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STATE OF WASHINGTON
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No. 91700-1
Court of Appeals No. 44866-1-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

COURTNIE DANIELLE CROSBY,

Petitioner.

PETITION FOR REVIEW

On review from the Court of Appeals, Division Two,
and the Superior Court of Pierce County

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A. IDENTITY OF PETITIONER

Courtne Crosby, appellant below, petitions this Court to grant review of the unpublished decision of the court of appeals designated in section B.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(3) and (4), Petitioner asks this Court to review the decision of Division Two of the Court of Appeals, issued under No. 44866-1-II, in State v. Crosby, on April 14, 2015 (2015 WL 1731225) (filed herewith as Appendix A), in which Division Two affirmed the convictions after denying Crosby's request for leave to file supplemental briefing on the application of this Court's decision in State v. Blazina, ___ Wn.2d ___, 344 P.3d at 680 (March 12, 2015), to Crosby's case.

C. ISSUES PRESENTED FOR REVIEW

1. Where this Court issues a decision on an issue potentially relevant to a case pending in the court of appeals, does it violate the appellant's state constitutional rights under Article I, section 22, to a full, fair and meaningful appeal and should review be granted under RAP 13.4(b)(3) when the lower appellate court refuses to allow supplemental briefing on the effect of this Court's new caselaw on the appellant's case?
2. Is it a violation of an appellant's fundamental due process and equal protection rights as mandated under Griffin v. Illinois, 351 U.S. 12, 17, 76 S. Ct. 585, 100 L. Ed. 891 (1956) and Rinaldi v. Yeager, 384 U.S. 305, 86 S. Ct. 1497,

16 L. Ed. 2d 577 (1966), and should review be granted under RAP 13.4(b)(3) where the state constitution guarantees the right to appeal but a lower appellate court unreasonably limits the arguments an indigent appellant may make after new caselaw issues from the highest state appellate court?

3. Further, is it a violation of due process and equal protection when different indigent appellants similarly situated in the same Division of the court of appeals are being treated differently in relation to this Court's decision in Blazina, with appellants like Petitioner being denied the opportunity to argue Blazina's applicability to their case while others are being given that chance?
4. Should Petitioner and those other indigents like her remain subjected to the same legal financial obligation system this Court recognized in Blazina as broken and unfair even though their appeals were still pending when Blazina was decided, they are in the same position as the defendants in Blazina and the same serious, systemic concerns and policy issues are present?
5. Should this Court grant review under RAP 13.4(b)(4) because the question of the scope of Blazina and its application to cases pending on appeal when it was decided is a question of substantial public importance upon which this Court should rule?

D. STATEMENT OF THE CASE

1. Procedural facts

Petitioner Courtnie Crosby was convicted of residential burglary, first-degree robbery and violation of a court order after a jury trial was held in Pierce County superior court in 2013. CP 25-27, 673-78; RCW

9.94A.530; RCW 9.94A.533; RCW 9.94A.825; RCW 9A.35.011; RCW 9A.56.190; RCW 9A.56.200; RCW 26.50.110(4). She appealed and, on April 14, 2015, Division Two of the court of appeals affirmed in an unpublished opinion. App. A at 1. This Petition timely follows.

2. Facts relevant to issues on appeal

a. Imposition of legal financial obligations below

At sentencing on May 3, 2013, the prosecutor asked the court to impose a number of “legal financial obligations” against Ms. Crosby, as follows:

[I]legal financial obligations to include \$500 crime victim penalty assessment; \$200 for court costs; \$500 for the DNA fee; \$1,500 for DAC recoupment; restitution to the victim in the amount of \$9,642.83, which has been signed already[.]

SRP 6-7.¹ In imposing the sentence, the sentencing court ordered restitution of \$9,642.85 as an “agreed” amount, as well as “a mandatory \$500 crime victim penalty assessment; a \$100 DNA testing fee; DAC recoupment in the amount of \$1,500; and \$200 court costs.” SRP 15; CP 88.

¹The sentencing proceedings of May 3, 2013, are referred to herein and in appellant’s opening brief as “SRP.” Further explanation of citation to the record is contained in appellant’s opening brief at 2 n. 1.

Preprinted on the judgment and sentence form was the following language, as section 2.5:

ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS

The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 88. The judgment and sentence imposed \$9,642.85 restitution to "crime victim's compensation," a \$500.00 crime victim assessment, a \$100.00 DNA fee, a \$200.00 "filing fee" and a \$1500.00 fee for "Court-Appointed Attorney Fees and Defense Costs," for a total of \$11,942.85" in legal financial obligations. CP 89. Someone also marked on the form a portion of the order which indicated that the payments on the amount were to commence immediately, that the clerk had the ability to set the minimum payment, that the defendant was required to "report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan," and requiring the defendant to pay any collection costs. CP 89-90.

