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NO. 64404-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH RUPE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE CHERYL CAREY

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court acted within its' discretion in denying defendant Jeremiah Rupe's motion to bifurcate the trial.

2. Whether Rupe has waived his challenge to the jury instruction on the aggravating circumstance.

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

4. Whether Rupe has failed to establish that the "pattern of abuse" aggravating circumstance is unconstitutionally vague.

5. Whether sufficient evidence supports the jury's finding of the "pattern of abuse" aggravating circumstance.

6. Whether sufficient evidence supports Rupe's conviction for unlawful imprisonment.

7. Whether the trial court properly denied Rupe's motion for a mistrial.

B. STATEMENT OF THE CASE

1. BACKGROUND

In December of 2004, 17-year-old Bailey Giard¹ began dating Jeremiah Rupe.² 4RP 79-80; 5RP 78.³ At the time, Bailey was living with her mother, Gina Giard. 4RP 78. Rupe was 24 years old, and was living with his girlfriend Adrienne Graham in the same apartment complex. 3RP 71; 4RP 78-79.

Bailey's mother did not like Rupe and forbade Bailey from seeing him. 4RP 81. However, by June of 2005, Bailey moved in with Rupe, who was still living with Graham. 3RP 112-13; 4RP 80-81.

Rupe was physically violent with Bailey. 3RP 128-29; 5RP 77. On multiple occasions, Rupe strangled Bailey, and she occasionally lost consciousness. 4RP 92-93, 110-11, 126. In an early incident, Rupe was in an argument with Graham when Bailey

¹ In order to avoid confusion the State uses first names when referring to Bailey Giard, her sister Nicole Giard and their mother Gina Giard.

² Rupe is occasionally referred to as "JT" in the transcripts. 2RP 96; 3RP 71-72.

³ The verbatim report of proceedings consists of 7 volumes designated as follows: 1RP: September 23, 24 and 29, 2009; 2RP: September 30, 2009; 3RP: October 1, 2009; 4RP: October 12, 2009; 5RP: October 13, 2009; 6RP: October 14, 2009; 7RP: October 23, 2009.

attempted to intervene. 3RP 117-18; 4RP 83-86. Rupe grabbed Bailey by the throat, threw her on a bed, choked her and told her that she was going to die. 3RP 118-19; 4RP 86-87. After Bailey started to turn blue, Rupe let go. 3RP 118, 122-23. Graham witnessed the incident, but did not call the police; instead, she stayed around the rest of the day in order to keep an eye on Rupe. 3RP 124-25.

Another time, Rupe hit Bailey multiple times in the face, causing her eye to become swollen shut. 4RP 101-06.

Rupe also was verbally abusive. He would call Bailey names and threatened to beat her up. 3RP 75, 128-29; 4RP 124. When Bailey talked about leaving him, Rupe threatened to kill her. 4RP 115.

Over the years, Bailey and Rupe moved around frequently, living with different relatives at times. 4RP 95-96, 109-10. Bailey became pregnant, and a son was born in May of 2006. 4RP 99-108; 5RP 83.

2. THE INCIDENT ON FEBRUARY 9, 2009

By January of 2009, Bailey was living at the apartment of her friends Stacy Campbell and Thomas Somsak. 2RP 22-24; 3RP 80;

5RP 85. In early February, Rupe moved in with Campbell and Somsak. 2RP 24-25. The atmosphere was tense because Bailey was attempting to end their relationship. 2RP 25-26; 4RP 121-22.

On February 9, 2009, in the early evening, Bailey and Rupe were walking toward her mother's residence and began to argue about their relationship. 3RP 52-55; 4RP 138-40; 5RP 85-87.

Rupe insisted that she needed to give him another chance.

4RP 140. Bailey did not feel safe and, using her mother's cell phone, called her sister Nicole. 4RP 55-56, 140-46. While on the cell phone, Bailey told Rupe that she did not want him following her or touching her. 4RP 58. Rupe hit her in the face and knocked her down; he then grabbed the cell phone and started talking to Nicole. 4RP 141-47.

Nicole then heard Bailey scream and yell "get away from me" and the phone went dead. 4RP 59. Nicole called her mother Gina, who went looking for Bailey and Rupe in her car. 3RP 84; 4RP 59, 147. When she found them, Bailey was walking ahead of Rupe and he was trying to grab at her. 3RP 84-85. Crying, Bailey got into the backseat of Gina's car. 3RP 85; 4RP 147.

