SUPREME COURT NO. 96594-3

COURT OF APPEALS NO. 34332-4-III

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
RESPONDENT

V.

DERRICK LYNN BARRETT,
APPELLANT/PETITIONER

RESPONSE TO PETITION FOR REVIEW

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1. Did the trial court abuse its discretion in not allowing two of the defense witnesses to testify?
2. Does a current unlawful imprisonment conviction count as a prior conviction to trigger the enhancement under RCW 9.94A.525(21) for scoring purposes?

B. STATEMENT OF THE CASE

1. Procedural Facts

On September 2, 2014, Mr. Barrett's preliminary hearing was held. RP at 3. The State charged Mr. Barrett with three counts of Rape in the Second Degree, Domestic Violence; Unlawful Imprisonment, Domestic Violence; and Assault in the Fourth Degree, Domestic Violence. CP at 259-262. Mr. Barrett's arraignment was held on September 15, 2014. RP at 9. On November 3, 2014, the trial date was stricken and the case was set on to a series of status conferences at defense counsel's request. RP at 17. Status conference dates were held on December 22, 2014; January 12, 2015; and March 23, 2015 with agreed continuances by both parties. RP at 23-28.

At status conference on April 20, 2015, trial was set for June 2, 2015. RP at 29, 30. On May 18, 2015, defense counsel requested a continuance and trial was reset to August 4, 2015. RP at 33.

On July 27, 2015, defense counsel requested to continue the trial to September 1, 2015. RP at 36. The State had an unavailable witness so agreed to continue the trial. RP at 36.

On August 24, 2015, defense counsel and the State both declared ready for trial for the September 1, 2015 trial setting. RP at 39. On August 31, 2015, the parties agreed to move the trial to the following week due to witness and defense counsel availability. RP at 43. On September 8, 2015, defense counsel requested to continue the trial another month as defense counsel had started another trial in a different jurisdiction. RP at 48. The State indicated it was ready for trial and that it was not in agreement with the continuance as this trial had already been scheduled around defense counsel's availability. RP at 50. The State had approximately sixteen witnesses confirmed and ready for trial to start the next day, some of whom had come from out of the area. RP at 49. Trial was moved to September 29, 2015, over the State's objection. RP at 51.

On September 21, 2015, the trial was continued at the State's request due to the unavailability of two law enforcement witnesses. RP at 57. Trial was re-set for November 10, 2015. RP at 57. On November 2, 2015, defense requested a trial continuance based on his unavailability. RP at 60. The State did not object as defense counsel had given the State notice. RP at 60. Trial was set for December 1, 2015. RP at 60. On

November 30, 2015, the trial was continued again due to other trials going forward that had a sooner outside date than Mr. Barrett's case. RP at 64. Trial was continued to January 5, 2016. RP at 65.

On December 21, 2015, both the State and defense counsel declared they would be ready for trial January 5, 2016. RP at 68. At readiness on January 4, 2016, the trial was moved to the following week without objection. RP at 71.

On January 4, 2016, six days before trial, defense counsel and the State spoke on the phone and defense counsel indicated that he may have a couple witnesses but he was not sure yet. RP at 88; CP at 210-221. The State requested the names of the potential witnesses. RP at 88; CP at 210-221. Defense counsel refused to disclose the names of the witnesses because he was not sure if he was going to call them or not. RP at 88; CP at 210-221. The State did not hear anything else about the witnesses until Sunday, January 10, 2016. RP at 88; CP at 210-221. Defense counsel indicated he intended on calling the witnesses. RP at 88; CP at 210-221. Defense counsel gave the State the names "Wendy Something" and David "Barrow", which turned out to be David Barton. RP at 88; CP at 210-221. The State asked what they would testify to and was told that Wendy would testify to something to the effect that she had seen the victim hitting herself in the leg a few days after the incident and saying she was trying to

make it more convincing. RP at 89; CP at 210-221. Mr. Barton would say something similar. RP at 89; CP at 210-221. Defense counsel told the State that he would provide a written summary of what their testimony would be. RP at 89; CP at 210-221. The State asked for phone numbers of the two individuals and was not provided them. RP at 89; CP at 210-221. The State received no written summary, nor contact information for either of the defense witnesses. RP at 89; CP at 210-221.

