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STATE OF WASHINGTON
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Supreme Court No. 100869-4

SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,
Respondent,

v.

AMY SUE BROWN,
Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. STATEMENT OF THE CASE

The defendant shoots Amanda Hill in the chest, killing her.

The defendant caught her fiancée, Brandon Fayard, and her friend, Amanda Hill, in bed together. RP[1] at 580. Mr. Fayard said the defendant was yelling, "I knew it, I knew it," probably because the defendant suspected Ms. Hill had been flirtatious with him. RP at 583, 585, 590. The defendant left the bedroom and Ms. Hill followed her out. RP at 570. Three minutes later, the defendant fired one shot, a contact shot, into Ms. Hill's chest, causing her death. Ex. 590, p. 30; RP at 580, 1114.

Ms. Hill admitted what type of gun it was and where she got it. It was a .38 revolver which was in a holster and in the side door pocket of the passenger door of a Cadillac Escalade

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[1] Unless otherwise indicated, "RP" refers to the verbatim report of proceedings from jury trial on 02/24-03/09/2020.

which she and Mr. Fayard used. RP at 601; Ex. 191 at 5:22:20-5:23:02).

The defendant's version of events is implausible.

After catching Ms. Hill and Mr. Fayard in bed, the defendant says she "caused a scene" and went outside to smoke a cigarette. RP at 1464. She says someone, later determined to be Ms. Hill, pushed her from behind, causing her to fall to the ground. RP at 1466. The defendant was flat on her back with Ms. Hill straddling her. RP at 1469. Ms. Hill had her hands around the defendant's nose and mouth. RP at 1469.

The defendant is 4'11.5" inches. Ex. 191 at 5:18:23-5:18:25. Yet she had the calmness, to stretch up to the door handle of the Cadillac Escalade, a height of 3'7" with her left hand, although she is right-handed, to where she keeps a firearm. Ex. 190 at 3:47:13-3:47:33, 3:58:30-3:58:34; Ex. 191 at 5:26:42-5:27:00; RP at 1343. During her police interrogation she could only reach a distance of 3'6" and that was without anyone on top of her and choking her. RP at 1343.

She was able to get the .38 revolver out of the side pocket of the passenger door. RP at 1471. While Ms. Hill was choking her, she was able to get the gun out of its holster and switch it to her right hand. RP at 1471. Although the defendant testified that she was successfully choking or suffocating her, she screamed at Ms. Hill to get off her. RP at 1470. Because Ms. Hill was on top of her choking her and Ms. Hill would not stop, the defendant shot her. RP at 1472.

This testimony differs from the defendant's statements to the police.

The defendant's story changed on key points, such as her fear of Ms. Hill and whether she needed to use a firearm on her.

Topic	**Statement to Police**	**Testimony**
Did Ms. Hill attack you twice?	No, just once as the defendant was stepping off the patio. Ex. 190 at 3:46:43-3:46:50.	Yes. "[A]t one point I was able to get her off me. . . . I attempted just to get up and run." RP at 1468.
Did Ms. Hill actually ever choke you?	*After the defendant got the gun*, Ms. Hill "shifted her hands from here to here." (Shows one hand	"[Ms. Hill] put her hands around my nose and mouth," before she was able to run. RP at 1468.

	around neck and one hand across chin and cheek to both hands around neck.) "And then that's when it finally did hit my throat." Ex. 190 at 3:58:14-3:58:20. "Q: When she was grabbing you by the neck, was she hurting you? A: I don't remember . . . I don't remember how tight she was. Q: Were you breathing okay? A: Yes, I was breathing. Q: She wasn't restraining or preventing you from breathing A: (defendant shakes head.) Ex. 190 at 4:07:27-4:07:54. "My train of thought is somebody's on top of me *trying* to choke me out. That was my thought." Ex. 190 at 4:17:11-4:17:16 (Emphasis added).	After being tackled, Ms. Hill again had her hands around the defendant's nose and mouth. RP at 1469. Ms. Hill did succeed in choking or suffocating her. Both hands were around her throat. RP at 1470.
Was she afraid Ms. Hill would kill her?	"I didn't think she was trying to kill me . . . And I wasn't trying to kill her. Q: Did you feel that your life was in danger? A: No. Ex. 190 at 4:15:54-4:16:09.	"I was just terrified that there was somebody on top of me trying to choke me out and I wanted her to stop." RP at 1472.

	Q: Do you believe then or now that Amanda was trying to hurt you? A: I believed then Amanda was trying to fight me. Was I in fear of my life? No. Ex. 192 at 6:05:33-6:05:48.	
Was it necessary to use the gun?	Q: Why not scream for Brandon, or scream at her . . . A: I don't know. Cuz I'm f—ing retarded. I don't f—ing know. I should have screamed for Brandon. Ex. 190 at 4:17:16-4:17:28. Q: What were you trying to accomplish when you grabbed the gun? A: I don't know what I was trying to accomplish. Q: Do you feel, Amy, that it was necessary for you to grab the gun? A: No, it wasn't. I f—ed up and I shouldn't have done that . . . . I f—ed up and I shouldn't have done that. . . . Did I need to reach for the gun? No. I did not." Ex. 192 at 6:05:11-6:05:56.	"She was on top of me choking me and I told her to get off of me and she was not responding. . . . I didn't know what else to do." RP at 1472.

The forensic evidence is not consistent with the defendant's version.

The forensic pathologist, Sigmund Menchel, performed the autopsy on Ms. Hill. RP at 1106. He found the path of the bullet was front to back, downward, and left to right. RP at 1113.

A bloodstain pattern analyst with the Washington State Patrol Crime Laboratory, Trevor Allen, examined bloodstains on Ms. Hill's clothing, the defendant's clothing, and photos of the crime scene. RP at 1136, 1139. He concluded that when Ms. Hill was shot, her torso was in a relative upright position with her in a squatting or semi-squatting stance. RP at 1180. This was based on the fact that her blood dripped onto the *interior* of her cardigan and onto her pants in a downward direction. RP at 1181. Since blood flows straight down, she was shot while her torso was erect. RP at 1181.

He also concluded that when Ms. Hill was shot, she was in a squatting or semi-squatting stance. RP at 1180. The blood

dropping onto Ms. Hill's pants from her chest wound meant that Ms. Hill had to be over the top of her jeans. RP at 1881. There were also drip stains to the lower left pant leg of Ms. Hill's jeans. RP at 1182. This would have to mean that her bleeding injuries were over the top portion of her pants. RP at 1182.

Mr. Allen also concluded that Ms. Hill and the defendant were in front of each other to some degree. RP at 1183. This conclusion was based on the spatter stains on the defendant's clothing. RP at 1183. After she was shot, Ms. Hill would have aspirated blood, meaning that the defendant was in front of her aspiration. RP at 1183. There were also drip stains found on the left knee or thigh area of the defendant's jeans, also indicating that the two were facing each other. RP at 1184.

Regarding the defendant's version, if she shot Ms. Hill while Ms. Hill was straddling her, there would have been drip bloodstains found on the sweatshirt the defendant was wearing. RP at 1192. There were none. RP at 1192. Further, there were

bloodstains on the running board just outside the front passenger door and blood spatter stains on the side of the Cadillac Escalade. RP at 1209-10. However, there were no bloodstains in the interior of the vehicle. RP at 1210.

The defendant's bloodstain expert, Paul Kish, agreed with Mr. Allen's characterization of the stains as either drip or spatter. RP at 1387. But he declined to make any conclusions, saying that he could not determine if the stains were caused by the first responders rendering aid and spattering and dripping blood onto, for example, Ms. Hill's lower pant leg. RP at 1387. This reasoning seems dubious. The 911 call began at 12:43:55. RP at 628. Mr. Fayard was still on the call with 911 at 12:52:45 when Dep. Perez arrived. RP at 629, 650. So, the police arrived approximately 10 minutes after the 911 call. At that point, Ms. Hill had no pulse and the police stopped life saving measures. RP at 652, 654.

Dr. Menchel found Ms. Hill had some blunt trauma injuries on parts of her body, including a contusion on the left

ear lobe, and small abrasion or contusion on the left side of her chin which would have occurred at the same time or shortly before the gunshot wound. RP at 1108-10. The contusions would have been consistent with a scuffle. RP at 1119-20. However, there were no similar marks on the defendant. See Ex. 192 at 5:37:03-5:38:50.

