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NO. 35545-1

**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JOHN ROACH, APPELLANT

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DIVISION II  
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Appeal from the Superior Court of Pierce County  
The Honorable Brian Tollefson

No. 04-1-05119-5

**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to preserve any claim of instructional error for review when there were no objections to the court's instructions below and no argument on appeal as to how the claimed error is reviewable under RAP 2.5?
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B. STATEMENT OF THE CASE.

1. Procedure

On November 3, 2004, the Pierce County Prosecutor's office charged appellant, JOHN EDWARD ROACH, hereinafter defendant, with one count of assault of a child in the second degree. CP 1-2. The State

alleged that defendant had beaten his 8 year old developmentally delayed son, Z.R. Id. The State later amended the information but the amendment did not affect the number or nature of the pending charge. CP 107.

The matter proceeded to trial before the Honorable Brian Tollefson. RP 19. There were numerous pretrial hearings including a CrR 3.5 hearing regarding the admissibility of the defendant's statements, a child competency hearing and a hearing on the admissibility of child hearsay. RP 26. None of the court's rulings on these issues is challenged on appeal. There were also hearings on whether certain impeachment evidence would be allowed regarding the victim's mother's, Ms. Roach, alleged history of making false reports against the defendant. The court made some tentative rulings. RP 373-393, 799. Defendant pursued his efforts to adduce this evidence on cross-examination of Ms. Roach and presented an offer of proof. RP 883-888. After hearing the offer of proof, the court ruled several areas could not be pursued on cross-examination. RP 889-891. The court's decision to limit the scope of cross-examination of Ms. Roach is challenged on appeal.

Neither party took any exceptions or made objections to the court's proposed instructions. RP 1176. Defendant challenges the giving of Instruction No 7, setting forth the common law definitions of assault, on appeal.

After hearing the evidence in this case, the jury found defendant guilty as charged. CP 147.

At sentencing, the court imposed a high end standard range sentence of 41 months, followed by 18-36 months of community custody, and standard legal financial obligations totaling \$1,110. RP 1283.

Defendant filed a timely notice of appeal from entry of this judgment. CP 183-194.

## 2. Facts

In the summer of 2004, Z.R., and his younger brother W.R. were enrolled in a daycare program at School Kid's Clubhouse in Puyallup. RP 440-444, 446. Shelly Silvas, was employed at the daycare as a program supervisor and daycare director; she had over 25 years experience working in daycare settings. RP 440-441, 446. On August 11, a Wednesday, she arrived at work to find two daycare employees upset over bruising they had noticed on Z.R. RP 448-449. Ms. Silvas brought Z.R. into the office and asked him if he had any "owies." RP 449. Another employee, Joy Longhurst was also present in the room. RP 449, 624-625. When Z.R. indicated that he did, Ms. Silvas held his shirt away from his body and saw bruising on his back and shoulder. RP 450. She did not recall if there was bruising on his face. RP 450. Looking at pictures that were taken a few

days later, Ms. Silvas indicated that the bruising was darker when she had seen it on Z.R.'s body. RP 451-455. She testified that based on her experience with children that bruising on the back and the back of the arms, such as Z.R. had, was unusual. RP 456. Ms. Silvas did not ask Z.R. how he got the injuries, but Z.R. told her that "daddy did it with the keys." RP 456. After seeing the injuries on Z.R., Ms. Silvas called the owner of the daycare, Peggy Emory, to inform her of the situation. RP 457. Ms. Silvas called CPS later that day to report the suspected abuse. RP 458.

Peggy Emory testified that she got a call from a director at the school asking her to go look at Z.R., who was now at the pool, as he was bruised. RP 863. Ms. Emory went to the pool and saw Z.R. who was wearing swimming trunks. RP 863-864. Ms. Emory saw bruises on his lower jaw and shoulder that she described as "very bright" and "acute." RP 864. After looking at the pictures that were taken a few days later, Ms. Emory indicated that the bruises were deeper in color when she had seen them on Z.R.'s body than they were in the pictures. RP 864-866. Ms. Emory asked Z.R. "What happened, buddy." RP 866. Z.R. launched into a long rambling explanation saying that he lost his dad's car keys and that his dad got mad and told him to find them, but that he didn't want to. RP 867-868. When he couldn't find them his dad got mad and poured syrup

in his hair and then hit him with the keys. RP 868. Ms. Emory asked if the dad hit him once or lots; Z.R. said he hit him lots. RP 868. Ms. Emory testified that Z.R. seemed a little angry when he described what happened to him. RP 876. The daycare called CPS twice and waited for someone to show up, but no one came. RP 870. When the defendant came to pick up his children the daycare released them to him. RP 870.