On January 11, 2016, State and defense counsel declared ready to start the trial on January 12, 2016. RP at 75. On the morning of trial, both the State and defense counsel indicated they were ready to proceed with the trial. RP at 83. The State filed a motion in limine to exclude the anticipated defense witnesses as no full names, contact information, or complete summaries of statements had been provided. CP at 210-221.

On the morning of trial, during motions in limine, defense counsel handed to the Court, and gave to the State, a defense witness list. RP at 83. The State moved in limine to exclude the two defense witnesses, Wendy Pillow and David Barton, based on the late disclosure and the failure to comply with discovery rules. RP at 88; CP at 210-221. The State argued that exclusion was the proper remedy because the case had been pending for approximately fifteen months, the witnesses were being disclosed formally the morning of trial, the State would have no time to

interview the witnesses as counsel would be in trial and it would cause delay, and the State would have no time to find impeachment or rebuttal evidence to respond to the witnesses' testimony. RP at 89; CP at 210-221.

Defense counsel argued that he had just heard a week prior from "a source" that these two individuals may be favorable witnesses and the delay was caused by him not being able to contact them. RP at 89. During counsel's argument, he fully disclosed the witnesses' anticipated testimony which would be that the day or so after the incident, the witnesses saw the victim striking herself in the thigh and when asked what she was doing, she responded that she was trying to make the bruises look more convincing. RP at 91. Defense counsel requested a continuance rather than exclusion. RP at 91.

The State responded in argument that defense counsel's argument to the court was the first time the State had even heard the full extent of the anticipated defense witness testimony. RP at 93. The testimony would involve time frames, alleged changes in injury, and the State simply had no time to find rebuttal evidence to these witnesses. RP at 93.

The trial court cited the defendant's discovery obligations under CrR 4.7, including the names and addresses of persons the defense intends to call at trial, together with any statements. RP at 95. The court referenced that the case was approximately seventeen months old. RP at

96. These witnesses were revealed a week before trial and no contact information was given to the State for either of the witnesses until the morning of trial. RP at 96.

The trial court ruled that disclosure of the names or partial names on Sunday, January 10, the day before trial at the earliest, constituted a surprise to the prosecution. RP at 96. The late disclosure affected the ability to talk with the victim about the testimony, to prepare, and to confirm other issues. RP at 96. The trial court did not find defense counsel's violation as a "willful" violation or that it was made in bad faith. RP at 96. The trial court then stated that the record was just too incomplete to determine whether it was willful or not because defense did not provide information about how the witnesses were discovered or who the "source" was. RP at 97.

The trial court ruled that because the testimony of both defense witnesses pertained to something that happened a day or two after the incident, the evidence becomes more speculative and unclear. RP at 99. The evidence that would be presented would include statements, excited utterances, photos, and a sexual assault examination kit from the time of the incident. RP at 98. An allegation that a couple days after the incident the victim wanted to make the injuries look worse is speculative and it "seems to relate to something that occurred after the event and not the

event itself." RP at 99. The court found that the intent of the evidence was to show the victim's desire to make the injury look more severe than it was, which is not significantly probative enough to diminish the evidence that may or may not come in from the hospital, sexual assault kit, observations of officers at the time of the incident or what the victim may testify to. RP at 102. Evidence that there may be additional bruising from the victim striking her leg would not diminish the evidence of whether this incident occurred or not. RP at 103.

The trial court precluded both defense witnesses from testifying. RP at 99, 100. The court seemed to suggest that the court may reconsider the witnesses as rebuttal for defense if the evidence were to show a significant increase in bruising when the officer went back for a follow up interview. RP at 101. The trial court indicated that "[f]or now, I'm going to exclude both witnesses" because of late disclosure. RP at 101.