Facts regarding jury selection:

There were objective reasons to strike all the potential jurors the State used peremptory challenges on. Only one, juror #32, was based on non-verbal factors:

Reasons provided for State's strikes:

Juror No:	Reasons for strike:
No. 17:	She wrote in response to question about opinions about the use of firearms, "I believe we should have the right to protect ourselves against the dangers of physical harm." And, in response to a question re: her opinions on firearms causing bias, "Possibly." CP 466.
No. 22:	In response to a previous juror who said that a person should be held accountable when they drink, "Q: Juror 22, do you agree with that as well? A: Well, I think everybody makes mistakes, you

	know. But you cannot judge on that." RP at 402. "Q: [W]hat are some of the things you're going to look for to decide whether or not you think they are telling the truth . . . ? A: I've never done this before so I don't know." RP at 404. Q: Did (other conversations with jurors) spark anything . . . you, personally, would look for in assessing credibility of either testimony or evidence? A: No, it's all what you present. . . . Q: How do you judge (your children's) statements to decide who is responsible . . . ? A: That's a very hard question. RP at 416.
No. 34	Q: What do you think about that idea that the force used in self-defense should either meet or only slightly exceed the perceived threat . . . . A: I don't think I fully agree with that. If myself and my family is being threatened, I'm going to do what needs to be done to take care of that. And if that means going over, but me and my family are fine, then that's what I would do." RP at 426. In addition, the prosecutor noted that she seemed uncomfortable and nervous during the voir dire. RP at 473
No. 36	Crossed out "yes" and wrote "maybe" to the question, could you set that opinion aside and decide this case in a fair and impartial manner? CP 617. She answered "maybe" to a question on whether her opinion about firearms might cause bias. She is a recovering addict and said she didn't know if her opinions on alcohol would cause her bias. CP 619.

No. 41	"Q: Is there anybody else in the panel . . . where they've interacted with somebody who was extremely fatigued? (The defendant had been awake for more than 24 hours when the shooting happened). A: Serving in the military. . . . We had long hours; . . . we had to deal with people under . . . a lot of fatigue . . . and they might have had some brawls because they changed things . . . . Q: (They were) communicating things to you that were in fact mistaken? . . . A: Correct, that's happened." RP at 452-53. State struck her because she seemed sympathetic to the notion that defendant's recall of events to the police could be faulty. RP at 474.
No. 32	Her body language during voir dire led to a perception that she did not like the tone and questions from the prosecutor. It was noticeable enough for the prosecutor to make a written note of it. RP at 475.

The defense attorney even agreed with some of these strikes. "I had a few notes that corroborated the State's reasons for exercising peremptories . . . ." RP at 477. The State could not recall the specific question quoted above regarding juror no. 34. RP at 473. However, juror 34 stated that she would aggressively confront a person over a perceived threat and

would not necessarily use force matching the threat. There were objective grounds to strike her, as well as the non-objective factors the State cited.

The trial court noted that the State's concerns about the nervousness and discomfort of jurors 32 and 34 was corroborated by a male juror not being left on the jury panel, although he was struck by the defense. RP at 478. The court also noted that the State did not use all its possible peremptory challenges. RP at 478. The court concluded by finding that there was a nondiscriminatory basis for each juror stricken. RP at 478.

The female jurors stricken were not comparable to the male jurors not stricken:

Comparison of females stricken to males on the jury

Female Juror No_	Defendant compares to male juror because:	Additional comment
No. 36	No. 33, he and No. 36 both had problems with alcohol. No. 3—his wife had problems with alcohol	No. 36 was unable to answer "yes" to questions of whether she could be fair.

		No. 33 is a former police officer who always locked firearms in a safe. RP at 418. No. 3 concerns were settled when he learned that the case involved one night of drinking. RP at 124.
No. 41	No. 33, "The State never asked about his experiences with fatigue in the military or law enforcement."	No. 41 volunteered the information about fatigue causing brawls and misstatements by people sleep-deprived. RP at 452-53.
No. 41	No. 37, who "thought someone might not tell the truth because of 'poor memory.'"	The full quote from No. 37 is: People "could be not telling the truth (because) they're trying to hide something. Perhaps they're embarrassed by the truth. Perhaps they're trying to protect someone else by withholding the truth. . . . because of a poor memory." RP at 452. He also stated regarding self-defense,

		"I think I would primarily agree with that (referring to a prior juror's comment that you can only take self-defense so far), that we should only go as far as necessary to defend yourself, and stop there. . . . [I]f you have the opportunity to escape, then you use that instead. RP at 425-26. This is not close to the information that No. 41 volunteered that sleep-deprivation could cause brawling and misstatements.
No. 41	No. 29, who said "memory 'just depends on what the incident is and how dramatic it was.'"	Juror No. 29 demonstrated an understanding of self-defense: "Q: [S]omeone's at the store with their kids and they get shoved. Would it be proportionate to pull out a weapon and either strike or shoot the person who shoved them? . . . A: No. . . . It was just a shove, I guess . . . as long as the

		person that shoved them isn't pulling out a gun . . . pulling out a gun would be over excessive." RP at 427-28. Juror 29's comment about memory does not approach what Juror 41 said.
17	No. 17 was pro-gun and so were No. 26 and No. 39.	No. 17 said she possibly would not be fair because of her pro-gun attitude. CP 466. Both No. 26 and 39 stated their opinions about firearms would not cause them any bias. CP 538, 642.
No. 36	No. 33. "While Juror No. 33 was a former law enforcement officer with military experience, Juror No.'s 36's daughters either worked for CPS or a jail."	That is hardly a comparison. The State could expect a former law enforcement officer who would have worked with prosecutors to be sympathetic. Not so with someone who had a daughter working for CPS or a jail.

The prosecution would have also preferred the statements of these two jurors, who happened to be men, over the six jurors they struck, who happened to be women.

No. 26	"Q: How do you think that right of self-defense applied actually works? A: If your life is in danger, or you feel threatened or someone else is threatened in your presence, you the right to self-defense or defense of somebody else. Q: Are there limits? . . . A: Well, you can only take that self-defense so far . . . at some point, once your situation has been dealt with, then you should back off. RP at 425-26.
No. 39	Has never consumed alcohol but could be fair and impartial in judging the facts of the case. If there is evidence of alcohol consumption he would not be biased. RP at 398

II. ARGUMENT

A. The Court should not accept review of the jury selection issue under any provision of RAP 13.4 (b).

The defendant argues that this Court should accept review under all four subsections of RAP 13.4.

1. The Court of Appeals' decision is not in conflict with any case.

The defendant claims that the Court of Appeals decision conflicts with *State v. Jefferson*, 192 Wn.2d 225, 429 P.3d 467

(2018) and *State v. Burch,* 65 Wn. App. 828, 830 P.2d 357 (1992). See PRV at 13. Those cases are not in conflict with this case.

The *Jefferson* court specifically applied the holding to race and ethnicity: "Our *Batson* protections are not robust enough to effectively combat *racial discrimination* during jury selection." (Emphasis added.) *Jefferson,* 192 Wn.2d at 229. "We need to do better to achieve the objectives of protecting litigants' rights to equal protection of the laws and jurors' rights to participate in jury service free from *racial discrimination*." (Emphasis added.) *Id.* "If a *Batson* challenge to a peremptory strike of a juror proceeds to that third step of *Batson's* three-part inquiry, then the trial court must ask whether an objective observer could view *race or ethnicity* as a factor in the use of the peremptory strike." (Emphasis added.) *Id.* "Our current *Batson* test does not sufficiently address the issue of *race discrimination* in juror selection." (Emphasis added.) *Id.* at 238. "[I]t is clear that *Batson* has failed to eliminate *race*

discrimination in jury selection." *Id.* at 240. "*Batson* fails to address peremptory strikes due to implicit or unconscious bias, as opposed to purposeful *race discrimination*." (Emphasis added.) *Id.* at 242. "(Prior US Supreme Court cases) did not address the issue of 'unintentional, institutional or unconscious' *race bias*." (Emphasis added.) *Id.* at 243. "[T]he relevant question is whether 'an objective observer could view *race or ethnicity* as a factor in the use of the peremptory challenge.'" (Emphasis added.) *Id.* at 249. "The evil of *racial discrimination* is still the evil this rule seeks to eradicate." (Emphasis added). *Id.* "But our current *Batson* standard fails to adequately address the pervasive problem of *race discrimination* in jury selection. . . . we hold that step three of the *Batson* inquiry must change: at step three, trial courts must ask if an objective observer could view *race* as a factor in the use of the peremptory challenge." (Emphasis added.) *Id.* at 252.

Burch, 65 Wn. App. at 836, applied *Batson* protections to gender. Neither case held that a higher standard than *Batson* should apply to gender in jury selection. RAP 13.4 (b)(1) and (2) do not apply.

RAP 13.4 (b)(3) does not apply. At the trial court both the defense attorney and the prosecution agreed that the *Batson* standard was appropriate. On appeal the defendant claimed that the trial court should have used the standards in GR 37 and in *Jefferson* and that her attorney was ineffective for not arguing the idea that an objective observer could view gender as a factor in the use of peremptory challenges, rather than the *Batson* standard.