Also ordered as a preprinted section was the following:

INTEREST The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to. civil judgments. RCW 10.82.090[.]

CP 90.

Ms. Crosby appealed and was determined by the trial court to be indigent and entitled to appointed counsel on appeal. CP 105-119.

b. Proceedings in the court of appeals

In her initial briefing on appeal, filed in March of 2014, Crosby argued that her constitutional rights to present a defense and to effective assistance of counsel were violated. Brief of Appellant (“BOA”) at 1-28. The prosecution’s response was filed in May of 2014 and the case was scheduled by Division Two of the court of appeals for consideration without oral argument on January 6, 2015. See ACCORDS printout, filed herewith as Appendix B.

On March 12, 2015, this Court decided Blazina, supra. See Blazina, 344 P.3d at 680. On March 30, 2015, Crosby filed a motion for leave to file a supplemental brief addressing the potential effect of Blazina on her case. App. B. At the same time, she filed the completed supplemental brief. App. B; see Supplemental Brief of Appellant.

On April 8, 2015, Division Two of the court of appeals denied the

motion to supplement without explanation. App. B. On April 14, 2015, the court issued an unpublished opinion affirming the convictions. App. A at 1. In that decision, Division Two rejected Crosby's arguments that the trial court had violated her right to present a defense and that counsel was ineffective. App. A at 1.

The decision did not mention the Blazina issue or address the legal financial obligations imposed against Crosby, despite her indigence. App. A at 1-11.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THE COURT SHOULD GRANT REVIEW TO ADDRESS WHETHER THE ARTICLE I, SECTION 22 RIGHT TO A FULL, FAIR AND MEANINGFUL APPEAL AND THE STATE AND FEDERAL DUE PROCESS AND EQUAL PROTECTION CLAUSES ARE VIOLATED WHEN THIS COURT ISSUES POTENTIALLY APPLICABLE NEW CASELAW BUT THE COURT OF APPEALS REFUSES TO ACCEPT SUPPLEMENTAL BRIEFING ON ITS APPLICATION IN SOME CASES WHILE NOT IN OTHERS

While there is no federal constitutional right to appeal in a criminal case, that right is guaranteed in our state by our constitution, Article 1, section 22.² See, State v. French, 157 Wn.2d 593, 602, 141 P.3d 54 (2006); State v. Rolax, 104 Wn.2d 129, 134, 702 P.2d 1185 (1985). As a

²Article I, § 22 (amend. 10) provides, in relevant part, that "[i]n criminal prosecutions, the accused shall have. . .the right to appeal in all cases."

result, the federal protections of due process and equal protection apply to appeals. See Griffin, supra, 351 U.S. at 17; see State v. Burton, 165 Wn. App. 866, 877, 269 P.3d 337, review denied, 174 Wn.2d 1002 (2012).

Thus, the U.S. Supreme Court has held, equal protection requires that any systems of appellate procedure used by a Court in a state with a constitutional right to appeal must be “free of unreasoned distinctions.” Rinaldi, supra, 384 U.S. at 310. This Court has similarly noted that, because our appellate courts are “an integral part of the criminal justice system, an appeal must comport with due process.” Burton, 165 Wn. App. at 877. Due process may be violated on appeal if the defendant is deprived of adequate, meaningful review of the issues she has raised, as in when she is deprived of an adequate record for raising an issue. See, State v. Larson, 62 Wn.2d 64, 66, 381 P.2d 120 (1963).

In this case, this Court is squarely presented with the question of whether the lower appellate court deprived an indigent defendant of a full and fair appeal, in violation of Article I, § 22 and state and federal due process under Article I, § 3 and the 14th Amendment, by refusing to allow supplemental briefing on the potential effect of a decision of this Court issued during the pendency of an appeal. Further, this Court is presented with the question of whether the equal protection rights of all indigent

defendants are being honored in Division Two, because different indigent appellants who are similarly situated on appeal are being treated differently, with some being allowed to file supplemental briefing on the issue and some denied that chance.

In Blazina, this Court did not fault the lower appellate courts for failing to exercise their discretion under RAP 2.5(a) to address the issue of whether the imposition of legal financial obligations on indigent defendants without consideration of ability to pay was a violation of RCW 10.01.160(3). Blazina, 344 P.3d at 683. But this Court found that the urgency of our broken “LFO” system compelled the exercise of its own discretion to reach the issue. The Court then made a clear declaration that RCW 10.01.160(3) requires that an indigent criminal defendant’s present and future ability to pay must be considered prior to imposition of legal financial obligations. 344 P.3d at 683-84.

Both the majority and the single concurring justice in Blazina acted on their deep concern for not only the individual but social harms being caused by the current system and its enforcement against indigents. 344 P.3d at 683-84; see 344 P.3d at 686 (Fairhurst, J., concurring). The Blazina decision ensured that future indigent defendants will at least have a hope of a reasonable ability to get out from under the crushing, unending

weight of LFOs and will only be ordered to pay them after a full consideration by a court of their actual financial situation.