The trial court did not feel there was any less effective sanction that could be imposed to avoid the surprise and prejudice to the State. RP at 101. The State had its sixteen witnesses ready to go for trial, many of which had come from out of the area, and the court was logistically ready for trial. RP at 103. A continuance would have disrupted the efficiency of the proceedings. RP at 103. The evidence that would have been put forward by the defense witnesses was of limited probative value given it

pertained to an alleged event a couple days after the incident and the substance of the testimony would not have diminished the evidence about whether the incident actually occurred or not. RP at 103.

Defendant was convicted of all counts after a three day trial. RP 80-578. At sentencing on 3/16/16, the trial court calculated his offender score as a seven for each of the counts of Rape in the Second Degree, Domestic Violence. RP at 601. The court counted two of the three rape charges as same course of conduct, scoring three points there on the controlling charge, one point from each of two Assault 4th degree, Domestic Violence convictions, and double scoring the other current offense of Unlawful Imprisonment, Domestic Violence for a total of seven points. RP at 597-601.

2. Substantive Facts

The State admitted photographs taken by Deputy Weigel at the time of the sexual assault examination showing numerous scratches and bruising to K.M.'s entire body. RP at 152; CP at 57-60 Exhibits 1-6. The State also admitted photos taken a few days after the incident, showing bruising and scratches along K.M.'s back, shoulders, and lower hip area that K.M. sustained during the struggle in the driveway. RP at 212; CP at 57-60 Exhibit 28. They were taken a few days later as bruises take time to develop. RP at 212. Defense counsel did not inquire about the incident of

K.M. allegedly striking herself at all during cross examination of K.M. RP at 214-227.

Sexual Assault Nurse Examiner (SANE) nurse Paulla Woods testified at trial. RP at 242. The full medical records and sexual assault examination report were admitted at trial. CP at 57-60 Exhibit 10. Ms. Woods testified to a significant bruise next to K.M.'s vagina that corresponded with the tear in her jeans. RP at 249. K.M. had abrasions to both ears, upper ears, her nose, upper lip and her chin. RP at 249. Both of her knees, elbows, tops of her feet, hands and her back all had abrasions. RP at 250. K.M. had debris, likely dirt, on the outside of the labia and a hair that did not appear to belong to K.M. in the interior of the labia. RP at 251, 263. No evidence of increased bruising came to light during the trial. RP at 133-484.

C. ARGUMENT

Review must be denied because the decision of the Court of Appeals is in accord with existing case law. The trial court did not abuse its discretion when it excluded defense witnesses. The trial court did not err in counting Unlawful Imprisonment, Domestic Violence, as a prior offense when calculating the defendant's offender score. Petitioner cites no reason to overturn long-standing precedent, therefore there is no basis to grant review under RAP 13.4(b).

1. **The Petition for Review should be denied because the decision of the Court of Appeals is not in conflict with any decision of this Court.**

The Petitioner argues that the trial court committed error in excluding two of defense witnesses. Petition for Review (hereinafter Petition), p. 3

A. The trial court did not abuse its discretion in excluding defense witness

Appellant asserts that the trial court erred when it excluded two potential defense witnesses as a discovery sanction. CrR 4.7 governs criminal discovery. *State v. Blackwell*, 120 Wn.2d 822, 826 (1993).

"[T]he defendant shall disclose to the prosecuting attorney the following material and information within the defendant's control no later than the omnibus hearing: the names and addresses of persons whom the defendant intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witness." CrR 4.7(b). There is a continuing duty to disclose. CrR 4.7(h)(2). A party shall promptly notify the other party of the existence of new discoverable material. CrR 4.7(h)(2).

"[I]f at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information

not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances." CrR 4.7(h)(7)(i). The "deems just" language gives a trial court discretion to exclude a defense witness as a sanction for a discovery violation. *State v. Venegas*, 155 Wn.App. 507, 520 (Div. 2, 2010), review denied, 170 Wn.2d 1003 citing *State v. Hutchinson*, 135 Wn.2d 863, 881-884 (1998). Exclusion of a defense witness does not violate the Sixth Amendment. *State v. Hutchinson*, 135 Wn.2d 863, 881 (1998) citing *Taylor v. Illinois*, 484 U.S. 400, 412-413 (1988).