2. There is not a significant question of law under the State or Federal Constitutions.

The defendant's argument is that 1) courts have used the same tests for gender and race discrimination in jury selection and that the test for gender discrimination should be increased to that for racial discrimination, and 2) the defendant's trial attorney should have anticipated this issue and not agreed to a

Batson standard for the challenges to female jurors struck by the State. Both arguments are incorrect. There is no significant question of constitutional law.

The first argument does not recognize discrimination against female jurors is not equivalent to the discrimination against racial or ethnic minorities. A Westlaw search using the term "Batson challenges based on race or gender" of all Washington State cases results in 65 reported cases. Of those, only four were relating to Batson challenges based on gender. In fact, women are not necessarily the target of discrimination in jury selection. Two of the four cases in Washington were efforts by the prosecution to have a predominately male jury. *Burch,* supra, and *State v. Beliz*, 104 Wn. App. 206, 15 P.3d 683 (2001), in which the prosecutors admitted they attempted to have a predominately male jury. *Beliz,* 104 Wn. App. at 214; *Burch,* 62 Wn. App at 841. The other two were unpublished cases in which the defendant alleged that the prosecution used peremptory challenges against *male* jurors. *State v. MacMillan*,

166 Wn. App. 1035, 2012 WL 661357 (Wash. Ct. App. Feb. 27, 2012)[2]; *State v. McLane*, 149 Wn. App. 1007, 2009 WL 485368, (Wash. Ct. App. Feb. 26, 2009)[3].

The Equal Rights Amendment (ERA) adopted in 1972 by Washington State prohibits discrimination on the basis of sex-based classifications. *Guard v. Jackson,* 132 Wn.2d 660, 664, 940 P.2d 642 (1997). It does not require that the protection against discrimination of the basis of gender equal that of protections against discrimination for racial or ethnic minorities. In fact, in jury selection discrimination may occur against women or men. There is no classification

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[2] This unpublished opinion, Attached as App. A, is a nonbinding authority that has no precedential value but is cited for such persuasive value as the court deems appropriate. GR 14.1; *Crosswhite v. DSHS*, 197 Wn. App. 539, 389 P.3d 731 (2017).

[3] This unpublished opinion, Attached as App. B, is a nonbinding authority that has no precedential value but is cited for such persuasive value as the court deems appropriate. GR 14.1; *Crosswhite v. DSHS*, 197 Wn. App. 539, 389 P.3d 731 (2017).

distinguishing between men and women for which the ERA would apply.

Concerning the defendant's second argument, there is no reason for a trial attorney to anticipate the defendant's argument on appeal. The defendant has cited no example of a jurisdiction which provided greater protections than *Batson* to combat racial or ethnic discrimination in jury selection and then increased such protections based on gender to keep up. Post-*Jefferson* and post-GR 37, the correct standard was the *Batson* standard to determine if the State correctly used its peremptory challenges against the six females. There were reasons in the record for five of the six and under the totality of circumstances—including that the State did not use its final peremptory challenge, the State cited non-verbal cues which were supported by the trial court, there was no excessive questioning of the juror, a similar male juror was challenged by the defense—the one remaining juror did not violate the *Batson* standard.

There are no constitutional issues regarding jury selection.

3. This issue does not involve an issue of substantial public interest that should be determined by the Supreme Court.

The defendant cites this Court's Gender and Justice Commission, WA Supreme Court, Gender and Justice Commission, *Final Report, 2021, How Gender and Race Affect Justice Now.* Https://www.courts.wa.gov/subsite/gjc/documents/2021_Gender_Justice_Study_Report.pdf. However, that study spoke of arguments in favor of including gender in GR 37. It did not recommend that amendment.

As stated above, a Westlaw search results in a total of four cases alleging gender discrimination in jury selection considered by either the Washington State Supreme Court or the Court of Appeals since 1992. There are more female attorneys than male attorneys in the United States, 51.5% to

48.5%, according to Lawyer Demographics and Statistics in the U.S.

The defendant has not presented examples of widespread bias against women (or men) in jury selection. In fact, her argument is not that there is systemic discrimination against women, but that the protection against gender discrimination should be increased to match the rule in *Jefferson* and the provisions of GR 37 for racial and ethnic discrimination.

There is no reason to accept review on the jury selection issue.

B. The self-defense issue is settled law; the Court of Appeals' decision is consistent with caselaw.

The defendant argued this issue in *State v. Brightman,* 155 Wn.2d 506, 521, 122 P.3d 150 (2005). The *Brightman* court held that to resist a felony it is required that the force used by the slayer be *reasonably necessary.* "Deadly force is only necessary where its use is objectively reasonable, considering the facts and circumstances as they were understood by the

defendant at the time." The Court cited *State v. Nyland,* 47 Wn.2d 240, 242, 287 P.2d 345 (1955) stating,

> The class of crimes in prevention of which a man may, *if necessary,* exercise his natural right to repel force by force to the taking of the life of the aggressor, are *felonies* which are committed by *violence and surprise;* such as murder, robbery, burglary, arson . . . sodomy and rape.

The *Brightman* court concluded that RCW 9A.16.050 (2), which provides for the defense of justifiable homicide when the slayer is resisting a felony, "incorporates the concept that each act of deadly force must be reasonably necessary under the circumstances." *Brightman,* 155 Wn.2d at 523.

Other cases are in accord. *State v. Griffith*, 91 Wn.2d 572, 576-77, 589 P.2d 799 (1979) held that a justifiable homicide instruction is appropriate only where the slayer has used such force as is reasonably necessary *under the circumstances.* (Emphasis added.) *State v. Brenner*, 53 Wn. App. 367, 377, 768 P.2d 509 (1989) held that where a homicide is committed in the defense of a felony or attempted felony, "the attack on the defendant's person [must threaten] life or

great bodily harm . . . ." In *State v. Castro*, 30 Wn. App. 586, 588-89, 636 P.2d 1099 (1981) the court held,

> in resisting an attempt to commit a felony, the person so resisting is not required to determine with absolute certainty what force is necessary for that purpose, but it does exact of him that *he shall not use any more force than shall seem to him to be reasonably necessary for that purpose.*

(Emphasis added.)

The defendant's reliance on *State v. Ackerman*, 11 Wn. App. 2d. 304, 453 P.3d 749 (2019) is misplaced. The trial court in *Ackerman* modified the standard instruction based on WPIC 16.03 concerning the defense of justifiable homicide while resisting a felony. First, the trial court substituted "*violent felony"* for "*felony"* in the instruction. The felony in question in *Ackerman* was a robbery and the trial court did not define "robbery" as a *violent felony. Id.* at 312. The *Ackerman* court held this alone was error. *Id.* at 313.

The *Ackerman* court also held it was error for the trial court to modify WPIC 16.03 by adding "*the violent felony threatens imminent danger of death or great personal injury* . . .

." *Id.* at 314. The *Ackerman* court recognized that the use of force in response to a felony must be reasonable citing *Brightman*. The court held that having a second instruction asking the jury to consider whether there was a reasonable belief of imminent danger of death or great personal injury associated the justifiable homicide in resistance of a felony instruction would be confusing and a misstatement of the requirements of RCW 9A.16.050 (2).

C. There are no grounds to accept review based on the photo of Ms. Hill holding her child.

The State will rely on its brief and the Court of Appeals on these issues.

III. CONCLUSION

Accordingly, the petition for review should be denied. This document contains 4,842 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 26th day of May, 2022.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Neil Fox
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2125 Western Avenue, Suite 330
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☒ E-mail service by agreement was made to the following parties:
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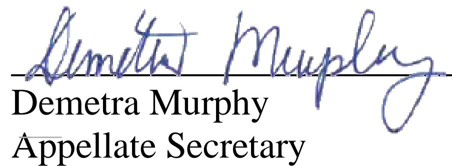
Signed at Kennewick, Washington on May 26, 2022.



Demetra Murphy
Appellate Secretary

Appendix A: *State v. MacMillan*, 166 Wn. App. 1035, 2012 WL 661357 (Wash. Ct. App. Feb. 27, 2012)

KeyCite Yellow Flag - Negative Treatment
Review Granted, Cause Remanded by State v. MacMillan, Wash., July 11, 2012

166 Wash.App. 1035

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 1.

STATE of Washington, Respondent,
v.
Terr Ellis MacMILLAN, Appellant.

No. 65847–6–I.
|
Feb. 27, 2012.

Appeal from Skagit Superior Court; Honorable John M. Meyer, J.

Attorneys and Law Firms

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Edwin Nick Norton, Skagit County Prosecuting Attorney, Erik Pedersen, Attorney at Law, Skagit County Prosecuting Attorney's Office, Mount Vernon, WA, for Respondent.

UNPUBLISHED OPINION

SPEARMAN, J.

