examination. Under the "open door" rule, the trial court has the discretion to allow cross-examination into areas that might otherwise not be permitted. State v. Berg, 147

Wn. App. 923, 939, 198 P.3d 529 (2008). A passing reference to a prohibited topic does not open the door for cross-examination about that topic. State v. Harstad, 153 Wn. App. 10, 28-29, 218 P.3d 624 (2009); State v. Stockton, 91 Wn. App. 35, 40, 955 P.2d 805 (1998). The trial court has considerable discretion in administering the open-door rule; its decision whether to allow cross-examination under this rule is reviewed for abuse of discretion. State v. Ortega, 134 Wn. App. 617, 626, 142 P.3d 175 (2006).

Here, the trial court did not abuse its discretion in finding that White did not open the door to questioning about the alleged 2007 stabbing incident. The testimony that Ryan claimed opened the door concerned White's discussion of an earlier assault by Ryan and her reaction to it:

> PROSECUTOR: And did you go outside at some point after you were slapped?
>
> WHITE: Oh, yeah. I would take off running. I mean I can't physically do too much to George [Ryan].
> PROSECUTOR: And when you took off running, what happened outside the house?
>
> WHITE: I got jumped on. He caught up with me.

2RP 328.

White's passing remark that there was not much physically she could do to Ryan was brief and made in the context of

explaining why she ran away from Ryan during an assault. Both she and Ryan were unarmed during this incident. White never claimed that she was incapable of using a weapon against Ryan; in fact, she testified about a different incident where she got a hammer to defend herself. 2RP 347-50, 387-90, 405. In addition, whether or not White could do much physically to Ryan was not relevant to the current charges; Ryan did not claim self-defense, and there was no evidence that White was ever armed. This brief remark did not open the door to questioning about whether White had stabbed Ryan two years earlier.

Finally, Ryan argued that the incident was somehow relevant to show that it was not reasonable that White feared him. However, he failed to show how cross-examination into this area would be probative on that issue given that he made no offer of proof concerning White's expected testimony in response to cross-examination about the incident. She might have denied stabbing him or claimed to have acted in self-defense. Ryan never articulated how the fact that White might have stabbed him two years earlier would show that it was not reasonable for her to be fearful when he brought a knife within four inches of her face and stated "I will kill you."

On appeal, Ryan offers a new argument in support of admissibility: he claims that the 2007 incident was admissible, like the other prior domestic violence incidents introduced by the State, in order to permit the jury to evaluate White's credibility with full knowledge of their relationship. Brief of Appellant 17-18. Ryan never made this argument below, and therefore, it should not be considered for the first time on appeal. State v. Jordan, 39 Wn. App. 530, 539, 694 P.2d 47 (1985) (the appellate court will not consider an alternative basis for admitting excluded evidence not raised below).

In any event, this argument lacks merit. The appellate courts have recognized that past acts of domestic violence by the defendant against the victim are admissible to assist the jury in assessing the victim's credibility. State v. Magers, 164 Wn.2d 174, 184-86, 189 P.3d 126 (2008); State v. Grant, 83 Wn. App. 98, 104-09, 920 P.2d 609 (1996). Ryan cites no authority for the notion that past acts of alleged violence by the *victim* are somehow admissible and relevant to his or her credibility, absent a self-defense claim by the defendant. Had Ryan made this new argument, the trial court would have acted within its discretion in denying cross-examination into the 2007 incident.

d. Any Error Was Harmless.

Assuming that the trial court erred in restricting cross-examination, any error was harmless. Confrontation clause violations are subject to harmless error analysis. Van Arsdall, 475 U.S. at 684; State v. Saunders, 132 Wn. App. 592, 604, 132 P.3d 743 (2006). The correct inquiry is whether, assuming that the damaging potential of the testimony was fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Van Arsdall, 475 U.S. at 684. Error is harmless if the court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010).

Here, there should be no doubt that the jury would have reached the same result had Ryan been permitted to cross-examine White about whether she stabbed him in 2007. This proposed cross-examination was on a collateral matter and did nothing to indicate that White was not telling the truth about the charged crimes. If anything, her testimony was restrained; she denied recalling many of the prior incidents and, at one point, she admitted getting angry at Ryan a lot and asked the jurors for help in

getting Ryan alcohol treatment. 2RP 310-33, 399-400. White's testimony that Ryan threatened her with a knife was corroborated by the facts that (1) when Ryan left White and exited the house, he approached Preston Thomas, and while still holding that knife, accused Thomas of having a relationship with White, (2) the police found the knife on Ryan, and (3) upon arrest, Ryan lied about being inside the house. Any error was harmless beyond a reasonable doubt.