Rupe told Gina that he was sorry for hurting Bailey and that he wanted to change and make things right. 3RP 87-88. Gina

allowed Rupe into her car and drove them both back to her home.

3RP 87-89; 4RP 149.

Upset that her mother had allowed Rupe back into her home, Bailey called an acquaintance, Brandon Baumann, and asked for a ride to Stacy Campbell and Thomas Somsak's apartment. 3RP 7-8; 5RP 88-90. Bailey arranged to meet Baumann at a gas station and asked her mother to give her a ride there. 3RP 8-9, 91; 4RP 150-52. However, before they left, Rupe followed them and forced his way into Gina's car. 3RP 91-92; 4RP 152-53. Though Gina and Bailey repeatedly asked that he exit the car, Rupe refused and insisted that he would go wherever Bailey went. 3RP 92; 4RP 153-54; 5RP 4.

After a short drive, Gina parked close to Baumann's car, and Bailey moved into his front passenger's seat. 3RP 11, 93-94; 5RP 5. Rupe followed her and sat in the backseat of Baumann's car. 3RP 11-13, 93-94; 5RP 8-9. When Bailey told him to get out, Rupe responded, "shut up, bitch." 3RP 13-14. He proceeded to insult Bailey, calling her a series of names and accusing her of being a bad mom. 2RP 35; 3RP 16-17; 5RP 11-13.

Baumann drove toward Campbell and Somsak's residence. As he approached their apartment, Rupe told him to pull over.

2RP 35-36; 3RP 20-21. Concerned about Rupe's intentions, Baumann picked a public spot to pull over: a gas station across from Campbell and Somsak's residence. 2RP 36; 3RP 20-21; 5RP18-22. Baumann then exited the car and went inside the gas station. 3RP 23.

Still in the car, Bailey and Rupe began arguing, and Rupe then placed his arm around her neck and pulled her toward him. 5RP 23-31. Using both of his hands, Rupe then started to strangle her, and Bailey could not breathe. 5RP 31-33, 38. Rupe told her that if she calmed down, he would let her go. 5RP 38-39. When Bailey went limp, he released her from his grip. 5RP 40.

Bailey then ran out of the car and across the gas station lot. 2RP 45; 3RP 37; 5RP 40-43. Rupe chased after her and caught up with her. 2RP 46; 3RP 37-38; 5RP 43-44. He told her that she had "really fucked up," placed her in a chokehold and dragged her back toward the car. 2RP 46-48, 103; 3RP 26-29; 5RP 44-51. Bailey resisted and screamed as she was being dragged. 2RP 51, 104-05; 5RP 53-54.

From her apartment across the street, Campbell saw the incident and told Somsak to go help Bailey. 2RP 41-53. Somsak drove over, saw Rupe forcing Bailey into the car, and told him to let

her go. 2RP 51-53, 100-05. Rupe released her, and Somsak drove her back to his apartment. 2RP 54-56, 105-06; 5RP 55-56.

Campbell called 911. 2RP 57-58. An officer arrived and spoke with Bailey; she was in shock and complained that her neck hurt. 3RP 149-52; 5RP 58-59.

Meanwhile, Rupe got into Baumann's car and told him "get me out of here." 3RP 30. Baumann drove him to Josh Freedle's house in Des Moines. 3RP 31. During the car ride, Rupe admitted that he had choked Bailey and stated that he could not believe that he had done it. 3RP 32. A short time later, the police arrived at Freedle's house. 3RP 60. Though Rupe asked Freedle to tell the police that he was not there, Freedle allowed the police to enter and arrest Rupe. 3RP 60-61.

Bailey 's neck later became swollen, and she felt pain in her neck for weeks. 2RP 63-65, 109; 4RP 65-66; 5RP 60-62. She later sought medical treatment and was diagnosed as suffering from neck sprain with chronic pain, a stretching injury to her nerves, and probable mild brain injury. 4RP 16-30; 5RP 62-66.

3. THE CHARGES AND TRIAL

Rupe was charged with second-degree assault, felony harassment, unlawful imprisonment, and fourth-degree assault. CP 137-41. With respect to the second-degree assault and unlawful imprisonment counts, the State also 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.