***1** Terr MacMillan was convicted of assault in the second degree with a deadly weapon enhancement. On appeal, he claims the trial court (1) gave a flawed unanimity instruction for the deadly weapon special verdict and (2) lacked authority to impose alcohol-related community custody conditions.[1] He also asserts several claims in a statement of additional grounds (SAG). We hold that the unanimity instruction was prejudicial error under *State v. Bashaw,* 169 Wn.2d 133, 234 P.3d 195 (2010) and that the trial court lacked authority to impose two of the alcohol-related conditions. We conclude that his SAG claims lack merit. We reverse in part, affirm in part, and remand for further proceedings.

FACTS

Terr MacMillan and Tracie Elliott began dating in the fall of 2009. They lived together until March 2010, when Elliott was convicted of possession of stolen property and sentenced to confinement.[2] MacMillan agreed to store Elliott's property while she was incarcerated. Sometime before Elliot's release from confinement, their relationship ended. After Elliott's release in April 2010, she found out MacMillan was storing her property at the residence of Max and Marie Shelman, the elderly parents of MacMillan's friend Sherry Grard. Elliott contacted the Shelmans, who confirmed MacMillan was storing items on their property.

Elliott and Brandon Gasho, the teenage son of a friend, went to the Shelman residence on April 29. Elliott towed away a utility trailer containing her belongings, although she knew the trailer belonged to MacMillan. Elliott and Gasho returned the next day in Elliott's sport utility vehicle (SUV). They unlocked a storage container on the Shelman property, and Elliott walked back to the SUV to position it for easier loading. She saw MacMillan drive up quickly. Elliott got into her SUV and locked the doors. MacMillan parked next to the SUV and ran to the SUV's passenger door. He tried to open the door but could not, so he returned to his car and took a sword out of the back seat. He swung the sword once at the passenger-side window of the SUV, shattering it. As Elliott tried to exit through the driver's side, MacMillan dove through the shattered window, grabbed Elliott's keys, and struck her in the head with his hand. Elliott got out of the car and began running. MacMillan ran after her and struck her on the hip with the flat side of the sword. When Elliott fell, MacMillan struck her left thigh in the same manner. He yelled that he was going to kill her and that "I should have taken care of you on Alger Mountain that day." MacMillan moved toward the storage container and Elliott moved toward Mr. Shelman, who was nearby on his tractor. MacMillan then ran after Elliott, grabbed her by the arm, and pulled her in the direction of the storage container. Elliott sought help from Mr. Shelman, who told MacMillan to let her go or he would find himself in jail. MacMillan let her go and Elliott headed toward the Shelmans' house. She testified that she looked back and saw MacMillan standing near the cars holding her purse and the sword. Gasho saw MacMillan walk past the cars and then disappear into the nearby woods on foot. By this time, Gasho had called 911. He saw that Elliott was limping and had bruises on her leg.

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***2** Shortly after these events, Ms. Shelman was inside her house when she answered a phone call from MacMillan. Ms. Shelman testified that MacMillan asked her to go out and tell Elliott that she would have to change her story. She testified that he was "very polite." Ms. Shelman told MacMillan she did not want to get involved and declined to pass along the message. Ms. Shelman also recalled tripping over a purse, which she thought was Elliott's, inside her home. She testified that Elliott was outside where the police were during this phone call. Elliott, on the other hand, testified that she was present when Ms. Shelman was talking on the phone with MacMillan and that she recognized MacMillan's voice because he was yelling.

The police arrived and searched the Shelman property and the adjoining woods. They did not find Elliott's purse or keys, or a sword. They found a sword sheath inside the car that MacMillan had driven. Police spoke with Elliott and observed that she was crying, breathing heavily, appeared to be in pain, and was favoring one leg. They also took photographs of bruising on Elliott's left thigh.

By amended information, the State charged MacMillan with robbery in the first degree, assault in the second degree, felony harassment, and tampering with a witness. All of the charges were designated domestic violence. Additionally, the State alleged MacMillan committed the robbery and assault while armed with a deadly weapon.

At trial, MacMillan testified that he was acting to defend his property from Elliott. He gave Elliott the keys to the storage container to get her property but wanted to be there when she did, so she would take only what was hers. He was called by Ms. Shelman after Elliott's visit on April 29 and was informed that Elliott had taken his trailer. The trailer was full of his tools but contained nothing belonging to Elliott. All of her belongings were in the storage container. He testified that Ms. Shelman called him again on April 30 and said Elliott was back. He hurried to the Shelmans' to prevent Elliott from taking the remainder of his belongings and to find out where she had taken the trailer. He also wanted his keys back. The car he was driving belonged to Grard. He denied knowing that a sword sheath was in the car but noted that Grard "has lots of oriental stuff."

MacMillan testified that when he arrived, he walked up to Elliott and asked what she was doing and where his stuff was, but she tried to start up her car and "was going to leave, run me over." He saw that the storage container was open and his belongings were on the ground. He then grabbed a stick and broke Elliott's window. He swatted Elliott with the stick and she told him she had sold his trailer and his property was gone. He heard someone say the sheriff was coming and he fled because he had a misdemeanor warrant. MacMillan denied striking Elliott with a pipe or sword, hitting her in the face, taking her purse or keys, or threatening to kill her. He testified that when he spoke with Ms. Shelman on the phone, he wanted to tell Elliott to tell the truth. MacMillan acknowledged past convictions for theft and possession of stolen property.

***3** The court gave the following special verdict instruction asking the jury to determine whether MacMillan was armed with a deadly weapon during the alleged robbery and assault:

> You will also be given special verdict forms. If you find the defendant not guilty of these crimes do not use the special verdict forms. If you find the defendant guilty of these crimes, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. 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."

For the general verdict, the jury was instructed on assault in the second degree by use of a deadly weapon. The jury was given separate instructions defining "deadly weapon" differently for purposes of the general verdict and the special verdict.

The jury found MacMillan guilty of assault in the second degree and tampering with a witness, acquitted him of robbery, and could not reach agreement on the harassment charge.[3] The jury answered "yes" to the special verdict form asking if MacMillan was armed with a deadly weapon while committing the assault and found that Elliott and MacMillan were "members of the same family or household" for the domestic violence designation.

At sentencing, the trial court opined that the jury appeared to have given "short shrift" to MacMillan's defense of property claim. It imposed a low-end standard range sentence of 75 months of confinement, which included a 12–month deadly-weapon enhancement on the assault count. The court also noted that MacMillan's criminal history included a prior

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conviction for possession of a controlled substance and was consistent with that of a person with a substance-abuse problem. MacMillan did not object when the court stated that he would be required to undergo a substance-abuse evaluation and follow-up treatment. Additionally, one of the conditions of community custody stated, "Do not possess or consume alcohol and do not frequent establishments where alcohol is the chief commodity for sale."

DISCUSSION

MacMillan claims on appeal that the trial court (1) gave a flawed unanimity instruction for the deadly weapon special verdict and (2) lacked authority to impose alcohol-related community custody conditions. He also makes several claims in a SAG. We address his claims in turn.

Special Verdict Instruction

MacMillan contends the special verdict instruction was error under *State v. Bashaw,* 169 Wn.2d 133, 234 P.3d 195 (2010). We review de novo whether a jury instruction correctly states the relevant law. *State v. Linehan,* 147 Wn.2d 638, 643, 56 P.3d 542 (2002).

Citing conflicting opinions from this court, the parties disagree as to whether MacMillan may raise this issue for the first time on appeal as one involving an error of constitutional magnitude. The State relies on *State v. Nunez,* 160 Wn.App. 150, 248 P.3d 103, *rev. granted,* 172 Wn.2d 1004, 258 P.3d 676 (2011) in which Division Ml held that a jury instruction requiring unanimity on a school zone enhancement was not manifest constitutional error that could be raised for the first time on appeal. MacMillan relies on *State v. Ryan,* 160 Wn.App. 944, 252 P.3d 895. *rev. granted,* 172 Wn.2d 1004, 258 P.3d 676 (2011), in which this Division disagreed with *Nunez* based on our understanding of *Bashaw.*[4] We find the reasoning of *Ryan* persuasive and will review MacMillan's claim for the first time on appeal.

***4** The next issue is whether the jury instruction was erroneous. There is no dispute that it was. The State concedes the instruction was substantively identical to the erroneous *Bashaw* instruction, which told jurors they must agree on an answer to the special verdict.[5] *Bashaw.* 169 Wn.2d at 146.