Another daycare worker, Kami Grosvenor, documented what she could recall about two conversations she had with the defendant the week of August 9-13, 2004. RP 641-649. The first conversation she recalled as a phone conversation where defendant told her he would not be bringing the children in because Z.R. had lost the keys to his car. RP 646. Defendant told Ms. Grosvenor that he was thinking about putting Z.R. into foster care. RP 646. Ms. Grosvenor thought this conversation occurred on the 11<sup>th</sup> but she did not make any notations about it until August 13<sup>th</sup>. RP 643-645. Ms. Grosvenor thought that on Friday, August 13, defendant told her that the boys were fighting over a sword in the bathroom that morning, but was uncertain if this was a face to face conversation or over the phone. RP 649, 657.

Ms. Roach testified regarding the ages and personalities of her two sons as well as some limited details regarding her separation from defendant and the ensuing custody disputes. RP 800-805. She testified

that in 2004, defendant had custody and that she had visitation once a month, on the second Saturday, for five hours. RP 805. She had scheduled visitation on August 14, 2004 and had last seen the boys the second Saturday in July. RP 805. Ms. Roach testified in more detail about the events of August 14 and how once the boys came inside from playing with their friends, she noticed the bruises on Z.R. and taken him to Mary Bridge Hospital. RP 805-809. She testified that she met with hospital social worker and the police that night and that she brought the boys back the following week to be interviewed at the Child Advocacy Center. RP 810. Ms. Roach testified that following those interviews, the boys had been placed in foster care for nine months and ten days until they were returned to her custody on May 27, 2005. RP 811.

Ms. Van Slyke, a crisis intervention social worker employed at the hospital testified that she saw Z.R. as he sat on the edge of a bed. RP 527. There was obvious bruising on the left side of his face and arm. RP 527. Ms. Van Slyke asked him one question: how did this happen? RP 527. Z.R. told her "my dad hit me." RP 528-529. Ms. Van Slyke called the police about the suspected abuse. RP 530. Ms. Van Slyke saw nothing about Ms. Roach's behavior the suggested she was coaching the children as to what to say. RP 535.

Deputy John Henterly of the Pierce County Sheriff's Department testified that he responded to emergency room at Mary Bridge Hospital around 6:30 in the evening on August 14, 2004 in regards to a child abuse complaint regarding Z.R. RP 495-498, 516. Deputy Henterly contacted Ms. Roach and got her to complete a handwritten statement. RP 498. The deputy then contacted Z.R. in a hospital room. The Deputy noticed bruising to the left side of Z.R.'s face, his left lower back, left shoulder, arm, and hand. RP 499. Deputy Henterly called a forensics officer to come photograph the injuries. RP 499-500. Several photographs documenting the extent and appearance of Z.R.'s injuries were admitted into evidence. RP 500-509. Deputy Henterly asked Z.R. how he got his bruises; Z.R. told him that his father had beaten him. RP 509-510. Deputy left the hospital and went to the home of Ms. Roach where he found defendant waiting in his car. RP 510. Deputy Henterly explained that he was investigating whether Z.R.'s bruising was the result of child abuse and that Z.R. had said that his father had caused the bruises. RP 512. After being informed of his Miranda rights, defendant told the deputy that he had never beaten his child and that he had not seen any bruising on Z.R. RP 512, 515. Defendant told the deputy that any bruising on Z.R. was the likely result of him fighting with his younger brother. RP 512-513. Defendant indicated that Z.R. takes a nightly bath

and that he draws the bath for his son, but did not explain how he did not see the bruising on his son's body. RP 512. The deputy arrested defendant at that time. RP 514.