The court of appeals decision here, however, deprived Ms. Crosby of that hope. The court of appeals issued a decision affirming and not even mentioning the more than \$11,000 in legal financial obligations imposed on Ms. Crosby, without objection by counsel and without any consideration of her present or future ability to pay - only the same “boilerplate,” preprinted finding this Court found insufficient in Blazina. See CP 88-89; App. A at 1-11; Blazina, 344 P.3d at 683. There was no consideration of the factors this Court has now described in Blazina, “such as incarceration and a defendant’s other debts, including restitution,” and no “individualized inquiry into the defendant’s current and future ability to pay.” See Blazina, 344 P.3d at 683-84.

This Court should grant review. First, it should answer the question of whether an appellant’s state constitutional right to appeal and the due process protections afforded that right are violated under these circumstances. The court of appeals is a lower appellate court, bound to follow the decisions of the majority of this Court as a higher authority. See State v. Gore, 101 Wn.2d 481, 486-87, 681 P.2d 227 (1984). Blazina, decided by this Court, is thus controlling on Division Two. Blazina was

issued before Division Two issued its decision in this case. Thus, the question of whether it applied to Crosby's pending appeal was relevant as Blazina provided a potential new argument for relief on Crosby's behalf.

Notably, the Rules of Appellate Procedure supported allowing Crosby to raise the issues created by this Court's decision in Blazina. Under RAP 10.1(h), appellate courts have broad discretion regarding briefing and "may" allow briefs to be filed regarding the merits of issues at any point during appellate review. And RAP 1.2, the rule of interpretation for the RAPs requires that they are to be "liberally interpreted to promote justice and facilitate the decision of cases on the merits." Division Two's actions here in denying a motion to file a brief on the merits of whether this Court's decision in Blazina should apply to Crosby's case is inconsistent with those mandates.

This Court should grant review under RAP 13.4(b)(3) to determine whether it is a violation of not only of the Article 1, § 22 right to appeal but also due process mandates to deny an appellant the opportunity to argue the application of a new decision of this Court which is issued during the pendency of the appeal. Further, this Court should address whether failing to allow the supplemental briefing and refusing to even

consider the issue amounts to a failure to comply with the mandate that lower appellate courts are bound by the decisions of this Court.

In addition, this Court should grant review under RAP 13.4(b)(3) to address the very serious equal protection issues raised by this case. Because of the court of appeals decision, Ms. Crosby, an indigent, was deprived of the chance for relief from the more than \$11,000 in LFOs imposed on her. See CP 88-89.

But she is in exactly the same position as the defendants in Blazina. The amounts were ordered without compliance with the statute or any consideration of her ability to pay. SRP 1-15. The amounts are subject to immediate collection and 12% interest, with Ms. Crosby having to pay fees and costs of any collection. CP 88-89. Without objection from her attorney, more than \$11,000 in LFOs was imposed on Ms. Crosby, with no consideration of whether she had any potential chance of paying. SRP 1-16.

This Court's concerns over the impact of our broken LFO system on people just like Ms. Crosby led it to take the unusual step of addressing the error for the first time on appeal in Blazina. Blazina, 344 P.3d at 683-85. Ms. Crosby was denied the same opportunity for relief given to the defendants by this Court in Blazina because the court of appeals denied

her the chance to even argue for such relief. This Court should grant review under RAP 13.4(b)(3) to address whether treating Ms. Crosby differently than the Petitioners in Blazina after Blazina was decided amounts to an appellate procedure “free of unreasoned distinctions” or instead is a violation of equal protection rights on appeal. See Rinaldi, supra, 384 U.S. at 310; Griffin, supra, 351 U.S. at 17.

Review should also be granted because there is a serious question of equal protection where similarly situated appellants receive different treatment from the very same appellate court. Just after denying Ms. Crosby the opportunity to argue the applicability of the new decision in Blazina, Division Two *granted* the same opportunity to another of undersigned counsel’s indigent appellate cases where there was no objection by trial counsel below and the issue was not raised in the initial opening brief, State v. Thomas Floyd, No. 46350-4-II. See ACCORDS printout 2, filed herewith as Appendix B. Division Two also ordered the prosecution to respond. Id.

It is unclear whether this difference in opportunity to argue the applicability of the new holdings of Blazina is the result of the structure of the courts of appeals. Under RCW 2.06.040, Division Two, like the other courts of appeals, sits in three-judge panels, rather than *en banc*. And it

has not adopted *en banc* procedures. As a result, the decision an appellant receives depends upon the happenstance of the panel - as happened a few years ago (in another of counsel's cases) when different panels of Division Two reached completely different conclusions on the very same legal issue of the proper application of this Court's rulings on application of a new U.S. Supreme Court decision to pending appeals. See, State v. Robinson, 171 Wn.2d 292, 253 P.3d 84 (2011) (consolidated appeals); State v. Cross, 156 Wn. App. 568, 590, 234 P.3d 288 (2010), overruled by Robinson, supra (Houghton, J.P.T., dissenting) (parsing out which judges from the division were on each of the different, conflicting decisions on the issue and arguing that "[j]ustice demands that the outcome of similar cases on the same issue should not depend on the composition of randomly selected three-judge panels").