Finally we must determine whether the instructional error was prejudicial. To find the error harmless, we must conclude beyond a reasonable doubt that the verdict would have been the same absent the error. *Bashaw,* 169 Wn.2d at 147 (citing *State v. Brown,* 147 Wn.2d 330, 341, 58 P.3d 889 (2002)). The State contends any error was harmless beyond a reasonable doubt because the jury returned a general verdict finding that the assault was committed by means of a deadly weapon. We disagree. The *Bashaw* court, in response to the State's argument that any error was harmless because the trial court polled the jury and the jurors affirmed that their decision was unanimous, stated, "This argument misses the point. The error here was the procedure by which unanimity would be inappropriately achieved." *Bashaw,* 169 Wn.2d at 147. The court explained:

> The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction. *Goldberg* is illustrative. There, the jury initially answered "no" to the special verdict, based on a lack of unanimity, until told it must reach a unanimous verdict, at which point it answered "yes." *Id.* at 891–93, 72 P.3d 1083. Given different instructions, the jury returned different verdicts. We can only speculate as to why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.

Id. This observation about the flawed deliberative process applies here. In addition, even if we were to consider the State's point that the jury found MacMillan guilty of assault with a deadly weapon, the definitions of "deadly weapon" for the general verdict and the special verdict are not interchangeable. It is easier for an item to qualify as a deadly weapon under the general verdict definition, which stated:

> Deadly weapon also [sic] means any weapon, device, instrument, substance or article including a vehicle, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

The definition of deadly weapon for the special verdict stated:

> A deadly weapon is an implement or instrument that has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are examples

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of deadly weapons: blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, and any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

***5** The general verdict definition encompasses not only a defendant's actual use of an instrument but also attempted or threatened use. It encompasses instruments that can produce substantial bodily harm. But the special verdict definition requires a showing that an instrument has the capacity to inflict death, and encompasses only actual use. Moreover, as MacMillan notes, there was conflicting evidence about the implement he used to strike Elliott.[6] We conclude the instructional error was not harmless beyond a reasonable doubt and, accordingly, reverse the sentencing enhancement.[7]

Community Custody Condition

MacMillan contends there was no evidence that alcohol was involved in the offense, therefore the sentencing court erroneously imposed the alcohol-related community custody conditions. A court may impose only a sentence that is authorized by statute. *State v.. Barnett,* 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Bahl,* 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

MacMillan's claim involves the condition, "Do not possess or consume alcohol and do not frequent establishments where alcohol is the chief commodity for sale." The State argues that the sentencing court properly imposed a substance-abuse evaluation and treatment where MacMillan did not dispute that he had a history of substance abuse. But MacMillan does not contest the imposition of a substance-abuse evaluation, only the alcohol-related conditions.

Under RCW 9.94A.703, some community custody conditions are mandatory, while others are subject to the court's discretion. Relevant to this case, the court may, in its discretion, order an offender to "[r]efrain from consuming alcohol" under subsection 3(e) or to "[c]omply with any crime-related prohibitions" under subsection 3(f).

We conclude that, because there was no evidence alcohol played a role in MacMillan's offenses, the sentencing court lacked authority to impose the conditions prohibiting him from possessing alcohol and from frequenting establishments where alcohol is the chief commodity for sale. The court did, however, have the authority to order the prohibition on alcohol consumption, which is specifically permitted by RCW 9.94A.703(3)(e) regardless of whether alcohol was involved in the offense. *State v. Jones,* 118 Wn.App. 199, 206–07, 76 P.3d 258 (2003).

SAG Issues

MacMillan's first SAG claim is that insufficient evidence supports his conviction for tampering with a witness. On a challenge to the sufficiency of the evidence, this court must decide whether, viewing the evidence in a light most favorable to the State, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green,* 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The elements of a crime may be established by direct or circumstantial evidence, one being no more or less valuable than the other. *State v. Delmarter,* 94 Wn.2d 634, 638, 618 P.2d 99 (1980). All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

***6** To convict MacMillan of tampering with a witness, the State had to prove the following elements beyond a reasonable doubt:

(1)That on or about April 30, 2010, the defendant attempted to induce a person to testify falsely or without right or privilege to do so, withhold any testimony or absent himself or herself from any official proceeding or withhold from a law enforcement agency information which he or she had relevant to a criminal investigation; and

(2) That the other person was a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceedings or a person whom the defendant had reason to believe might have information relevant to a criminal investigation; and

(3) That any of these acts occurred in the State of Washington.

MacMillan challenges the sufficiency of the evidence based on: (1) inconsistencies within Ms. Shelman's testimony and

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inconsistencies between her testimony and Elliott's; (2) Ms. Shelman's testimony that she told MacMillan she would not deliver his message to Elliott; (3) the lack of evidence that he made further attempts to persuade Shelman to deliver his message to Elliott; (4) the lack of evidence about the effect that MacMillan's words had on Elliott; and (5) the fact that Elliott was cooperative with police and appeared as a witness against MacMillan at trial.

These arguments lack merit. The crime of tampering with a witness does not require an actual contact with the witness. *State v. Williamson,* 131 Wn.App. 1, 6, 86 P.3d 1221 (2004). Furthermore, this claim is based mostly on the lack of consistency in and credibility of the witnesses' testimony. But "[c]redibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo,* 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer,* 48 Wn.App. 539, 542, 740 P.2d 335 (1987)). We defer to the trier of fact on issues of conflicting testimony and persuasiveness of the evidence. *State v. Walton,* 64 Wn.App. 410, 415–16, 824 P.2d 533 (1992) (citing *State v. Longuskie,* 59 Wn.App. 838, 844, 801 P.2d 1004 (1990)).

MacMillan's next SAG claim involves the following jury question, regarding the to-convict instruction for tampering with a witness, submitted to the trial court during deliberations:

Instruction 20 Item 1[8]

> Does the delivery of a message by a second party constitute an attempt?
> The trial court answered, "You are to be guided by the instructions of law previously provided." *Id.* MacMillan claims that the trial court did not have a well-founded reason for not answering the jury's question. But he fails to explain why the trial court's response was erroneous or prejudicial to him.

MacMillan's last SAG claim is that he received ineffective assistance of counsel for several reasons. To prevail on a claim of ineffective assistance, a defendant must satisfy the two-prong test under *Strickland v. Washington,* 466 U.S. 668, 687–88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If a defendant fails to establish either prong, we need not inquire further. *State v. Hendrickson,* 129 Wn.2d 61, 77, 917 P.2d 563 (1996). First, he must show that counsel's representation fell below an objective standard of reasonableness. *Id.* Only legitimate trial strategy constitutes reasonable performance. *State v. Aho,* 137 Wn.2d 736, 745, 975 P .2d 512 (1999). Second, he must show that the deficient performance was prejudicial. *Hendrickson,* 129 Wn.2d at 78. Prejudice occurs when it is reasonably probable that but for counsel's errors, " 'the result of the proceeding would have been different.' " *State v. Lord,* 117 Wn.2d 829, 883–84, 822 P.2d 177 (1991) (quoting *Strickland,* 466 U.S. at 694). There is a strong presumption of effective representation of counsel, and the defendant must show that there was no legitimate strategic or tactical reason for the challenged conduct. *State v. McFarland,* 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

***7** MacMillan contends that counsel's failure to seek a lesser included offense instruction on attempted witness tampering amounted to ineffective assistance. Assuming that a person can be charged with attempted tampering with a witness, MacMillan fails to explain why a lesser included instruction was appropriate here given the evidence. He also claims ineffective assistance based on counsel's failure to object to photographs of and testimony about Elliott's injuries, and counsel's failure to retain a medical expert. But he does not explain why any of the photographs were inadmissible or why expert testimony was admissible, nor does he show prejudice. Finally, MacMillan claims counsel's failure to bring a *Batson*[9] challenge during jury selection amounted to ineffective assistance. He asserts that the prosecution struck as many men as possible to obtain a predominantly female jury, prejudicing his ability to receive a fair trial.[10] SAG 14–15. However, absent a showing of prejudice, *Batson* errors cannot be raised for the first time on appeal. *State v. Wise,* 148 Wn.App. 425, 440, 200 P.3d 266 (2009). MacMillan asserts, "It could be concluded that given the [female jurors'] responses and the fact that they as females are more vulnerable to violence and therefore more sensitive to it, that the defendant was sure to get convicted of a violent crime against a woman regardless how weak or circumstantial the evidence." This explanation is inadequate to show prejudice. Furthermore, it fails to account for the jury's acquittal on the robbery count and failure to agree on the felony harassment count.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

WE CONCUR: APPELWICK and BECKER, JJ.

All Citations

Not Reported in P.3d, 166 Wash.App. 1035, 2012 WL 661357

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Footnotes

1 MacMillan also claims defense counsel was ineffective for failing to object to the illegal conditions, but we do not address this claim because we directly address the validity of the conditions.

