

**RECEIVED
SUPREME COURT
STATE OF WASHINGTON
CLERK'S OFFICE**

Sep 30, 2016, 11:41 am

RECEIVED ELECTRONICALLY

SUPREME COURT NO. 93602.5
COURT OF APPEALS NO. 73350-8-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PETERSON BARZIE,

Petitioner.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA INVEEN

ANSWER TO PETITION FOR REVIEW

DANIEL T. SATTERBERG
King County Prosecuting Attorney

IAN ITH
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

 ORIGINAL

TABLE OF CONTENTS

	Page
A. <u>INTRODUCTION</u>	1
B. <u>STANDARD FOR ACCEPTANCE OF REVIEW</u>	2
C. <u>STATEMENT OF THE CASE</u>	2
D. <u>THIS COURT SHOULD DENY THE PETITION FOR REVIEW BECAUSE BARZIE MAY NOT RAISE A NEW ARGUMENT IN A PETITION FOR REVIEW</u>	2
E. <u>CONCLUSION</u>	4

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Barzie, No. 73350-8-I, 2016 WL 4507474
(issued August 29, 2016)..... 1, 3

State v. Brush, 183 Wn.2d 550,
353 P.3d 213 (2015)..... 1

State v. Halstien, 122 Wn.2d 109,
857 P.2d 270 (1993)..... 3

State v. Jackman, 156 Wn.2d 736,
132 P.3d 136 (2006)..... 1, 2, 3

Rules and Regulations

Washington State:

RAP 13.3 3

RAP 13.4 2

A. INTRODUCTION

Peterson Barzie has filed a petition for review of the unpublished Court of Appeals opinion in State v. Barzie, No. 73350-8-I, 2016 WL 4507474 (issued August 29, 2016), affirming his exceptional sentence imposed after a jury convicted Barzie of one count of harassment and two counts of felony harassment. Barzie seeks review of the portion of the court of appeals' opinion holding that the trial court's erroneous jury instruction "could not have prejudiced Barzie." 2016 WL 4507474 at *3. He contends that the decision conflicts with this Court's decisions in State v. Brush, 183 Wn.2d 550, 558-59, 353 P.3d 213 (2015), and State v. Jackman, 156 Wn.2d 736, 745, 132 P.3d 136 (2006). The State answers briefly to point out that Barzie did not make an argument about Jackman, or even cite Jackman, in any of his briefing to the court of appeals, despite plenty of opportunity to do so. Thus, the court of appeals did not have the opportunity to address this new argument, which is not based on new case law, and this Court should not consider it.

B. STANDARD FOR ACCEPTANCE OF REVIEW

“A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b).

C. STATEMENT OF THE CASE

The facts of this case were well recited in the unpublished opinion of the court of appeals and the State's briefing below.

D. THIS COURT SHOULD DENY THE PETITION FOR REVIEW BECAUSE BARZIE MAY NOT RAISE A NEW ARGUMENT IN A PETITION FOR REVIEW

Barzie's petition for review includes a new argument: that the court of appeals' decision, that the trial court's comment could not have prejudiced Barzie, is in conflict with State v. Jackman. But Barzie never raised Jackman at the court of appeals. See Brief of Appellant; Reply Brief of Appellant; Statement of Additional

Authority. Consequently, the court of appeals did not address Jackman. This Court will not ordinarily consider an issue not raised or briefed in the court of appeals. State v. Halstien, 122 Wn.2d 109, 130, 857 P.2d 270 (1993); RAP 13.3(a) (allowing a party to seek review by the Supreme Court of a “decision” of the Court of Appeals). Accordingly, this Court should not accept review.

Barzie’s citation to Jackman underpins a new argument. He now claims that a defendant’s “failure to contest an issue does not inevitably result in the State meeting its burden to prove that no prejudice could have resulted.” Petition for Review at 8. The State had plainly argued that Barzie “barely challenged that the pattern of abuse was ‘prolonged.’”¹ Brief of Respondent at 17. Yet Barzie made no mention of Jackman in his reply brief. The first time Barzie mentioned Jackman at all was in his petition for review, in claiming that the decision of the court of appeals conflicts with Jackman.

¹ The fact that Barzie never contested the prolonged period of time element was only one factor in the court of appeals’ decision that no prejudice could have resulted. The State also argued that an eight-year pattern of abuse was plainly prolonged, and the court of appeals agreed: “Because evidence of the abuse dated back several years and because Barzie did not contest the prolonged period of time element of the alleged aggravating circumstance. . . (the jury) could only have found that it was for a prolonged period of time.” 73350-8-1, 2016 WL 4507474, at *3.

This Court should decline to consider this new argument and should decline to review the sound opinion of the court of appeals.

E. CONCLUSION

For the foregoing reasons, the petition for review should be denied.

DATED this 30TH day of September, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
IAN ITH, WSBA #45250
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Richard W Lechich, the attorney for the appellant, at richard@washapp.org, containing a copy of the ANSWER TO PETITION FOR REVIEW in State v. Peterson Barzie, Cause No. 73350-8, in the Supreme Court, for the State of Washington.

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

Dated this 30 day of September, 2016.

Name:
Done in Seattle, Washington