Z.R. was interviewed at the Child Advocacy Center on August 17, 2005, by Cornelia Thomas. RP 682. The interview was conducted outside of Ms. Roach's presence. RP 679, 684. When Ms. Thomas asked Z.R. where he was living, he responded by telling her that he wasn't living with his dad anymore; he said the cops came because he got hit. RP 702. Z.R. then showed Ms Thomas a bruise on his shoulder. RP 702. Ms Thomas started to ask a question about how the bruise got there but Z.R said "my dad hit me" before she could finish. RP 703. Ms. Thomas then asked about a red bump she could see on Z.R.'s forehead. RP 703. Z.R. said that was just a bump and that he gets lots of bumps all over; he could not remember how he got that bump. RP 703. Returning to the bruise on his shoulder, Z.R. said that his dad had hit him with his fist. RP 704. When asked whether the fist was open or closed, Z.R said it was open at first then changed his answer to closed. RP 704-705. He then demonstrated to Ms. Thomas what his dad's hand looked like; he showed her a closed fist. RP 705. Z.R. said his dad hit him because he had lost his keys. RP 705. Z.R indicated that his dad hit him once on the shoulder but that hit had hit him other places as well and pointed them out to Ms

Thomas. RP 706-708. Z.R. told Ms. Thomas that his dad had put flour and syrup on the top of his head and spat at him; this was also part of the lost keys incident. RP 711-716. Z.R. indicated his father had spat in his face. RP 712. Z.R. indicated that he had to sleep with the flour and the syrup in his hair and that his neck was all sticky when he woke up. RP 716. Z.R. stated that his father had kicked him in the back three times and that he still had a bruise and pain from this. RP 718-722. Z.R. showed Ms. Thomas the bruise. RP 719. He indicated that his father's shoes were on and that it "really hurted." RP 720-721. Z.R. indicated that his dad had slapped him and made him bleed "bloody boogers" from his nose. RP 724-727.

Z.R. testified that last August while at his dad's house his dad got mad at him because he has lost his dad's keys. RP 899. He said that his dad was yelling at him and that his dad put flour and syrup in his hair. RP 900, 915. Z.R. said his father kicked him in the back and on his arms while he was on the floor. RP 901-902. He was wearing shoes at the time and it hurt. RP 904. Z.R. also indicated that his father had hit him with a fist. RP 902. Z.R. did not remember talking to anyone about the bruising at the pool at his daycare, but did recall talking to a lady at the hospital about the bruising. RP 906. Z.R. testified that his dad made the black marks on his shoulders and arms. RP 906.

Defendant presented the testimony of four witnesses. Ms. Couture testified regarding business records at the daycare and what they indicated about the Roach boys attendance the week of August 9-13<sup>th</sup>. RP 1180-1194. The records indicated that Z.R was not at the daycare on Friday, August 13, and that W.R. was not at the daycare on Wednesday, August 11, but that both boys were there four days that week. Id. It would be possible to sign them in for the wrong day. RP 1193.

Ms. Littles was testified that she rented a portion of her home to the defendant, where he lived with his two sons. RP 974-975. She recalled the week of August 9-14<sup>th</sup> 2004. RP 975. She testified that Z.R. and W.R would play swords and hit each other and that, in general, they engaged in a lot of rough-housing. RP 985-986. She never noticed that the boys were ever afraid of their father and never saw the defendant mistreat them. RP 976-980.

Dean Barr testified regarding defendant's presence at work from August 2 until August 13 , 2004, based upon his time card. RP 1030. According to the time card, defendant worked every day that two week period and was usually at work by 8:10 a.m. RP 1034-1036. The only exception was on Monday August 9, when he clocked in at 11:50 a.m. RP 1036-1037.

Bill Harrington was the guardian ad litem in the Roach's divorce proceedings, which he described as contentious. RP 1045-1053. He testified that based upon his investigation in the divorce proceedings, he thought defendant was the better parent and that a final order awarding defendant custody was supposed to be entered August 9, 2004. RP 1061-1062. He was with defendant and the boys prior to the visitation on August 14<sup>th</sup> and notice nothing amiss. RP 1063-1067. The GAL testified that he was skeptical about the charges because of his knowledge of the divorce proceedings and because Ms. Roach had a "history of influencing the children." RP 1136-1139. He also testified that her reputation in the community for truthfulness and veracity around May 2004 was "bad." RP 1095.

The defendant did not testify.

C. ARGUMENT.

1. DEFENDANT FAILED TO PRESERVE ANY CLAIM OF INSTRUCTIONAL ERROR IN THE TRIAL COURT AND HAS FAILED TO DEMONSTRATE A CLAIM THAT MAY BE RAISED FOR THE FIRST TIME ON APPEAL.
  - a. Defendant failed to take exception to the challenged instruction in the trial court and concedes it is a correct statement of the law.