2 Evidence of Elliott's convictions for possession of stolen property and theft was admitted at trial.

3 The court ultimately dismissed the harassment charge with prejudice.

4 The Washington Supreme Court has accepted review in *Nunez* and *Ryan* on the issue of whether a criminal defendant may first challenge on appeal a unanimity instruction that is erroneous under *Bashaw.*

5 The Bashaw court explained, "Though unanimity is required to find the *presence* of a special finding increasing the maximum penalty, it is not required to find the *absence* of such a special finding." *Bradshaw,* 169 Wn.2d at 147 (citing *State v. Goldberg,* 149 Wn.2d 888, 893, 72 P.3d 1083 (2003)).Therefore an instruction stating that unanimity was required for either determination was error. *Id.*

6 Elliott testified that the instrument was a sword about three to four feet in length and about two to three inches wide. Mr. Shelman testified that he saw MacMillan break Elliott's window with what he thought was a stick. Gasho testified that the object was long, skinny, and looked like a pipe. MacMillan himself testified that he used a stick.

7 This remedy is consistent with *Bashaw* and *Ryan,* in which the courts, after concluding that the instructional errors were not harmless beyond a reasonable doubt, vacated the sentencing enhancements and exceptional sentences respectively. *Bashaw,* 169 Wn.2d at 148; *Ryan,* 160 Wn.App. at 950.

8 Instruction No. 20, Item 1 referred to the first element in the to-convict instruction for tampering with a witness: "(1) That on or about April 30, 2010, the defendant attempted to induce a person to testify falsely or without right or privilege to do so, withhold any testimony or absent himself or herself from any official proceeding or withhold from a law enforcement agency information which he or she had relevant to a criminal investigation...."

9 A *Batson* challenge is based on the principle that the Fourteenth Amendment's equal protection clause requires defendants to be "tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Batson v. Kentucky,* 476 U.S. 79, 85–86, 106 S.Ct. 1712, 90 LEd.2d 69 (1986) (citing *Martin v. Texas,* 200 U.S. 316, 321, 26 S.Ct. 338, 50 L.Ed. 497 (1906)). *Batson* articulated a three-part analysis to determine whether discriminatory criteria were used to peremptorily challenge a venire member: (1) the defendant must establish a prima facie case of purposeful discrimination, by providing evidence that raises an inference that a peremptory challenge was used to exclude a venire member from the jury on account of the member's race; (2) if a prima facie case is established, the burden shifts to the prosecutor to come forward with a race-neutral explanation for challenging the venire member; and (3) the trial court must determine whether the defendant has established purposeful discrimination. *Batson,* 163 U.S. at 96–98. A *Batson* challenge can also be raised against peremptory challenges based on gender. *State v. Burch,* 65 Wn.App. 828, 833–36, 830 P.2d 357 (1992).

10 The prosecution used peremptory challenges to strike six men and one woman from the venire. The defense struck five women and two men, and the jury was ultimately composed of three men (one being an alternate juror) and ten women.

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Appendix B: *State v. McLane*, 149 Wn. App. 1007, 2009 WL 485368, (Wash. Ct. App. Feb. 26, 2009)

149 Wash.App. 1007

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 3.

STATE of Washington, Respondent,
v.
Jonathan James McLANE, Appellant.

No. 26758–0–III.
|
Feb. 26, 2009.

West KeySummary

1 **Jury** Peremptory challenges

A defendant failed to make a prima facie case that the prosecutor's exercise of six of eight peremptory challenges against all white male prospective jurors was motivated by gender, in his trial for first degree rape and third degree child molestation. There was no relevant circumstances that raised an inference that the prosecutor's challenge of the prospective white male jurors was based on group membership. Nothing in the State's questioning of the struck jurors during voir dire suggested a concern with their gender.

Appeal from Benton Superior Court; Hon. Robert G. Swisher, Judge.

Attorneys and Law Firms

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Andrew Kelvin Miller, Benton County Prosecutors Office, Megan Ann Bredeweg, Attorney at Law, Kennewick, WA, for Respondent.

UNPUBLISHED OPINION

BROWN, J.

***1** Jonathan James McLane appeals his three first degree rape convictions and one third degree child molestation conviction, contending (1) insufficient evidence supports one of his first degree rape convictions, (2) the prosecutor violated his equal protection rights when exercising peremptory challenges, and (3) that sentencing errors occurred. The State concedes the sentencing errors and we reject Mr. McLane's first two contentions. Accordingly, we affirm Mr. McLane's convictions, and remand for sentencing corrections.

FACTS

Because one of the issues is sufficiency of the evidence, the facts are stated in the light most favorable to the State. *See State v. Salinas,* 119 Wash.2d 192, 201, 829 P.2d 1068 (1992) (stating, "[w]hen the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant"). Mr. McLane's evidence insufficiency challenge is limited to count I relating to M.M. Thus, we do not fully develop the facts related to the other counts relating to M.M. and her sister, C.M.

On February 5, 2007, C.M. and M.M. disclosed to their mother, Laura McLane, that their father, Mr. McLane, had sexually abused them. According to M.M., whose date of birth is September 19, 1997, the sexual abuse started when she was seven years old until she was nine years old. M.M. identified one incident where Mr. McLane inserted his penis in her vagina, and stated he attempted to do so on numerous occasions. In addition, M.M. identified an incident, a couple of weeks prior to her disclosure to Ms. McLane, where Mr. McLane inserted his finger in her vagina. M.M. also identified several other instances of sexual contact by Mr. McLane, including oral contact.

The State charged Mr. McLane with five counts of first degree rape of a child, four counts against M.M., and one count against C.M. The counts against M.M. included count I, with alleged dates of June 1, 2006 to September 1, 2006; count II, with alleged dates of September 19, 2006 to September 30, 2006; count III, with alleged dates of December 1, 2006

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to December 31, 2006; and count IV, with alleged dates of January 1, 2007 to January 31, 2007. The final count, count V, was against C.M., with alleged dates of January 1, 1998 to December 31, 2000. In count VI, the State charged Mr. McLane with one count of third degree child molestation against C.M., occurring between March 26, 2005 and March 26, 2006.

During jury selection, the State exercised six of its eight peremptory challenges, striking Juror Nos. 2, 19, 25, 26, 37, and 39. All of the stricken jurors were male. Defense counsel did not object to any of these challenges based on gender.

The State asked Juror No. 2 to state his definition of reasonable doubt. The State questioned Juror No. 19 regarding his ability to listen to children testify about sexual acts. In addition, the State questioned Juror No. 25 regarding the possibility of delayed disclosure of sexual abuse by children and distrust of adults. The State recognized Juror No. 26 as a witness for a defendant in an unrelated criminal case. The State questioned Juror No. 26 regarding his feelings from that case, and whether they could enter into his thoughts in the present case. Juror No. 37 stated his son was investigated for indecent liberties, but never charged with the crime. The State questioned Juror No. 37 regarding his ability to set aside his feelings from that investigation, and whether he was frustrated with the criminal justice system. The State did not question Juror No. 39.

***2** Twelve women and two men were jurors. Before deliberations, two women were selected as alternates, leaving the final make-up of the jury as 10 women and two men.

C.M., M.M., Ms. McLane, Detective Larry Smith of the Benton County Sheriff's Office, and Dr. Sara Zirkle testified for the State. M.M. was 10 years old at trial. M.M. testified Mr. McLane inserted his finger in her vagina a couple of weeks prior to her disclosure to Ms. McLane. M.M. described the look of Mr. McLane's penis, including that "white stuff" would come out of it when he rubbed it. 3 Report of Proceedings (RP) (Oct. 31, 2007) at 359. M.M. testified regarding oral contact by Mr. McLane, including kissing her vagina and "[l]ick [ing] around it." 3 RP (Oct. 31, 2007) at 362. When questioned regarding when Mr. McLane would kiss her vagina, M.M. testified, "[s]ometimes when he would touch me on the weekend ... [i]t started from [age] seven till [sic] nine." 3 RP (Oct. 31, 2007) at 361.

M.M. further testified Mr. McLane attempted to insert his penis in her vagina "[a] lot of times," and was successful on one occasion. 3 RP (Oct. 31, 2007) at 364. M.M. testified before Mr. McLane "would try to make his private go into mine" he would put "oil," which he stored in his nightstand, on his hands, and then "on my private and his private, too." 3 RP (Oct. 31, 2007) at 362–63. M.M. identified a red bottle of K–Y personal lubricant, which was found in Mr. McLane's home in the location specified by M.M., as the "oil" he used. *Id.* Regarding the time period when Mr. McLane inserted his penis in her vagina, M.M. testified:

> [Question:] Were there times when your dad's private would go inside your private?
>
> [Answer:] Yes.
>
> [Question:] And how far would it go in?
>
> [Answer:] Not that far.
>
> ....
>
> [Question:] And when did—do you remember when this started happening?
>
> [Answer:] When I was seven.
>
> ....
>
> [Question:] ... So how often then—you said it started when you were seven and up till [sic] you were nine; that's correct?
>
> [Answer:] Yes.
>
> [Question:] How often—would this happen every time you saw [Mr. McLane] on the weekends?
>
> [Answer:] No.
>
> [Question:] Okay. But it happened on the summer break?
>
> [Answer:] Yes.