This Court should grant review under RAP 13.4(b)(3) to address whether the procedures applied in Division Two, resulting in differing treatment on the same issue for indigent defendants similarly situated in relation to Blazina, allows improper, unreasoned distinctions between appellants in violation of principles of equal protection.

Finally, this Court should grant review under RAP 13.4(b)(4), because the question of proper application of the decision in Blazina to

cases which were pending on appeal when it was decided is an issue of substantial public importance upon which this Court should quickly rule. In Blazina, the Court appeared to believe that the failure to properly consider a defendant's indigency and present and future ability to pay before imposing legal financial obligations was "unique" to the petitioners in that case. 344 P.3d at 684-86. But it was not, as Ms. Crosby's case shows. Thus, while Blazina was sufficient to remedy the scope of the potential injustice suffered by the petitioners in that case, its application to other appellants in the very same position was not made clear - as the actions of the court of appeals here show.

Imposition of legal financial obligations is not a minor, clerical event. It is an event which can reduce the rest of the defendant's life to a cycle of poverty and prevent them from ever becoming a productive member of society once they are released from prison. In Blazina, this Court recognized these highly troubling facts and that our system is, put simply, broken as it is applied to indigent defendants like Ms. Crosby. Despite these findings and this Court's historic recognition in Blazina of the failures of the LFO component of our criminal justice system, Division Two here denied Ms. Crosby the opportunity to even argue that Blazina should apply. Only by granting review can this Court ensure that the

injustices it tried to redress in Blazina are not perpetuated in this case.

This Court should grant review under RAP 13.4(b)(3) and (4).

F. CONCLUSION

For the foregoing reasons, this Court should accept review of the decision of Division Two of the court of appeals.

DATED this 14th day of May, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel via the upload portal at the Court of Appeals, Division Two, at their official service address, pcpatcecf@co.pierce.wa.us, and petitioner by depositing the same in the United States Mail, first class postage pre-paid, as follows: Ms. Courtnie Crosby, DOC 361110, WCCW, 9601 Bujacich Rd. NW, Gig Harbor, WA 98332-8300.

DATED this 14th day of May, 2015.

/s Kathryn Russell Selk
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

No. 44866-1-II

STATE OF WASHINGTON
BY _____
DEPUTY

Respondent,

v.

COURTNIIE DANIELLE CROSBY,

UNPUBLISHED OPINION

Appellant.

MELNICK, J. — Courtnie Crosby appeals her convictions for residential burglary, robbery in the first degree, and violation of a court order. Crosby argues that the trial court violated her right to present a defense when it denied her continuance motion and that she received ineffective assistance of counsel. We affirm.

FACTS

I. THE CRIMES

Crosby and Felix Preval had a romantic relationship that ended in late December 2011. Crosby and her children resided with Preval in his home until their relationship ended.

A no contact order prohibited Crosby from contacting Preval. On December 28, 2011, Crosby went to Preval's home to retrieve some of her belongings, but an argument ensued and she left. Later in the evening, Crosby returned. While Preval and Crosby loaded her belongings into a vehicle, Darnell Jones and Clayton King attacked Preval. After dragging Preval into his home, Jones and King stabbed Preval several times in his abdomen, puncturing his stomach. They also

took approximately \$19,000 in cash from Preval's home. Crosby entered and remained in the home throughout the incident. After the stabbing, Crosby did not help Preval, and she fled the scene.

The State charged Crosby by amended information with assault in the first degree, residential burglary, robbery in the first degree, and felony violation of a court order. Additionally, the State alleged that Crosby or an accomplice was armed with a deadly weapon during commission of the assault, burglary, and robbery.

II. MOTION FOR CONTINUANCE

Initially set for May 7, 2012, the trial court continued the trial four times because the parties needed time to prepare for trial and Crosby's co-defendant was assigned a new attorney.

Due to a breakdown of communication with Crosby, her attorney enlisted another defense attorney to assist him on Crosby's case. On January 29, 2013, Crosby's original attorney moved to withdraw and asked that the attorney who assisted on Crosby's case substitute as counsel. The new attorney represented to the trial court that she had been involved in the case for approximately three months, that she had already reviewed the discovery, and that she had talked to Crosby. She assured the trial court that she could try the case without any additional continuances if it was set over about a month. At that time, the defense knew of no new witnesses. The following colloquy occurred between the trial court and the new attorney:

THE COURT: [R]eally, really, really, really, you can be ready on March 4th? If you were a brand-new lawyer walking into this thing, I really don't feel like I can hold you to that. You have actually seen the discovery and talked to the defendant, so you should have a basis—

[ATTORNEY]: Your Honor, I would say I have been involved in this case, you know—I'm going to say approximately three months.