The scope of criminal discovery is within the trial court's discretion. *Blackwell*, 120 Wn.2d at 826. A reviewing court will not disturb a trial court's discovery decision absent a manifest abuse of that discretion. *Id.* See also *State v. Gregory*, 158 Wn.2d 759 (2006); *State v. Hamlet*, 83 Wn.App. 350 (1996), *aff'd*, 133 Wn.2d 314; *State v. Norby*, 122 Wn.2d 258 (1993); *State v. Yates*, 111 Wn.2d 793 (1988). A manifest abuse of discretion arises when "the trial court's exercise of discretion is 'manifestly unreasonable or based upon untenable grounds or reasons.'" *State v. Lile*, 398 P.3d 1052, 1060 (2017); *State v. Darden*, 145 Wn.2d 612, 619 (2002). The reviewing court need not agree with the trial court's decision in order to affirm the decision. *Lile*, 398 P.3d at 1060. The Court must merely hold the decision to be reasonable. *Id.*

The principals underlying CrR 4.7 have been stated as follows:

> In order to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protections of persons, effective law enforcement, the adversary system, and national security.

Yates, 111 Wn.2d at 797 citing Criminal Rules Task Force, *Washington Proposed Rules of Criminal Procedure* 77 (West Pub'g Co. ed 1971). Guidance in constructing the criminal discovery rule is also found in CrR 1.2 which states:

> These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, effective justice, and the elimination of unjustifiable expense and delay.

Yates, 111 Wn.2d at 797.

The United States Supreme Court has stated that "[t]he adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played." *Williams v. Florida*, 399 U.S. 78, 82 (1970).

The factors to be considered in deciding whether to exclude evidence as a sanction are: (1) the effectiveness of less severe sanctions;

(2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness' testimony; and (4) whether the violation was willful or in bad faith. *Hutchinson*, 135 Wn.2d at 883.

This situation has been previously addressed in *State v. Kipp*, 171 Wn.App. 14 (Div. 2, 2012), overruled on unrelated Privacy Act grounds in *State v. Kipp*, 179 Wn.2d 718 (2014). In *Kipp*, the defense first disclosed the name of the defense witness six days before trial. *Id.* at 31. The substance of the witness' testimony was disclosed on the first day of trial. *Id.* at 32. The defense stated that the late disclosure was based on the fact that the witness had been deployed with the Navy; however, he had been home for two weeks prior to defense disclosing him as a witness. *Id.* at 32. The State argued that it would be prejudiced by the witness because the substance of the testimony had not been disclosed and there was no time to find a rebuttal witness. *Id.*

The trial court excluded the witness based on the lateness of the disclosure, the duplicative nature of the testimony, and the fact that the proceedings would need to be halted for half a day or more to allow the State to speak with its witnesses. *Id.* The trial court ruled "[the witness] was disclosed too late to provide an orderly trial process...." *Id.* at 33.

The Court of Appeals held that the trial court's decision to exclude the witness was not an abuse of discretion under *Hutchison*. *Id.*

> As to the first *Hutchinson* factor, "the effectiveness of less severe sanctions," the court found that a continuance of a half day or more would be effective. But as to the second factor, "the impact of witness preclusion on the evidence at trial and the outcome of the case," the trial court found that the impact of excluding [the witness] would be low because [the witness'] testimony duplicated that of other witnesses. As to the third *Hutchinson* factor, "the extent to which the prosecution will be surprised or prejudiced by the witness's [*sic*] testimony," the trial court found that the prosecution would be prejudiced by [the witness'] testimony based on the extra time needed to interview the other witnesses so close to trial, or to halt trial to prepare rebuttal testimony. And as to the fourth *Hutchinson* factor, "whether the violation was willful or in bad faith," the trial court found that [the defendant] could have avoided the late disclosure of [the witness].