3 RP (Oct. 31, 2007) at 427, 429.

Dr. Sara Zirkle, a pediatrician specializing in developmental pediatrics, testified she examined M.M. in February 2007. After completing a vaginal exam, Dr. Zirkle concluded M.M. had "nonspecific finding[s]," meaning there is more than one thing that could have caused the minor inflammation she found. 3 RP (Oct. 31, 2007) at 440. Dr. Zirkle testified it would be possible for a tear to occur, and heal without any

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scarring. She further testified an injury is less likely when a lubricant is used.

Detective Smith testified he executed a search warrant at Mr. McLane's home. He located a red bottle of K–Y personal lubricant, in a cabinet on the left side of the headboard on Mr. McLane's bed, which was the location specified by M.M.

***3** The State called one rebuttal witness, Anna Hahn, a licensed mental health counselor. In addition, Mr. McLane called one surrebuttal witness, Jonathan Carollo, a licensed independent clinical social worker. Both witnesses testified regarding behaviors in response to sexual abuse.

Jury instruction 6 instructed the jury, in order to convict Mr. McLane of first degree rape of a child as charged in count I, it had to find the following elements were proven beyond a reasonable doubt:

> (1) That between the date of June 1, 2006 and September 1, 2006, [Mr. McLane] had sexual intercourse with [M.M.];
>
> (2) That [M.M.] was less than twelve years old at the time of the sexual intercourse and was not married to [Mr. McLane];
>
> (3) That [M.M.] was at least twenty-four months younger than [Mr. McLane]; and
>
> (4) That this act occurred in the State of Washington.

Clerk's Papers (CP) at 68. Further, jury instruction 11 defined "sexual intercourse" as "any penetration of the vagina or anus however slight, by an object, including a body part, when committed on one person by another, whether such persons are of the same or opposite sex." CP at 73. Defense counsel did not object to either jury instruction.

Regarding the sexual intercourse definition, the State argued in closing: "Sexual intercourse: Any penetration of the vagina or anus, however slight, by an object, including a body part. Intercourse doesn't just have to be a penis in a vagina ... it also can be a finger ... [i]t can also be a tongue." 6 RP (Nov. 5, 2007) at 931. Defense counsel did not object.

The jury found Mr. McLane guilty of counts I, IV, V, and VI. The jury found the existence of three aggravating factors alleged by the State. On counts I, IV, and V, the trial court sentenced Mr. McLane to a minimum term of confinement of 340 months, with a maximum term of life, pursuant to RCW 9.94A.712. On count VI, the trial court sentenced Mr. McLane to a term of confinement of 60 months, and community custody for 36 to 48 months, "or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer." CP at 11. Mr. McLane appealed.

ANALYSIS

A. Peremptory Challenges

The issue is whether the State's peremptory challenges violated Mr. McLane's rights under the Equal Protection Clause of the Fourteenth Amendment. Mr. McLane contends, for the first time on appeal, that the State violated his right to equal protection by exercising its peremptory challenges to exclude six men from the jury.

We review constitutional challenges de novo. *Fusato v. Wash. Interscholastic Activities Ass'n,* 93 Wash.App. 762, 767, 970 P.2d 774 (1999).[1] Further, claims of gender discrimination in jury selection may be raised for first time on appeal. *See State v. Burch,* 65 Wash.App. 828, 838–39, 830 P.2d 357 (1992); *State v. Beliz,* 104 Wash.App. 206, 214, 15 P.3d 683 (2001).

In *Batson v. Kentucky,* the Supreme Court held, "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race." *Batson v. Kentucky,* 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The equal protection guaranty was later extended to prohibit the State from using its peremptory challenges against potential jurors based upon their gender. *See Burch,* 65 Wash.App. at 833–36, 830 P.2d 357 (extending the reasoning of *Batson* to the use of peremptory challenges based upon a juror's gender); *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 146, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) (confirming "the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender").

***4** Determining whether an equal protection violation occurred during jury selection involves a three-part process. *Batson,* 476 U.S. at 96–98; *see also Beliz,* 104 Wash.App. at 213, 15 P.3d 683. First, the defendant must "establish a prima facie case of purposeful discrimination." *State v. Evans,* 100 Wash.App. 757, 763–64, 998 P.2d 373 (2000) (citing *State v. Luvene,* 127 Wash.2d 690, 699, 903 P.2d 960 (1995)). Second, "[o]nce a prima facie case is shown to exist, the burden shifts to the party exercising the peremptory challenge to give a neutral explanation related to the particular case to be

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tried." *Id.* at 764, 998 P.2d 373 (citing *Luvene,* 127 Wash.2d at 699, 903 P.2d 960). Third, the trial court must "consider the proffered explanation to determine whether there is a discriminatory purpose behind the exercise of the peremptory challenge." *Id.* (citing *State v. Rhodes,* 82 Wash.App. 192, 196, 917 P.2d 149 (1996)). In addition, "if no prima facie case exists, the proponent of the strike is not required to offer a neutral explanation." *Id.* at 769, 917 P.2d 149 (citing *State v. Wright,* 78 Wash.App. 93, 100–01, 896 P.2d 713 (1995)).

A prima facie case of purposeful discrimination requires first showing "the peremptory challenge was exercised against a member of a constitutionally cognizable group." *Burch,* 65 Wash.App. at 840, 830 P.2d 357. "Second, the defendant must demonstrate that this fact 'and any other relevant circumstances raise an inference' that the prosecutor's challenges of a venire person was based on group membership." *Id.* (quoting *Batson,* 476 U.S. at 96). And, " 'relevant circumstances' may include a pattern of strikes against members of the group or the particular questions asked during voir dire." *Evans,* 100 Wash.App. at 764, 998 P.2d 373 (citing *Rhodes,* 82 Wash.App. at 196, 917 P.2d 149).

Here, the State exercised six of eight peremptory challenges against a sole gender, male, satisfying the first step in establishing a prima facie case. *See J.E.B.,* 511 U.S. at 129–31, 140–41 (gender discrimination). But, Mr. McLane has not satisfied the second step, that " 'other relevant circumstances raise an inference' that the prosecutor's challenge of a venire person was based on group membership." *Burch,* 65 Wash.App. at 840, 830 P.2d 357 (quoting *Batson,* 476 U.S. at 96). Nothing in the State's questioning of the struck jurors during voir dire suggests a concern with their gender. The fact that the State exercised its peremptory challenges against males, without more, is insufficient to establish a prima facie case of purposeful discrimination. *See, e.g., Evans,* 100 Wash.App. at 770–71, 998 P.2d 373 (declining to find a prima facie case of racial discrimination based solely on the exercise of peremptory challenge against a juror of color).

This case is distinguishable from those cases where gender discrimination in the State's use of its peremptory challenges was found, when raised for the first time on appeal. *See Burch,* 65 Wash.App. at 828, 830 P.2d 357; *Beliz,* 104 Wash.App. at 206, 15 P.3d 683. In both of those cases, the prosecutors justified their exercise of peremptory strikes against jurors in racial minorities by informing the court their intent was to remove women from the jury. *Burch,* 65 Wash.App. at 832, 841–42, 830 P.2d 357; *Beliz,* 104 Wash.App. at 210, 213–14, 15 P.3d 683. Here, in contrast, the State did not indicate it intended to exclude men from the jury. Mr. McLane fails to establish a prima facie case of gender discrimination in jury selection.

B. Evidence Sufficiency, Count I

***5** The issue is whether the evidence presented at trial was sufficient to support Mr. McLane's conviction for first degree rape of a child against M.M., as charged in count I. Mr. McLane contends M.M. did not testify a particular incident of sexual intercourse occurred during the time frame charged in count I, June 1, 2006 to September 1, 2006.[2]

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green,* 94 Wash.2d 216, 221, 616 P.2d 628 (1980) (citing *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas,* 119 Wash.2d at 201, 829 P.2d 1068. "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.*

Mr. McLane contends the evidence was insufficient to support his conviction for first degree rape of a child against M.M. as charged in count I. Specifically, Mr. McLane argues M.M. did not testify a particular incident of sexual intercourse occurred during the time frame charged in count I, June 1, 2006 to September 1, 2006. We disagree. Viewing the quoted portion of 3 RP (Oct. 31, 2007) at 427, 429 recited in the facts, a jury could reasonably find Mr. McLane put his private inside M.M.'s private each summer break from when M.M. was age seven through age nine, including the summer break in 2006. While Mr. McLane argues other testimony is ambiguous or conflicting, the jury decides what weight is given to admissible testimony. *State v. Camarillo,* 115 Wash.2d 60, 71, 794 P.2d 850 (1990) (fact finder makes credibility determinations, not appellate court).