Trial began in September of 2009. A jury convicted Rupe of second-degree assault, unlawful imprisonment and fourth-degree assault and found the aggravating circumstance. CP 76-77, 79-81. The jury acquitted Rupe of felony harassment. CP 82. The court imposed an exceptional sentence of 63 months on the second-degree assault conviction. CP 96. This appeal follows.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED RUPE'S MOTION FOR BIFURCATION.

Rupe claims that the trial court erred in denying his motion to bifurcate the trial and conduct a separate proceeding on the

aggravating circumstance. The trial court acted well within its discretion in denying bifurcation because (i) evidence relating to the pattern of abuse aggravating circumstance was admissible in the trial of the charged crimes, and (ii) many of the same witnesses provided testimony about the substantive crimes and the aggravating circumstance. Moreover, any error was harmless given the trial court's limiting instruction and the overwhelming evidence supporting Rupe's convictions.

a. Relevant Facts

The State initially charged Rupe with second-degree assault and unlawful imprisonment. CP 1-2; 1RP 32-33. At the omnibus hearing on August 28, 2009, the State gave notice that it would amend the information to add a count of felony harassment and the pattern of abuse aggravating circumstance. 1RP 33; CP ___ (Sub. No. 29).

During pretrial proceedings, on September 24, 2009, the State amended the information to add the pattern of abuse aggravating circumstance and a fourth-degree assault count. 1RP 9; CP 8. During this hearing, Rupe indicated that he wanted the court to bifurcate the trial and hold a separate hearing on the

aggravating circumstance. 1RP 17-18. The court reserved ruling on the issue. 1RP 19.

At the next hearing on September 29, 2010, the State moved to amend the information to add a count of felony harassment. 1RP 32-33. Rupe acknowledged that he had previously received notice of the felony harassment charge, but objected to the timing of the amendment: "[I]t seems designed as a way to get around the requirement of the bifurcation of the prior bad acts and would therefore object on that basis." 1RP 33. Rupe did not argue or suggest that the evidence was insufficient to support the felony harassment charge. The court allowed the amendment. 1RP 33.

The parties then argued the bifurcation motion. Rupe claimed that bifurcation was warranted because evidence of his prior acts of domestic violence was unduly prejudicial. 1RP 33-34. The prosecutor argued that Rupe's prior acts of domestic violence were admissible and relevant to the charges of felony harassment and unlawful imprisonment. 1RP 34-37. The court denied the defense motion, finding that the evidence was relevant to the felony harassment and unlawful imprisonment charges and that the

probative value of the evidence outweighed its prejudicial effect.

1RP 38-39.⁴

At the conclusion of trial, the court issued a limiting instruction concerning the prior acts of domestic violence:

Evidence has been introduced in this case on the subject of prior incidents between the defendant and Bailey Giard. You should consider this evidence only insofar as it may assist you in considering her state of mind on February 9, 2009 and in considering your answers to the Special Verdict Forms A(2), B(1), and C(1). You may not consider this evidence for any other purpose.

CP 73.

- b. Evidence Of Rupe's Prior Acts Of Domestic Violence Was Admissible On The Charged Crimes.

The appellate court reviews a trial court's decision on bifurcation for abuse of discretion. State v. Monschke, 133 Wn. App. 313, 335, 135 P.3d 966 (2006). A court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. Id.

⁴ This hearing was recorded, and the transcript of this hearing provided by Rupe contains many inaudibles, particularly during the court's ruling on the bifurcation issue. The State had another transcriptionist review the audio of the hearing and that transcriptionist was able to prepare a more detailed transcript of the hearing. The State has now moved to add that transcript to the record.

Generally, the Sentencing Reform Act ("SRA") provides that evidence of the substantive crimes and evidence of the aggravating circumstance shall be presented to the jury at the same time. RCW 9.94A.537(4). When certain aggravating circumstances are alleged, including the pattern of abuse aggravating circumstance, the trial court has the discretion to conduct a bifurcated trial "if the evidence supporting the aggravating fact is not part of the res geste of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime." Id.

Here, the trial court acted well within its discretion in denying Rupe's motion for bifurcation because evidence of his prior acts of domestic violence was admissible in trial of the charged crimes. First, Rupe's history of acts of domestic violence against Bailey was admissible to show the reasonable fear element of felony harassment. See State v. Magers, 164 Wn.2d 174, 182, 189 P.3d 126 (2008) (holding that when felony harassment is charged, evidence of the defendant's prior violent acts is admissible to show that it was reasonable for the victim to be fearful of the defendant's

threats); State v. Ragin, 94 Wn. App. 407, 411-12, 972 P.2d 519 (1999) (same).