The Washington Supreme Court has made it clear that in order for a party to challenge a jury instruction on appeal, there must be compliance

with CrR 6.15(c).<sup>1</sup> State v. Scott, 110 Wn.2d 682, 686-687, 757 P.2d 492 (1988). CrR 6.15(c) imposes two requirements to properly preserve an instructional issue for appellate review: 1) counsel must make an objection in the trial court (“objection requirement”); and, 2) the reasons for the objection must be stated with particularity (“specificity requirement”). The Supreme Court has long recognized that this procedural rule has two components, both of which must be satisfied.

We have frequently held that *only* exceptions which are made to instructions in the trial court may be considered on appeal. State v. Hinkley, 52 Wn. (2d) 415, 325 P. (2d) 889 (1958); State v. Johnson, 55 Wn. (2d) 594, 349 P. (2d) 227 (1960); State v. Lyskoski, 47 Wn. (2d) 102, 287 P. (2d) 114 (1955). Furthermore, if the exception taken is too general to be effective in calling the trial court’s attention to any error, there can be no review of the alleged error on appeal. State v. Wilson, 38 Wn. (2d) 593, 231 P. (2d) 288 (1951); State v. Collins, 50 Wn. (2d) 740, 314 P. (2d) 660 (1957).

State v. Harris, 62 Wn.2d 858, 872-873, 385 P.2d 18 (1963) (emphasis in original). There are cases where the court has reviewed claimed instructional error when compliance with the specificity requirement was questionable. See, e.g., State v. Gosby, 85 Wn.2d. 758, 5539 P.2d 680

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<sup>1</sup> That rule provides in the relevant part:

Objection to instructions. Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict, and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and the refusal to give a requested instruction or submission of a verdict or special finding form. The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused. The court shall provide counsel for each party with a copy of the instructions in their final form.

(1975). However, the State has been unable to find any published case where a Washington appellate court has reviewed claimed non-constitutional instructional error where there was a failure to comply with the objection requirement in the trial court.

In State v. Scott, 110 Wn.2d at 682, this court was faced with an appellant trying to raise instructional error on appeal when there had been no objections made in the trial court. As this court phrased it “[appellant] seeks to avoid the consequence of his failure to comply with the well settled procedural requirements by elevating his challenge ‘into the constitutional realm’” so that it could be raised for the first time on appeal under the provisions of RAP 2.5(a)(3) as error of constitutional magnitude. Scott, 110 Wn.2d at 686, citing State v. Louie, 68 Wn.2d 304, 314, 413 P.2d 7 (1966). Ultimately, the court found that the claimed instructional error did not present an issue of constitutional magnitude and, thus, did not qualify for review under RAP 2.5(a)(3). The holding of Scott is clear; instructional error that is not properly preserved with an objection in the trial court and which does not present an issue of constitutional magnitude is not reviewable. See also, State v. Hinkley, 52 Wn.2d 415, 325 P.2d 889 (1958); State v. Johnson, 55 Wn.2d 594, 349 P.2d 227 (1960); State v. Louie, 68 Wn.2d 304, 311-312, 413 P.2d 7 (1966) (citing numerous cases); State v. Hoffman, 116 Wn.2d 51, 111-112, 804 P.2d 577 (1991).

On appeal, defendant assigns error to the giving of Instruction No. 7, an instruction setting forth the three common law definitions of assault.

See, Assignment of Error No 1, Appellant Brief at p. 1. There were no objections or exceptions taken to the court's instructions. RP 1176. Defendant fails to address the lack of an objection to this instruction in the trial court in his appellate brief. Moreover, he acknowledges that the instruction correctly states the law. Appellant's brief at p. 8. He makes no argument as to how his claim reaches a constitutional issue that might be reviewable for the first time on appeal under RAP 2.5(a)(3). Any argument raised in the reply brief would be untimely and need not be considered. Fosbre v. State, 70 Wn.2d 578, 424 P.2d 901 (1967). This court should refuse to review this issue as defendant has failed to preserve a claim of instructional error in the trial court and failed to demonstrate that the issue may be raised for the first time on appeal.

- b. Defendant cites no authority for the proposition that assault of a child in the second degree requires an actual battery.