Mr. McLane tangentially contends in connection with his evidence insufficiency arguments that jury instruction 11 gave an incomplete definition of sexual intercourse and compounded the alleged evidence sufficiency problem. But

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he did not object to this instruction in the trial court and the State contends the instruction cannot be challenged for the first time on appeal.

RAP 2.5(a)(3) precludes review of an issue for the first time on appeal unless the trial court committed a "manifest error affecting a constitutional right." *See, e.g., State v. McDonald,* 138 Wash.2d 680, 691, 981 P.2d 443 (1999). With respect to jury instructions challenged for the first time on appeal, "[a]s long as the instructions properly inform the jury of the elements of the charged crime, any error in further defining terms used in the elements is not of constitutional magnitude." *State v. Stearns,* 119 Wash.2d 247, 250, 830 P.2d 355 (1992).

Mr. McLane concedes the "to-convict" instruction for count I, jury instruction 6, included all of the elements of that crime. *See* Appellant's Br. at 17. We agree that jury instruction 6 properly set forth the elements of first degree rape of a child. *See* RCW 9A.44.073(1) (first degree rape of a child). Because Mr. McLane's claim does not implicate a constitutional error, we decline review. *See Stearns,* 119 Wash.2d at 250, 830 P.2d 355.

***6** Also intertwined with his sufficiency of the evidence argument, Mr. McLane contends the following portion of the State's closing argument exceeded the definition of sexual intercourse set forth in jury instruction 11: "Sexual intercourse: Any penetration of the vagina or anus, however slight, by an object, including a body part. Intercourse doesn't just have to be a penis in a vagina ... it also can be a finger ... [i]t can also be a tongue." 6 RP (Nov. 5, 2007) at 931. Mr. McLane did not object to this argument below.

" 'To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct by the prosecutor and prejudicial effect.' " *State v. O'Donnell,* 142 Wash.App. 314, 327, 174 P.3d 1205 (2007) (quoting *State v. Munguia,* 107 Wash.App. 328, 336, 26 P.3d 1017 (2001)). "[T]he defendant bears the burden of proof on both issues." *Id.* at 328, 26 P.3d 1017 (citing *Munguia,* 107 Wash.App. at 336, 26 P.3d 1017). Further, " '[a]bsent a proper objection, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered.' " *Id.* (quoting *Munguia,* 107 Wash.App. at 336, 26 P.3d 1017). Statements made by the prosecutor to the jury regarding the law "must be confined to the law as set forth in the instructions given by the court." *State v. Davenport,* 100 Wash.2d 757, 760, 675 P.2d 1213 (1984) (citing *State v. Estill,* 80 Wash.2d 196, 199, 492 P.2d 1037 (1972)).

Mr. McLane shows no improper prosecutor conduct. The State properly argued the law as it was given in jury instruction 11, by clarifying that penetration by "an object, including a body part" encompasses penetration by a finger or a tongue. 6 RP (Nov. 5, 2007) at 931. Thus, the State's argument was confined to the law as stated in the jury instructions. *See Davenport,* 100 Wash.2d at 760, 675 P.2d 1213 (citing *Estill,* 80 Wash.2d at 199, 492 P.2d 1037). Accordingly, Mr. McLane's prosecutorial misconduct argument fails.

C. Sentencing Issues

The first issue is whether the sentence imposed for count V, first degree rape of a child, was erroneous. Mr. McLane contends the sentence was incorrectly imposed pursuant to RCW 9.94A.712, because this statute was not in effect on the date of the offense, January 1, 1998 to December 31, 2000. The State concedes Mr. McLane should not have been sentenced pursuant to RCW 9.94A.712. We accept this concession as a matter of law under our de novo standard of review. *See State v. Armendariz,* 160 Wash.2d 106, 110, 156 P.3d 201 (2007); *State v. Murray,* 118 Wash.App. 518, 521, 77 P.3d 1188 (2003).

"When determining defendants' potential sentences, trial courts apply the statute in effect at the time the defendant committed the current crimes." *State v. Failey,* 144 Wash.App. 132, 142, 181 P.3d 875, *review granted,* 164 Wash.2d 1034, 197 P.3d 1185 (2008) (citing *State v. Varga,* 151 Wash.2d 179, 191, 86 P.3d 139 (2004)). RCW 9.94A.712 was not enacted until 2001. *See* Laws of 2001, 2d Spec. Sess., ch. 12, § 303. Accordingly, the trial court erred in imposing sentence on count V pursuant to RCW 9.94A.712. We remand for resentencing under the statute in effect at the time of the crime, January 1, 1998 to December 31, 2000. *See* former RCW 9.94A.120 (2000), *recodified as* RCW 9.94A.505 by Laws of 2001, ch. 10, § 6.

***7** The second issue is whether the trial court erred in imposing community custody on count VI, third degree child molestation. Mr. McLane contends because the trial court imposed the statutory maximum on count VI, it could not also impose community custody. The State concedes the sentence as stated in the judgment and sentence exceeds the statutory

maximum, but contends the proper remedy is remand for clarification of the sentence. " 'We review a sentencing court's application of the community custody provisions of the Sentencing Reform Act of 1981, chapter 9.94A RCW, de novo.' " *State v. Torngren,* 147 Wash.App. 556, 196 P.3d 742, 747 (2008) (quoting *State v. Motter,* 139 Wash.App. 797, 801, 162 P.3d 1190 (2007), *review denied,* 163 Wash.2d 1025, 185 P.3d 1194 (2008)).

On count VI, the court sentenced Mr. McLane to 60 month's confinement, and community custody of 36 to 48 months, "or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer." CP at 11. Third degree child molestation is a class C felony. RCW 9A.44.089(2). The statutory maximum is 60 months. *See* RCW 9A.20.021 (1)(c) (setting forth the maximum sentence for a class C felony). Further, a sentence for this crime must include community custody "for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer." RCW 9.94A.715(1). The community custody range for third degree child molestation is 36 to 48 months. WAC 437–20–010.

"[A] trial court may sentence a defendant to the statutory maximum, including community custody." *Torngren,* 196 P.3d at 748 (citing *State v. Hibdon,* 140 Wash.App. 534, 538, 166 P.3d 826 (2007)). "The sentence is valid when the judgment and sentence 'set[s] forth the statutory maximum and clearly indicate [s] that the term of community [custody] does not extend the total sentence beyond that maximum.' " *Id.* (alterations in original) (quoting *Hibdon,* 140 Wash.App. at 538, 166 P.3d 826). "Where the judgment and sentence does not so indicate, an appropriate remedy is to remand for clarification of the sentence." *Hibdon,* 140 Wash.App. at 538, 166 P.3d 826 (citing *State v. Sloan,* 121 Wash.App. 220, 224, 87 P.3d 1214 (2004)). An alternative remedy is a remand for resentencing. *Id.* (citing *State v. Zavala–Reynoso,* 127 Wash.App. 119, 124, 110 P.3d 827 (2005)).

Mr. McLane was sentenced to the statutory maximum on count VI, plus community custody, but the judgment and sentence does not indicate the community custody term does not extend the sentence beyond the statutory maximum of 60 months. Accordingly, the case is remanded for sentencing clarification. *See Hibdon,* 140 Wash.App. at 538, 166 P.3d 826. On remand, the judgment and sentence must be amended to indicate the community custody term on count VI does not extend the total sentence beyond the statutory maximum of 60 months. *See Torngren,* 196 P.3d at 748 (quoting *Hibdon,* 140 Wash.App. at 538, 166 P.3d 826).

***8** Affirmed, remanded for resentencing on count V and sentencing clarification of count VI.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

We concur: SCHULTHEIS, C.J., SWEENEY, J.

All Citations

Not Reported in P.3d, 149 Wash.App. 1007, 2009 WL 485368

Footnotes

1 In contrast, when a trial court rules on a *Batson* challenge, "[t]he determination of the trial judge is accorded great deference on appeal and will be upheld unless clearly erroneous." *State v. Hicks,* 163 Wash.2d 477, 486, 181 P.3d 831, *cert. denied,* 555 U.S. 919, 129 S.Ct. 278, 172 L.Ed.2d 205 (2008) (internal quotation marks omitted) (quoting *State v. Luvene,* 127 Wash.2d 690, 699, 903 P.2d 960 (1995)). *See also Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Here, the trial court did not rule on the gender discrimination issue.

2 Also, for the first time in his reply brief, Mr. McLane raises ineffective assistance of counsel. Reply Br. at 2. However, Washington appellate courts will not consider arguments raised for the first time in a reply brief. *Lewis v. City of Mercer Island,* 63 Wash.App. 29, 31, 817 P.2d 408 (1991).

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