2. THE COURT SHOULD REJECT RYAN'S BELATED CHALLENGE TO THE SPECIAL VERDICT INSTRUCTION.

Citing the recent case of State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), Ryan challenges the special verdict instructions for the deadly weapon allegation and the pattern of abuse aggravating circumstance, arguing that the jury should not have been told that it had to be unanimous in order to answer "no." However, Ryan did not object to this instruction below, and because the claimed error is not of constitutional magnitude, he has waived this issue on appeal. Even if the issue is not waived, the rule in Bashaw does not apply to the exceptional sentence aggravating circumstance because, unlike the school bus stop

enhancement at issue in that case, the relevant statute governing exceptional sentence procedures expressly requires jury unanimity for a "no" finding.

a. Relevant Facts.

The court provided the jury with special verdict forms for the pattern of abuse aggravating circumstance and the deadly weapon allegation. The instruction for the special verdict forms stated in pertinent part:

> Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

CP 79. This instruction is identical to WPIC 160.00. Ryan did not object or take exception to this instruction. 3RP 449-50.

b. Ryan Has Waived Any Challenge To The Special Verdict Instruction.

Under RAP 2.5(a), the court may consider an issue raised for the first time on appeal when it involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3). In order to raise an error for the first time on appeal under this rule, the appellant must

demonstrate that (1) the error is manifest, and (2) the error is truly of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). Ryan must make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. Id.

The case cited by Ryan, Bashaw, makes clear that the claimed error is not of constitutional dimension. Bashaw was charged with three counts of delivery of a controlled substance and a school bus stop sentencing enhancement. The special verdict form for the sentencing enhancement stated: "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." 169 Wn.2d at 139. The Supreme Court held that the instruction was incorrect because it told the jury that they had to be unanimous to answer "no." Id. at 145-47. Citing State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), the court held that "a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence." 169 Wn.2d at 146.

In so holding, the court acknowledged that this rule was not of constitutional dimension. "This rule is not compelled by constitutional protections against double jeopardy, cf. State v. Eggleston, 164 Wn.2d 61, 70-71, 187 P.3d 233 (stating that double jeopardy protections do not extend to retrial of noncapital sentencing aggravators), cert. denied, __ U.S. __, 129 S. Ct. 735, 172 L. Ed. 2d 736 (2008), but rather by the common law precedent of this court, as articulated in Goldberg." 169 Wn.2d at 146 n.7. Instead, the court cited policy justifications for this common law rule:

> The rule we adopted in Goldberg and reaffirm today serves several important policies.... The costs and burdens of a new trial, even if limited to the determination of a special finding, are substantial. We have also recognized a defendant's "'valued right' to have the charges resolved by a particular tribunal." [Citation omitted]. Retrial of a defendant implicates core concerns of judicial economy and finality. Where, as here, a defendant is already subject to a penalty for the underlying substantive offense, the prospect of an additional penalty is strongly outweighed by the countervailing policies of judicial economy and finality.

Id. at 146-47.

Ryan does not acknowledge that he did not object to the instruction below, nor does he explain how the issue raised is of

constitutional magnitude. He has waived his challenge to this instruction.

c. The Special Verdict Instruction Was A Correct Statement Of The Law For The Aggravating Circumstance.

Even if the issue is not waived, Ryan cannot show that the special verdict instruction given was erroneous with respect to the exceptional sentence aggravating circumstance because the relevant statute requires jury unanimity for any kind of verdict. Bashaw involved a school bus stop sentencing enhancement,[3] and the relevant statute is silent as to whether the jury must be unanimous before they may answer "no" to the special verdict. See RCW 69.50.435. In contrast, the statute governing exceptional sentence aggravating circumstances requires jury unanimity for any verdict. RCW 9.94A.537(3) states in pertinent part: "The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory." By its

[3] Goldberg, the case cited in Bashaw, also did not involve an exceptional sentence aggravating circumstance; rather, it was an aggravated first-degree murder case and involved aggravating circumstances under RCW 10.95.020. 149 Wn.2d at 894-95.

plain language, RCW 9.94A.537(3) requires jury unanimity to return either a “no” or a "yes" special verdict on an aggravating factor.