Kipp, 171 Wn.App. at 33. As the court stated in *Kipp*, "nobody needs to be preparing for trial any more than necessary on the eve of trial." *Id.* at 32.

The current case is analogous to *Kipp*, and the late disclosure is even more flagrant. In *Kipp*, the witness' name was disclosed six days before trial and the substance of the testimony was disclosed the morning of trial. In this case, the names of the witnesses were disclosed in part, the day before trial, but not in totality until the morning of trial.

Appellant cites to multiple cases defining the word "promptly" in the context of CrR 4.7 as "the moment of discovery or confirmation." *Appellant's Brief*, 9. However, Appellant's own definition undercuts their argument that the disclosure was "prompt." Defense counsel was aware of the witnesses more than a week before trial but refused to disclose the names to the State. RP at 88; CP at 210-221. Instead, defense counsel withheld the names of the individuals until the night before trial. RP at 88; CP at 210-221. This was a Sunday and it was only because the prosecutor was working over the weekend that the State even got any information from defense counsel. Even at that point, defense counsel did not disclose the actual identities of the witnesses. Counsel disclosed the name of "Wendy something" and David "Barrow" as a possible last name. RP at 88; CP at 210-221. The State was provided no contact information to attempt to contact these witnesses the night before trial despite defense counsel saying he would provide it. RP at 89; CP at 210-221. Even had full names been provided, the information is meaningless if the State is given no contact information to contact the witnesses.

The trial court's ruling excluding the witnesses addressed all of the *Hutchinson* factors. The trial court found that the violation was not willful or in bad faith under the fourth *Hutchinson* factor. RP at 96. However, the trial court then said that there simply was not enough information

provided for the court to determine if the late disclosure was willful or not. RP at 97. Respondent asserts that defense counsel's late disclosure was willful and was in bad faith. Defense counsel knew of the witnesses a week before trial and refused to disclose the names to the State when the State requested the names. On the night before trial, defense counsel did not even make an attempt to give the proper names, instead giving the name of "Wendy Something" and David "Barrow" instead of Barton. Furthermore, defense counsel did not disclose contact information for the two witnesses the night before trial, nor a summary of their expected testimony, even though counsel had the information. This is both willful and in bad faith.

The trial court found that the late discovery constituted both surprise and prejudice to the State under the third *Hutchinson* factor. RP at 96. The State had not been given the names until the night before trial and no contact information until the day of trial. RP at 96. The late disclosure affected the State's ability to talk with the victim about the testimony and to prepare any rebuttal or impeachment evidence. RP at 96.

The trial court made a clear ruling on the second *Hutchinson* factor. The court ruled that because the proffered testimony of the two witnesses pertained to something that happened after the incident, it

became speculative and unclear. RP at 99. The testimony would pertain to something that occurred after the event, not the event itself. RP at 99. The intent of the defense witness testimony would be to show the victim's desire to make the injury look more severe, which is not significantly probative enough to diminish the other evidence that may come in. RP at 102. Evidence that there may be additional bruising from the victim striking her leg would not diminish the evidence of whether this incident occurred or not. RP at 103. The trial court therefore found that there would be very little impact on the outcome of the case.

The court felt there was no less effective sanction that could be imposed under the circumstances under the final *Hutchinson* factor. RP at 101. The case had been pending for approximately seventeen months and the defense witnesses had known about the case the whole time. RP at 96. The State had its sixteen witnesses ready to start the trial, many of which had come from out of the area. RP at 103. The logistics of a trial can be complicated, and the court was ready to start the trial. RP at 103. Where as a continuance would have disrupted the efficiency of the proceedings. RP at 103. Given the limited probative value of the defense witnesses' testimony, the surprise to the State, the late disclosure, and the disruption a continuance would have caused, the trial court felt no less effective sanction could be imposed under the circumstances. RP at 101.