THE COURT: So, you feel confident.

[ATTORNEY]: [The original attorney] might be able to correct me on that. I have had discussions with [him] and Ms. Crosby together and separately regarding the

case, and I have read all of the discovery. I have read through it all. Some of them in depth with Ms. Crosby.

THE COURT: Does March 4th work for you?

[ATTORNEY]: Yes, it does.

Report of Proceedings (RP) (Jan. 29, 2013) at 13-14. Over the State's objection, the trial court granted the motion to withdraw, entered an order authorizing substitution of counsel, and continued the trial to March 4, 2013.

On the morning of March 4, Crosby moved for a continuance. In support of her motion, the attorney explained that two-and-a-half weeks prior to trial, she learned that Crosby "has a lifelong history of abuse including abuse and violence with the alleged victim in this case." RP (Mar. 4, 2013, J. Chushcoff) at 5. The attorney argued that she believed Crosby suffered from battered person syndrome and that it would be an appropriate defense to the charges. At that point, she was in the process of gathering Crosby's mental health records, but because many records were out of state, she did not yet have all of them. She advised the trial court that two psychologists agreed with her "analysis of the situation and [were] willing to support that defense" but they weren't available the first two weeks of March. RP (Mar. 4, 2013, J. Chushcoff) at 5. Crosby argued that she needed expert testimony to explain why Crosby would make otherwise seemingly illogical statements to law enforcement.

The State objected, noting that Crosby's prior conviction for assault constituted the only known domestic violence between Crosby and Preval. Crosby did not persuade the trial court that battered person syndrome would be an applicable defense in the case. The trial court denied the continuance motion because the case had been pending for approximately one year and "[t]hat's plenty of time for the defense to get ready on this case." RP (Mar. 4, 2013, J. Chushcoff) at 18.

Again on March 4, Crosby renewed her continuance motion and requested two additional weeks to prepare. Her attorney represented to the trial court that once she became Crosby's trial counsel and started working with her to prepare for trial, she learned more about Crosby's background and realized that there was "an issue pertaining to battered women's syndrome [that is] . . . definitely . . . relevant in terms of explaining Ms. Crosby's conduct before, during, and after the events that caused the charges to be brought." RP (Mar. 4, 2013, J. Culpepper) at 8. She intended to use battered person syndrome to explain why Crosby gave conflicting and untrue statements to law enforcement. At that time, no potential expert witnesses had performed psychological examinations of Crosby. The trial court again denied the continuance motion and stated that battered person syndrome would not be applicable to Crosby's defense.

III. THE TRIAL

Preval testified that on December 28, 2011, prior to Crosby's arrival, he saw two men outside his home. During the attack, Crosby didn't help Preval; he thought that he heard Crosby say she wanted to call the police, "but not with any kind of energy." RP (Mar. 6, 2013) at 123. Preval also heard Jones tell Crosby not to call the police and that he didn't want to hurt her. According to Preval, Crosby faced him during the stabbing. Preval had not previously told Crosby about the cash he kept in his home. While Preval recuperated from his injuries in the hospital, Crosby contacted him via text message and told him that one of the men raped her.

The State presented further evidence of Crosby's involvement in the incident through the testimony of Detectives Robert Baker and Health Holden, who described Crosby's changing accounts of the incident. During Detective Baker's first interview with Crosby on February 1, 2012, Crosby said Jones and King dragged Preval inside and then came back outside and forced

her into the residence. Crosby gave Detective Baker a detailed account of an alleged sexual assault committed upon her. The intensity of Crosby's emotions varied throughout the interview.

Following the interview, Detective Baker obtained a warrant to locate and seize evidence of the alleged sexual assault. However, swabs of suspected liquids from the carpet in the room in which Crosby claimed she was sexually assaulted returned no evidence to substantiate that a sexual assault had occurred.

On March 8, Detective Holden interviewed Crosby while Detective Baker watched. Crosby "made it very clear that she had nothing to do with [the men involved in the incident]" and that she "had not contacted them." RP (Mar. 11, 2013) at 282. She again claimed that she was sexually assaulted. Crosby said that she did not receive anything taken during the incident.