Rupe acknowledges that his prior acts of domestic violence against Bailey were relevant to the felony harassment charge. Appellant's Opening Brief at 10-11. Instead, he claims that he should not have been charged with the felony harassment because there was insufficient evidence that he made a threat to kill Bailey. Id. at 12-14.

Rupe never made this argument below, and he should not be heard now to claim that the State should not have been allowed to present the felony harassment charge to the jury. When he opposed the motion to amend, Rupe never suggested the evidence was insufficient to support the felony harassment charge. In fact, when he later argued in favor of bifurcation, he made the opposite argument: he claimed that evidence of his prior acts of domestic violence was unnecessary because the State had sufficient evidence for the charges based upon the events of the day.⁵ Had Rupe believed there was insufficient evidence supporting the felony

⁵ Defense counsel argued, "There are sufficient facts, I believe, your Honor, in the charges as they are currently presented and the witnesses' testimony will allow the State to present its case based on the events as they occurred that day." 1RP 33.

harassment charge, he could have brought a motion to dismiss under State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986). He did not, and cannot be allowed to raise this issue for the first time on appeal. RAP 2.5(a).

In any event, even had Rupe brought a Knapstad motion, there was sufficient evidence to present the felony harassment charge to the jury. In order to justify dismissal of the charge, Rupe would have had to show that no material facts were in dispute and that the undisputed facts were insufficient as a matter of law to establish a prima facie case of guilt. Knapstad, 107 Wn.2d at 356. In deciding the sufficiency of the evidence, the court views the facts and all reasonable inferences in the light most favorable to the State. State v. Missieur, 140 Wn. App. 181, 184-85, 165 P.3d 381 (2007).

Rupe argues there was insufficient evidence that he made a threat to kill Bailey. The term "threat" is defined as "to communicate, directly or *indirectly* the intent... [t]o cause bodily injury in the future to the person threatened or to any other person." RCW 9A.04.110(27) (emphasis added). The term "threat" includes both explicit and implicit threats. State v. Harvill, ___ Wn.2d ___,

234 P.3d 1166, 1169 (2010); State v. Shcherenkov, 146 Wn. App. 619, 625, 191 P.3d 99 (2008), rev. denied, 165 Wn.2d 1037 (2009).

Here, as the prosecutor explained, the felony harassment charge was based upon Rupe's actions of strangling Bailey, chasing after Bailey, telling her that she had made a big mistake and had "messed up," and dragging her back to the car. 1RP 37. Given that Rupe had previously told Bailey that he would kill her if she left him,⁶ it was certainly reasonable for her to perceive his comments and actions as a threat to kill. State v. Hanson, 126 Wn. App. 276, 280, 108 P.3d 177 (2005) (holding that there was sufficient evidence of harassment where the defendant grabbed the victim's arm and forced her to sit on the bed, bruised her arm, spit on her, poured soda on her, threatened her not to call the police, would not allow her to leave, and punched her in the head). Not surprisingly, after she escaped from Rupe, Bailey reported to Campbell and Somsak that she thought that Rupe was going to kill her. CP 127. Given these facts, the trial court would have properly denied a Knapstad motion seeking the dismissal of the felony harassment charge.

⁶ 4RP 115.

Given that the felony harassment charge was properly allowed and that Rupe's prior acts of domestic violence against Bailey were admissible to show the reasonable fear element, bifurcation was unwarranted under RCW 9.94A.537(4).

In addition, the evidence of prior domestic violence was relevant to the unlawful imprisonment charge. As the prosecutor explained, the State's theory was that Rupe was engaged in a continuing course of conduct with respect to unlawful imprisonment. 1RP 35; CP 24-25. By following Bailey from car to car and telling her that he would go wherever she went, he had intimidated her from attempting to leave him. When she finally did run, he used physical force to restrain her movements. Bailey's history with Rupe -- his prior threat to kill her if she left him and his willingness to use physical violence against her -- was thus relevant to whether he had restrained Bailey through intimidation. The trial court properly concluded that bifurcation was not warranted given that the evidence relating to the aggravating circumstance was relevant on the substantive charges.

c. The Trial Court Had The Discretion To Hold A Single Trial.