What is also relevant to this issue, is that the trial court's ruling suggested that if evidence was admitted at trial that showed K.M. did have significant bruising to her thigh a few days after the incident, defense may be able to call Ms. Pillow and Mr. Barton as rebuttal witnesses. RP at 101. Given that the evidence did not show such bruising, the witnesses were not called.

The trial court has discretion on matters of evidence and the trial court exercised that discretion in this case. The trial court addressed all of the factors laid out in *Hutchinson* and felt that exclusion was appropriate. The only question for this Court on review is whether that decision was based on reasonable grounds. *Lile*, 398 P.3d at 1060. Given the trial court's lengthy analysis, the court's decision was reasonable and there was no manifest abuse of discretion.

B. The decision of the Court of Appeals is in accord with existing case law.

Petitioner cites no authority that is in conflict with the decision of the Court of Appeals. Petitioner, however, cites numerous cases that are consistent with the decision of the Court of Appeals. Petition, p.3-4.

To support his argument, Petitioner first states that the trial court's exclusion of defense witnesses hindered Mr. Barret's right to present a defense when a lesser remedy would have been effective. Petition, p.3.

None of Petitioners cases support this argument. Petition, p.3-4.

In *State v. Cayetano-Jaimes*, 190 Wash.App. 286, 359 P.3d 919 (2015), the first case cited by Petitioner, the issue was not about excluding defense witnesses due to discovery violations, instead it dealt with excluding a defense witness due to the way in which her testimony would be given. *Id.* Unlike in the present case, the defense counsel timely disclosed the witness the defense intended to call and the nature of their testimony. *Id.*

Petitioner correctly notes that the defendant has a continuing duty to disclose information promptly to the prosecution as it is discovered and to the court if this material is discovered during trial. CrR 4.7(h)(2). Petitioner claims that this was done by defense counsel. Petition, p.3. Defense counsel stated himself that he did not, in fact, disclose the names of the potential witnesses to the prosecution. RP at 89-90. Defense counsel finally told prosecution that he did intend to call these witnesses at trial the day before readiness and two days before trial, but proceeded to give no contact information and went so far as to give the incorrect names to the State. RP at 88. The Court of Appeals analysis of CrR 4.7(h)(2) was in accordance with established case law.

2. The trial court correctly calculated petitioner's offender score.

Petitioner cites no authority that is at conflict with the decision of the Court of Appeals.

A. The sentencing guidelines are clear on how to calculate offender scores.

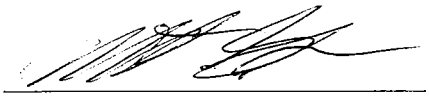
Petitioner claims that his other current conviction of Unlawful Imprisonment, Domestic Violence, should not have triggered as a prior conviction despite the clear meaning of the statutes. Petition, p.5. RCW 9.94A.589(1)(a) clearly states that whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score. RCW 9.94A.589(1)(a). This is in accordance with long established case law and the Court of Appeals correctly applied that case law.

D. CONCLUSION

The decision of the Court of Appeals is not in conflict with any decision of this Court. Petitioner cites no reason to overturn long-standing precedent. There is no basis to grant review under RAP 13.4(b).

DATED this 14th day of February, 2019.

Respectfully submitted,



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SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Plaintiff/Respondent	)	COA No. 965943
vs.	)	CERTIFICATE OF SERVICE
Derrick Lynn Barrett Defendant/Appellant	)	

I, Shauna Field, do hereby certify under penalty of perjury that on the 15th day of February, 2019, I caused the original Response to Petition for Review to be filed in the Supreme Court and a true copy of the same to be served on the following in the manner indicated below:

Derrick Lynn Barrett
#388196
Airway Heights Correction Center
PO Box 2049
Airway Heights, WA 99001-2049

(X) U.S. Mail

Signed in Okanogan, Washington this 15th day of February, 2019.

Shauna Field, Office Administrator

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OKANOGAN COUNTY PROSECUTING ATTORNEY'S OFFICE

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