Moreover, the Supreme Court defers to the legislature's policy judgment with respect to the exceptional sentence procedures, State v. Davis, 163 Wn.2d 606, 614, 184 P.3d 639 (2008), and the legislature has made it clear that the policy justification for the common law rule discussed in Bashaw does not apply to aggravating circumstances. As discussed above, the Bashaw court held that the reason that unanimity was not required for a "no" finding was because, in the court's opinion, the costs and burdens of conducting a second trial on a sentencing enhancement outweighed the interest in imposing the additional penalty on a defendant. However, with respect to aggravating circumstances, the legislature has indicated that the imposition of an appropriate exceptional sentence outweighs any concern about judicial economy or costs. When an exceptional sentence is imposed but is subsequently reversed, the legislature has expressly authorized the superior court to conduct a new jury trial on the aggravating circumstances alone. RCW 9.94A.537(2).[4] This policy judgment is

[4] In this case, if this Court were to reverse Ryan's exceptional sentence based upon Bashaw, the State would be entitled to again seek an exceptional sentence at a new trial on the aggravating circumstance.

not surprising, because exceptional sentences are reserved for the worst offenders. When the jury finds an aggravating circumstance, the trial court has the discretion to impose a sentence up to the statutory maximum. In contrast, the Supreme Court characterized the school bus zone sentencing enhancement as simply "an additional penalty" imposed upon a defendant "already subject to a penalty on the underlying offense." Bashaw, 169 Wn.2d at 146-47. Bashaw does not apply to aggravating circumstances, and the special verdict form accurately stated the law.

d. The Rule In Bashaw Is Contrary To Legislative Intent.

While this Court is bound by Bashaw, the State respectfully submits that the holding in that case is incorrect and offers the following argument in order to preserve the issue.

The state constitutional right to jury trial in criminal matters stems from Const. art. I, § § 21 and 22. Const. art. I, § 21 which provides that "[t]he right of trial by jury shall remain inviolate .... ", preserves the right to a jury trial as that right existed at common law in the territory when section 21 was adopted. Sofie v. Fiberboard Corp., 112 Wn.2d 636, 645, 771 P.2d 711, 780 P.2d 260 (1989).

This right, in criminal cases, included a right to a twelve person jury, and a right to a unanimous verdict. State v. Stegall, 124 Wn.2d 719, 723-24, 881 P.2d 979 (1994); State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980).

The Washington Supreme Court has rejected the notion that a defendant can waive the unanimity requirement. In State v. Noyes, 69 Wn.2d 441, 446, 418 P.2d 471 (1966), the defendant's first trial resulted in a hung jury which stood 11 to 1 for acquittal. On appeal, the court characterized as "without merit" the notion that the defendant could waive his right to a unanimous verdict and accept the vote of 11 jurors as a valid verdict of acquittal. Id. at 446.

When enacting sentencing enhancement statutes, the legislature is presumed to be familiar with the court's rulings on jury unanimity. In only one sentencing statute concerning aggravated first-degree murder, RCW 10.95.080(2), did the legislature give force or meaning to a non-unanimous verdict. Thus, for all other sentencing statutes, consistent with the dictates of Const. art. I, § 21, the legislature's procedure requires unanimity before a sentencing verdict can be rendered for conviction or acquittal.

The fixing of legal punishments for criminal offenses is a legislative function. State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986). The judiciary may only alter the sentencing process when necessary to protect an individual from excessive fines or cruel and inhuman punishment. Id. Otherwise, the court may recommend or identify needed changes, but must then wait for the legislature to act. See, e.g., State v. Pillatos, 159 Wn.2d 459, 469-70, 150 P.3d 1130 (2007) (absent statutory authority, courts could not empanel juries to determine the existence of aggravating circumstances); State v. Martin, 94 Wn.2d 1, 7, 614 P.2d 164 (1980) (absent statutory authority, courts could not empanel juries to decide whether a defendant who pled guilty should receive the death sentence). Accordingly, it is for the legislature, not the court, to allow for acquittal based upon a non-unanimous jury.

3. THE TRIAL COURT'S FINDINGS ON THE EXCEPTIONAL SENTENCE HAVE BEEN ENTERED.

Ryan asks this Court to remand for entry of findings of fact and conclusions of law for the exceptional sentence. This is

unnecessary; the trial court has now entered such findings. Supp. CP __ (Sub No 81).

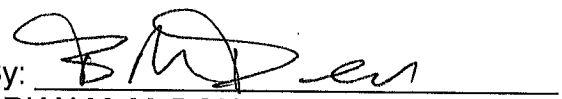
D. CONCLUSION

For the reasons cited above, this Court should affirm Ryan's convictions and exceptional sentence.

DATED this 24th day of September, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



By: _____
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Harlan Dorfman and Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. GEORGE RYAN, Cause No. 64726-1-I, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame
Name

9/24/10
Date

Done in Seattle, Washington

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