Even if the evidence relating to the aggravating circumstance was not admissible on the underlying substantive crimes, the trial court had the discretion to deny bifurcation. RCW 9.94A.537(4) simply permits, but it does not mandate, bifurcation if three listed criteria are met. The statute states that “the trial court *may* conduct a separate proceeding.” RCW 9.94A.537(4) (emphasis added). The word “may” when used in a statute is generally permissive and operates to confer discretion. State v. McMillan, 152 Wn. App. 423, 426-27, 217 P.3d 374 (2009) (citing Spokane County ex rel. Sullivan v. Glover, 2 Wn.2d 162, 165, 97 P.2d 628 (1940)). Accordingly, the SRA vests considerable discretion in the trial court in deciding whether to conduct a bifurcated trial.

Here, the trial court acted well within its discretion given issues of judicial economy and the instructions issued to the jury. Many of the same witnesses provided testimony about the substantive crimes and the aggravating circumstance. Bailey Giard, Gina Giard, Stacy Campbell, and Thomas Somsak were witnesses to the substantive crimes and to the pattern of abuse.

Had the trial court conducted two separate trials, the witnesses would have been forced to testify twice.

Moreover, in order to avoid undue prejudice, the trial court issued an instruction limiting the jury's consideration of the prior acts evidence: "You should consider this evidence only insofar as it may assist you in considering [Bailey's] state of mind on February 9, 2009 and in considering your answers to the Special Verdict Forms A(2), B(1), and C(1). You may not consider this evidence for any other purpose." CP 73. The jury is presumed to follow this instruction. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). Given these facts, the trial court was not required to bifurcate the trial.

d. Any Error Was Harmless.

Assuming that the trial court erred in denying the motion to bifurcate, any error was harmless. See State v. Thach, 126 Wn. App. 297, 311, 106 P.3d 782 (2005) (holding that error in admitting previous acts of domestic violence was not of constitutional magnitude and subject to harmless error analysis). An error is harmless unless there is a reasonable probability that it materially affected the outcome of the case. State v. Halstien, 122 Wn.2d

109, 127, 857 P.2d 270 (1993). Here, it is not reasonably probable that the denial of the motion to bifurcate affected the outcome of the case given the limiting instruction, discussed above, and the overwhelming evidence on the substantive charges.

With respect to the second-degree assault and unlawful imprisonment convictions, Stacy Campbell, Thomas Somsak and Brandon Baumann witnessed Rupe's act of grabbing Bailey by the throat and dragging her across the parking lot. Rupe later admitted to a friend that he had choked Bailey. 3RP 32. With respect to the fourth-degree assault conviction, Bailey's sister Nicole heard the incident over the cell phone, and Rupe conceded in closing argument that he committed this act and should be found guilty of it. 6RP 123. Any error in failing to bifurcate was harmless.

2. THE COURT SHOULD REJECT RUPE'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), Rupe challenges the special verdict instruction for 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, Rupe 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 exceptional sentence aggravating circumstances 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. 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 72. This instruction is identical to WPIC 160.00.

Rupe did not object or take exception to this instruction.

6RP 57-60.

b. Rupe 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). The defendant 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 Rupe, 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." Id. 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.

Rupe 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.

Even if the issue is not waived, Rupe cannot show the special verdict instruction given was erroneous because the relevant statute governing exceptional sentence aggravating circumstances requires jury unanimity for any kind of verdict. Bashaw involved a school bus stop sentencing enhancement,⁷ 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

⁷ 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.

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 plain language, RCW 9.94A.537(3) requires jury unanimity to return a "no" or "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).⁸ This policy judgment is not surprising, because exceptional sentences are reserved for the worst offenders. When the jury finds an aggravating circumstance finding, 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.

3. RUPE HAS FAILED TO ESTABLISH THAT THE AGGRAVATING CIRCUMSTANCE IS UNCONSTITUTIONALLY VAGUE.

Rupe claims that the pattern of abuse aggravating circumstance is unconstitutionally vague under the Due Process Clause. Appellant's Opening Brief at 21-25. However, the Washington Supreme Court has held that aggravating

⁸ In this case, if this Court were to reverse Rupe'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.

circumstances are not subject to due process vagueness challenges because they do not define conduct or allow for arbitrary arrest and criminal prosecution by the State. This Court is bound by that decision, which Rupe does not discuss.