Immediately following the interview with Detective Holden, Detective Baker again interviewed Crosby. Detective Baker told Crosby that law enforcement knew that she had set up the robbery. Crosby said that she received twenty-three \$100 bills from Jones and King following the incident. She said that Jones is a friend, and she sought his help to get her belongings back from Preval. She admitted that she planned to rob Preval of money. Crosby told Detective Baker that she met Jones and King prior to the incident, and she told them they would have to jump Preval outside and bring him into the residence. Crosby drove Jones and King to Preval's residence, and dropped them off a few blocks away. Later in the interview, Crosby admitted that she lied about the sexual assault. Finally, on March 9, Crosby told Detective Baker that Jones told her to go to the back bedroom during the incident and make it sound like she had been assaulted.

Crosby testified at trial. She apprised the jury of her feelings and emotions at the times of the interviews, but not about any mental health diagnoses or her history of abuse. She testified that discussions with Jones and King about robbing Preval were a joke. Crosby said she did not

know that Preval kept cash in his residence and that Jones had pulled her hair and forced her to take an envelope of cash to prevent her from going to law enforcement. Crosby admitted to taking the cash and spending some of it. Crosby acknowledged the falsity of the sexual assault story and said that Jones told her to tell Detective Baker that she was raped. Crosby testified that she did not tell Preval about any sexual assault. She said that she lied to Detective Baker because she feared Jones and King, and that she continued to lie in subsequent interviews because she thought she needed to provide consistent statements. Crosby testified that she agreed with what Detective Baker suggested during the first interview only because he “kept banging on the table” and she wanted him to stop. RP (Mar. 12, 2013) at 429.

The jury found Crosby not guilty of assault in the first degree, but guilty of robbery in the first degree while armed with a deadly weapon, residential burglary while armed with a deadly weapon, and violation of a court order. The trial court sentenced her to a standard range sentence of 77 months in custody. Crosby appealed.

ANALYSIS

I. RIGHT TO PRESENT A DEFENSE

A. Standard of Review

A defendant in a criminal trial has a constitutional right to present a defense. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.” *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). However, a criminal defendant's right to present a defense is not absolute; a defendant seeking to present evidence must show that the evidence is “at least minimal[ly] relevant” to a fact at issue

in the case. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)).

A trial court's denial of a continuance motion may infringe on a defendant's right to compulsory process and right to present a defense "if the denial prevents the defendant from presenting a witness material to [her] . . . defense." *State v. Downing*, 151 Wn.2d 265, 274-75, 87 P.3d 1169 (2004). We determine whether a trial court's denial of a continuance motion violated a criminal defendant's constitutional right to present a defense on a case-by-case basis, examining "the circumstances present in the particular case." *Downing*, 151 Wn.2d at 275 n.7 (quoting *State v. Eller*, 84 Wn.2d 90, 96, 524 P.2d 242 (1974)). We review the trial court's decision to grant or deny a continuance motion for an abuse of discretion. *Downing*, 151 Wn.2d at 272. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). And we review de novo claims of a denial of Sixth Amendment rights, including the right to present a defense. *See e.g., Jones*, 168 Wn.2d at 719; *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009).

B. The Trial Court's Continuance Ruling Did Not Violate Crosby's Right to Present a Defense

Crosby argues that by denying her continuance motion to secure records of her history of abuse and to procure expert testimony on battered person syndrome, the trial court abused its discretion which resulted in a violation of her constitutional right to present a defense. We disagree.

[E]ven where the denial of a motion for continuance is alleged to have deprived a criminal defendant of his or her constitutional right to compulsory process, the decision to deny a continuance will be reversed only on a showing that the accused was prejudiced by the denial and/or that the result of the trial would likely have been different had the continuance not been denied.

State v. Tatum, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994). Here, the trial court did not abuse its discretion by denying the motion for a continuance. Crosby can demonstrate neither prejudice nor that the result of the trial would likely have been different.

A subset of post-traumatic stress disorder (PTSD), battered person syndrome is a “collection of behavioral and psychological characteristics exhibited by victims of a prolonged, repetitive pattern of physical and emotional abuse at the hands of their partners.” *State v. Riker*, 123 Wn.2d 351, 358, 869 P.2d 43 (1994). Evidence of abuse and battered person syndrome can be admitted to support a claim of self-defense. *In re Pers. Restraint of Faircloth*, 177 Wn. App. 161, 169, 311 P.3d 47 (2013) (citing *State v. Janes*, 121 Wn.2d 220, 238-41, 850 P.2d 495 (1993)).¹ Self-defense requires, along with other evidence, that “the defendant reasonably perceived imminent danger of great personal injury.” *Faircloth*, 177 Wn. App. at 169. “[T]he syndrome [is] . . . admitted only in cases in which the batterer and the victim have developed a strong relationship, usually over a period of years.” *Riker*, 123 Wn.2d at 360. Expert testimony on this syndrome outside of the context of a relationship between the batterer and the victim is not admissible. *Riker*, 123 Wn.2d at 363. Furthermore, evidence of battered person syndrome is not admissible for purposes of “general credibility.” *State v. Green*, 182 Wn. App. 133, 155, 328 P.3d 988 (2013) (quoting *State v. Hanson*, 58 Wn. App. 504, 508, 793 P.2d 1001 (1990)), *review denied*, 337 P.3d 325 (2014).

¹ Battered woman syndrome and battered child syndrome both “find their basis in abuse-induced PTSD and elicit a similar response from the abuse victim.” *Janes*, 121 Wn.2d at 235. “Given the close relationship between the battered woman and battered child syndromes, the same reasons that justify admission of the former apply with equal force to the latter.” *Janes*, 121 Wn.2d at 235.

The trial court acted reasonably by denying Crosby's continuance motion. Crosby was in custody and the trial had been pending for almost one year. The trial date had already been continued four times. Despite learning this new information two-and-a-half weeks prior to the trial date, Crosby did not move for a continuance until the day of trial. The potential expert witnesses had not yet evaluated Crosby and were opining based on only what Crosby's counsel had represented to them. At the time she moved for a continuance, Crosby failed to establish the admissibility or materiality of these experts' testimony. Because the trial court's decision to deny the continuance motion was not manifestly unreasonable or based on untenable grounds, the trial court did not abuse its discretion.

Additionally, when reviewing the record and the particular circumstances of the case, Crosby has not shown that any prejudice resulted from the denial of her continuance motion. The records and expert testimony regarding battered person syndrome were not relevant to her defense. Crosby did not claim self-defense. Furthermore, the record demonstrates that Crosby did not participate in the use of force against Preval and she did not perceive imminent danger of great personal injury by Preval. In fact, Crosby wanted to offer expert testimony on battered person syndrome to explain her behavior during and after the incident, e.g. why she did not call the police, why she accepted money from Jones and King, and why she gave conflicting statements to Detectives Holden and Baker. This use of battered person syndrome is irrelevant to her defense and expert testimony would not be relevant in this context. *See Riker*, 123 Wn.2d at 358. Because the evidence Crosby would have offered if the trial court granted her continuance motion is not minimally relevant to a fact at issue in the case, she cannot show that she was prejudiced by the denial or that the result of the trial would likely have been different. The trial court did not violate Crosby's right to present a defense or abuse its discretion, and Crosby was not prejudiced.

II. THE TRIAL COURT'S RULING DID NOT RESULT IN INEFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

Crosby also contends that the trial court decision to deny the continuance resulted in her attorney providing ineffective assistance of counsel. To prevail on an ineffective assistance of counsel claim, Crosby must show that counsel's performance was so deficient that it "fell below an objective standard of reasonableness" and that the deficient performance prejudiced her. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). There is a strong presumption that defense counsel's performance was not deficient. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To establish prejudice, the defendant must show a reasonable probability that the deficient performance affected the outcome of the trial. *Thomas*, 109 Wn.2d at 226. We review ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

B. Crosby Did Not Receive Ineffective Assistance of Counsel

Crosby argues ineffective assistance of counsel because her counsel could not adequately represent her without evidence and expert testimony to establish battered person syndrome. We disagree and hold that Crosby did not receive ineffective assistance of counsel.

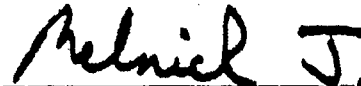
Performance may be deficient if "counsel failed to conduct appropriate investigations to determine what defenses were available, adequately prepare for trial, or subpoena necessary witnesses." *State v. Maurice*, 79 Wn. App. 544, 552, 903 P.2d 514 (1995). When the courts have held that a failure to investigate or call a potential witness constituted ineffective assistance, the witness has been crucial to the presentation of a legitimate defense. *See, e.g., Thomas*, 109 Wn.2d at 232. As discussed above, battered person syndrome is not a legitimate defense in the circumstances of Crosby's case because she did not present a defense of self-defense. Therefore,

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her counsel was not deficient because any evidence regarding battered person syndrome was not admissible. Because Crosby fails to establish that her counsel's performance was deficient, her ineffective assistance of counsel claim fails.

We affirm Crosby's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Melnick, J.

We concur:


Worswick, P.J.


Sutton, J.