Even if a vagueness challenge could be brought, Rupe has failed to meet his burden of establishing unconstitutional vagueness. Because Rupe's vagueness challenge does not implicate the First Amendment, he must demonstrate that the aggravating circumstance is unconstitutionally vague as applied to him. Given his history of strangling, assaulting and verbally abusing Bailey, Rupe was on notice that the pattern of abuse aggravating circumstance could apply to him if he continued to assault her.

a. The Aggravating Circumstance Is Not Subject To A Due Process Vagueness Challenge.

Under the Due Process Clause, a statute is void for vagueness if (1) it fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or (2) it does not provide standards sufficiently specific to prevent arbitrary enforcement. State v. Eckblad, 152 Wn.2d 515, 518, 98 P.3d 1184

(2004). Both prongs of the vagueness doctrine focus on laws that prohibit or require conduct. State v. Baldwin, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003).

The Washington Supreme Court has held that aggravating circumstances are not subject to vagueness challenges under the Due Process Clause because they "do not define conduct nor do they allow for arbitrary arrest and criminal prosecution by the State." Baldwin, 150 Wn.2d at 459. "A citizen reading the guideline statutes will not be forced to guess at the potential consequences that might befall one who engages in prohibited conduct because the guidelines do not set penalties." Id. at 459. The court further observed that "[t]he guidelines are intended only to structure discretionary decisions affecting sentences; they do not specify that a particular sentence must be imposed. Since nothing in these guideline statutes requires a certain outcome, the statutes create no constitutionally protectable liberty interest." Id. at 461.⁹

Rupe does not cite or discuss Baldwin. Yet, a decision by the Washington Supreme Court is binding on this Court, and it is

⁹ The Washington Supreme Court is considering this issue in State v. Stubbs, 144 Wn. App. 644, 184 P.3d 660 (2008), rev. granted, 165 Wn.2d 1035 (2009). In that case, the defendant has challenged an aggravating circumstance as unconstitutionally vague. Stubbs was argued on March 9, 2010.

error not to follow directly controlling authority by the Supreme Court. State v. Pedro, 148 Wn. App. 932, 950, 201 P.3d 398 (2009), rev. denied, 169 Wn.2d 1007 (2010).

The Supreme Court's analysis in Baldwin remains valid even though a jury, rather than a judge, now makes the finding of whether an aggravating circumstance accompanied the commission of the crime. The aggravating circumstances in RCW 9.94A.535 do not purport to define criminal conduct. Instead, they list accompanying circumstances that may justify a trial court's imposition of a higher sentence. A jury's finding of an aggravating circumstance does not mandate an exceptional sentence. Even when a jury finds an aggravating circumstance, the trial court has considerable discretion in deciding whether the aggravating circumstance is a substantial and compelling reason to impose an exceptional sentence. RCW 9.94A.535. The Supreme Court's analysis in Baldwin remains valid.

b. The Aggravating Circumstance Is Not Unconstitutionally Vague.

Even if Rupe could challenge the aggravating circumstance for vagueness, his claim should fail. The party challenging a

statute under the "void for vagueness" doctrine bears the burden of overcoming a presumption of constitutionality, i.e., "a statute is presumed to be constitutional unless it appears unconstitutional beyond a reasonable doubt." State v. Halstien, 122 Wn.2d 109, 118, 857 P.2d 270 (1990). A statute is vague if it either fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or it does not provide standards sufficiently specific to prevent arbitrary enforcement. Eckblad, 152 Wn.2d at 518. However, a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct. State v. Watson, 160 Wn.2d 1, 7, 154 P.3d 909 (2007). The Supreme Court has recognized that some measure of vagueness is inherent in the use of language. Id.

As Rupe acknowledges, because his vagueness challenge does not implicate the First Amendment, he must demonstrate that the aggravating circumstance is unconstitutionally vague as applied to him. City of Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990). The challenged statute "is tested for unconstitutionality by inspecting the actual conduct of the party who challenges the ordinance and not by examining

hypothetical situations at the periphery of the ordinance's scope."

Douglass, 115 Wn.2d at 182-83.

The statute at issue provides that the aggravating circumstance exists if "[t]he current offense involved domestic violence... [and] [t]he offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time." RCW 9.94A.535(3)(h)(i). Rupe claims that the phrase "multiple incidents over a prolonged period of time" is unconstitutionally vague. However, it is readily apparent that the aggravating circumstance is not unconstitutionally vague when considered in the context of Rupe's conduct.