RUSSELL SELK LAW OFFICES

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CASE EVENTS # 448661

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| 05/15/2015 | Mandate | Due | PONZOHA, DAVID |
| 04/17/2015 | Cost Bill <i>Comment: State \$6.96, AIDF \$4,972.94 against Courtnie Crosby in the amount of \$4979.90</i> | Filed | MILLER, CHELSEY L |
| 04/14/2015 | Decision Filed | Status Changed | |
| 04/14/2015 | Opinion Service Date: 2015-04-14 Pages: 11 Publishing Status: Unpublished Publishing Decision: Affirmed Opinion Type: Majority Opinion Number: 2015-06796 JUDGE: Sutton Lisa ROLE: Concurring JUDGE: Melnick Rich ROLE: Authoring JUDGE: Worswick Lisa ROLE: Concurring | Filed | MELNICK, RICH |
| 04/14/2015 | Trial Court Action Service Date: 2015-04-14 | Not Required | MELNICK, RICH |
| 04/08/2015 | Order on Motions Service Date: 2015-04-08 | Filed | WORSWICK, LISA |
| 03/30/2015 | Motion for Supplemental brief Service Date: 2015-03-30 Motion Status: Decision filed | Filed | SELK, KATHRYN A. RUSSELL |
| 03/30/2015 | Appellants Supplemental brief Service Date: 2015-03-30 <i>Comment: 11 pgs.</i> | Not filed | SELK, KATHRYN A. RUSSELL |
| 01/06/2015 | Heard and awaiting decision | Status Changed | |
| 01/06/2015 | Non-Oral Argument Hearing <i>Comment: 2:00 PM Worswick Lisa Melnick Rich Sutton Lisa</i> | Scheduled | |
| 12/01/2014 | Other brief | Received by Court | |
| 11/13/2014 | Set on a calendar | Status Changed | |
| 11/13/2014 | Non-Oral Argument Setting Letter | Sent by Court | |
| 11/07/2014 | Other brief <i>Comment: app., resp noa email</i> | Sent by Court | |

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| 09/24/2014 | Screened | Status Changed | |
| 09/24/2014 | Check case Information <i>Comment: NOA 3 In screening</i> | Information - not filed | |
| 05/09/2014 | Statement of Additional Grounds for Review <i>Comment: if/when sag filed set ready in screen</i> | Not filed | Crosby, Courtnie Danielle |
| 05/07/2014 | Ready | Status Changed | |
| 05/07/2014 | Respondents brief Service Date: 2014-05-07 Pages: 26 | Filed | MILLER, CHELSEY L |
| 04/14/2014 | Supplemental Clerk's Papers Pages: 4 Physical Location: LF <i>Comment: ord of ind. Pgs. 123-126</i> | Filed | SELK, KATHRYN A. RUSSELL |
| 04/09/2014 | Report of Proceedings <i>Comment: sent to app 4/9/14</i> | Received by Court | |
| 04/03/2014 | Report of Proceedings | Sent by Court | |
| 04/01/2014 | Other <i>Comment: vrp request to app.</i> | Filed | SELK, KATHRYN A. RUSSELL |
| 03/27/2014 | Supplemental Designation of Clerk's Papers Service Date: 2014-03-27 | Filed | SELK, KATHRYN A. RUSSELL |
| 03/20/2014 | Clerk's Notice to Crim App Re Statement Service Date: 2014-03-20 | Sent by Court | PONZOHA, DAVID |
| 03/19/2014 | Appellants brief Service Date: 2014-03-17 Pages: 27 <i>Comment: p/m 3/17/14 \$200 sanc due if not filed by 3/17/14 per rule of 2/6/14. furhter ext to cj</i> | Filed | SELK, KATHRYN A. RUSSELL |

CASE EVENTS # 463504

| Date | Item | Action | Participant |
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| 12/31/2020 | Check case Information | Information - not filed | PIERCE COUNTY SUPERIOR COURT |
| 05/21/2015 | Respondents Supplemental brief <i>Comment: Blazina (may file, no more than 10 pps) See 4/30/15 ruling</i> | Due | WASANKARI, BRIAN NEAL |
| 04/30/2015 | Ruling on Motions Service Date: 2015-04-30 <i>Comment: Appellant's motion to file a supplemental brief in order to address the recent Blazina decision is granted. The brief is accepted for filing. Respondent may file a supplemental responsive brief, of no more than 10 pages, within 21 days of the date of this ruling.</i> | Filed | BEARSE, AURORA R. |
| 04/20/2015 | Respondents brief Service Date: 2015-04-20 Pages: 5 <i>Comment: Portal</i> | Filed | WASANKARI, BRIAN NEAL |
| 04/16/2015 | Appellants Supplemental brief Pages: 12 <i>Comment: mot to file supp brief per State v. Blazina pending (copy of supp brief in LF) **accepted for filing 4/30/15 ruling</i> | Filed | SELK, KATHRYN A. RUSSELL |
| 04/16/2015 | Motion for Supplemental brief Service Date: 2015-04-15 Hearing Location: None Motion Status: Decision filed <i>Comment: rec'd @ 10:06 PM on 4/15/15 after the 4/15/15 time deadline Mot to File Supp App Brief per State v. Blazina opinion</i> | Filed | SELK, KATHRYN A. RUSSELL |
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| 12/31/2020 | Check case Information | Information - not filed | PIERCE COUNTY SUPERIOR COURT |
| 05/21/2015 | Respondents Supplemental brief <i>Comment: Blazina (may file, no more than 10 pps) See 4/30/15 ruling</i> | Due | WASANKARI, BRIAN NEAL |
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