The testimony established that Rupe dated Bailey for approximately four years and that he was physically violent with her on multiple occasions throughout their relationship. 3RP 128-29; 4RP 92-93, 110-11, 126; 5RP 77. Early in their relationship, Rupe's ex-girlfriend Graham witnessed Rupe choke Bailey while telling her that she was going to die. 3RP 118-19; 4RP 86-87. Only after Bailey started to turn blue, did Rupe let go. 3RP 118, 122-23. On another occasion, Rupe hit Bailey multiple times, causing her eye to become swollen shut. 4RP 101-06. Throughout their

relationship, Rupe was verbally abusive, calling Bailey names and threatening to beat her up. 3RP 63, 128-29; 4RP 124. A person of ordinary intelligence would understand that this behavior would subject him to the pattern of abuse aggravating circumstance. The Court should reject Rupe's vagueness challenge.

4. SUFFICIENT EVIDENCE SUPPORTS THE AGGRAVATING CIRCUMSTANCE FINDING AND THE UNLAWFUL IMPRISONMENT CONVICTION.

Rupe claims that insufficient evidence supports the pattern of abuse aggravating circumstance and his unlawful imprisonment conviction. These claims are without merit.

In a challenge to the sufficiency of the evidence, the court views the evidence in the light most favorable to the State. "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Evidence is sufficient to support a conviction if any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). The appellate court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the

persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

With respect to the aggravating circumstance, the State was required to show that the offenses were part of an ongoing pattern of psychological, physical, or sexual abuse of Bailey "manifested by multiple incidents over a prolonged period of time." RCW 9.94A.535(3)(h)(i). As described above, the evidence introduced at trial clearly established this aggravating circumstance. Over a period of nearly four years, Rupe threatened, berated, strangled and assaulted Bailey. The testimony concerning this abuse was sufficient to support the jury's finding of the aggravating circumstance.

With respect to Rupe's unlawful imprisonment conviction, the State was required to show that Rupe knowingly restrained Bailey. RCW 9A.40.040. "Restrain" is defined as "restrict[ing] a person's movements without consent and without legal authority in a manner which interferes substantially with his [or her] liberty." RCW 9A.40.010(1). Restraint is without consent if it is accomplished by physical force, intimidation, or deception. RCW 9A.40.010(1).

Prior to trial, the State's theory with respect to the unlawful imprisonment charge was that Rupe was engaged in a continuing

course of conduct, beginning with his threats and intimidating behavior of following her from car to car and ending with his actions of placing Bailey in a headlock and dragging her. 1RP 37. In his challenge on appeal, Rupe only argues that his initial behavior was not sufficient to support an unlawful imprisonment conviction. Appellant's Opening Brief at 29. However, there can be no question that by the end, as he dragged Bailey back to the car in a headlock, he had restrained her movement without her consent. The Court should affirm Rupe's unlawful imprisonment conviction.

5. THE TRIAL COURT PROPERLY DENIED RUPE'S MOTION FOR A MISTRIAL.

Rupe claims that the trial court erred by denying his motion for mistrial based on the prosecutor's cross-examination of Rupe's mother, a defense witness, about Rupe's calls from jail. Given that the fact of Rupe's calls was properly admitted, the trial court acted well within its discretion in denying the motion.

a. Relevant Facts

While in custody, Rupe made numerous telephone calls to his mother that were tape-recorded by the King County Jail.

1RP 10; CP 131. During pretrial proceedings, the prosecutor indicated that she would introduce portions of the taped calls.

1RP 10. Defense counsel acknowledged that she had these recordings; the only concern that counsel raised was that Rupe had complained about the adequacy of his counsel in some of the calls.

1RP 11. In response, the prosecutor stated that she would not be offering those portions of the calls. 1RP 11.

Rupe called his mother, Debbie Adams, as a witness.

1RP 9. During cross-examination, the prosecutor questioned her about Rupe's calls to her after the incident:

PROSECUTOR: And he had made those calls to you from the jail?

ADAMS: Yeah. Yeah.

DEFENSE COUNSEL: Objection.

THE COURT: Overruled.

PROSECUTOR: And you're aware that those phone calls are recorded?

ADAMS: Yes.

6RP 15. The prosecutor then elicited that in one recorded conversation, Rupe told his mother that "he screwed up" and that he had placed Bailey in a headlock. 6RP 16.

Rupe later moved for a mistrial, complaining that the jury should not have been informed that he was in jail. 6RP 55. The prosecutor replied that Rupe was on notice that the State intended to offer the calls, and suggested that a limiting instruction could be given to cure any prejudice. 6RP 55-56. The trial court denied the motion for a mistrial, but offered to give a limiting instruction. 6RP 56. Rupe's counsel considered the issue and asked that no limiting instruction be given. 6RP 62.

b. The Fact That Rupe Was In Jail Was Properly Elicited.

In determining whether a trial court abused its discretion in denying a motion for mistrial, this Court will find abuse only if no reasonable judge would have reached the same conclusion. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. Id. In determining the effect of an irregular occurrence during trial, the court examines "(1) its seriousness; (2) whether it involved cumulative evidence; and

(3) whether the trial court properly instructed the jury to disregard it.” Id.

Here, the trial court properly denied the motion for a mistrial because there was no irregularity. Rupe's argument is premised on the notion that, although the existence and substance of his recorded telephone calls were admissible, the jury should not have been informed of the circumstances of the recording. Under normal circumstances, the State cannot record a telephone conversation between family members, and an ordinary juror would reasonably wonder how the State could possibly have recordings of Rupe's telephone calls with his mother. Rupe cites no authority for the notion that he was entitled to sanitize this evidence by hiding the circumstances behind the recording of the telephone calls. The fact that Rupe called his mother from jail was admissible.

In State v. Mullin-Coston, 115 Wn. App. 679, 693, 64 P.3d 40 (2003), aff'd, 152 Wn.2d 107, 95 P.3d 321 (2004), the court rejected an argument identical to Rupe's. In Mullin-Coston, several witnesses testified about conversations and contacts that they had with the defendant while he was in jail. On appeal, this Court rejected the defendant's claim that the trial court abused its discretion in allowing the jury to hear that he was in jail during these

conversations. In doing so, the court rejected the argument that such references were analogous to cases in which the defendant is physically restrained in front of the jury:

[A]lthough references to custody can certainly carry some prejudice, they do not carry the same suggestive quality of a defendant shackled to his chair during trial. Jurors must be expected to know that a person awaiting trial will often do so in custody. Many factors go into the determination of whether a defendant will be released pending trial, including the seriousness of the charged crime and the person's ability to pay bail.

115 Wn. App. at 693.

Mullin-Coston is dispositive. Here, the discussion of the jail was brief and the State used the reference only to explain why the State had tape-recordings of Rupe's telephone calls. The prosecutor did not further mention Rupe's incarceration.

The cases cited by Rupe are easily distinguished. In State v. Finch, 137 Wn.2d 792, 862, 975 P.2d 967(1999), the Supreme Court held that the trial court erred in shackling a defendant during trial and allowing the jury to see that he was restrained. As this Court recognized in Mullin-Coston, there is a significant difference between exposing the jury to a shackled defendant and testimony that reveals that the defendant was in jail.

In State v. Gonzalez, 129 Wn. App. 895, 120 P.3d

645 (2005), the trial court told the jury at the beginning of trial that the defendant could not post bail, was being held in jail, was transported to court in handcuffs, and was being guarded by uniformed officers in the courtroom. The Court of Appeals, citing Finch and noting that there was no reason for the trial court to inform the jury of these facts, held that the court's comments undermined the presumption of innocence. Here, in contrast, the jury was not told that Rupe was currently in custody and, moreover, there was a legitimate basis to elicit testimony that he had made calls from the jail.

Even assuming the court should have excluded the fact that the calls were made by Rupe while in jail, a mistrial was not warranted. As noted above, the evidence of Rupe's guilt was substantial. The discussion of the fact that he was in jail was brief. Moreover, it would not be surprising that Rupe had spent time in jail: the jury heard unchallenged testimony that the police arrested Rupe. Given these facts, Rupe has not shown that nothing short of a new trial would insure that he would be tried fairly. The trial court properly denied Rupe's motion for a mistrial.

D. **CONCLUSION**

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

DATED this 10th day of September, 2010.

Respectfully submitted,

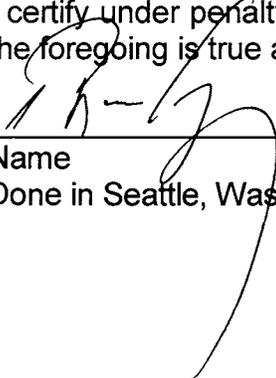
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. JEREMIAH RUPE, Cause No. 64404-1-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.



Name
Done in Seattle, Washington

09-10-10

Date