Assault of a child in the second degree is proscribed in RCW 9A.36.130, which provides:

(1) A person eighteen years of age or older is guilty of the crime of assault of a child in the second degree if the child is under the age of thirteen and the person:

(a) Commits the crime of assault in the second degree, as defined in RCW 9A.36.021, against a child; or

(b) Intentionally assaults the child and causes bodily harm that is greater than transient physical pain or minor temporary marks, and the person has previously engaged in

a pattern or practice either of (i) assaulting the child which has resulted in bodily harm that is greater than transient pain or minor temporary marks, or (ii) causing the child physical pain or agony that is equivalent to that produced by torture.

RCW 9A.36.130. Violation of RCW 9A.36.130(1)(a) requires proof of an assault in the second degree under RCW 9A.36.021; that statute sets forth many alternative means of committing assault in the second degree:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture.

RCW 9A.36.021. The Legislature did not provide a statutory definition of the term “assault,” so Washington courts apply the common law definition. State v. Stevens, 158 Wn.2d 304, 310-311, 143 P.3d 817

(2006). Washington recognizes three common law definitions of assault: (1) an attempt, with unlawful force, to inflict bodily injury upon another (attempted battery)<sup>2</sup>; (2) an unlawful touching with criminal intent (actual battery); and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm (common law assault). *Id.* The common law definitions are broadly worded and some do not require that there be a touching. As a result, it is clear that the Legislature did not envision an “assault” as necessarily requiring any physical act of touching. *State v. Tili*, 139 Wn.2d 107, 117, 985 P.2d 365 (1999).

In the case now before the court, defendant went to trial on an information charging him with violating RCW 9A.36.021(1)(a) and 9A.36.130(1)(a); the relevant charging language read as follows:

That JOHN EDWARD ROACH ...a person eighteen years of age or older, did unlawfully and feloniously, ... intentionally assault Z.R., being under the age of thirteen, and thereby recklessly inflict substantial bodily harm...

CP 107 (amended). The jury instruction setting forth the definition of assault in the second degree was properly limited to the means of committing assault in the second degree alleged in the information. Instruction No. 9, CP 128-146; *see*, Appendix A. Similarly the “to

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<sup>2</sup> The parenthetical descriptions for the different types of assault are those employed by the Supreme Court in *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994) and by the appellant.

convict” instruction on the assault of a child in the second degree was properly limited to the means charged in the information. Instruction No. 14, CP 128-146; see, Appendix B. The jury was given an instruction defining assault using all three of the common law definitions. Instruction No. 7, CP 128-146, see, Appendix C. As noted earlier, there were no objections or exceptions taken to the court’s instructions. RP 1176.

Defendant asserts that “assault of a child as defined by the statute....requires *actual battery*.” Appellant’s brief at p.8 (emphasis in original). This claim is baldly asserted with no citation to any authority to support the proposition that when the Legislature used the phrase “commits the crime of assault in the second degree, as defined in RCW 9A.36.021” that the term “assault” referred only to actual batteries. When the Legislature defined the crime of assault in the second-degree, it created six alternative means of committing that crime. RCW 9A.36.021(1)(a)-(f). No case has ever held that the provisions of RCW 9A.36.021 are limited to actual batteries; rather case law indicates that an assault may be proved by any of the three types of common law assault that is supported by the evidence. See, State v. Eastmond, 129 Wn.2d 497, 500, 919 P.2d 577 (1996); State v. Byrd, 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995). Where no authorities are cited in support of a proposition, the court is not required to search for authorities, but may assume that counsel, after diligent efforts, has found none. DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 372 P.2d 193 (1962). Contentions unsupported by argument

or citation of authority will not be considered on appeal. RAP 10.3(a)(5); Seattle v. Muldrew, 69 Wash.2d 877, 877-878 (1966). This contention should be summarily rejected as unsupported by any authority.

c. The jury was not instructed on an uncharged alternative means.

Finally, defendant argues that the jury was instructed on an uncharged alternative means. The Legislature enacted two alternative means of committing assault of a child in the second degree, RCW 9A.36.130(1)(a) and (b), but the jury was instructed on the single means charged in the information. CP 107, 128-146, Instruction Nos. 10 and 14. Further, the jury was instructed on only one means of committing second-degree assault: intentionally assaulting another and thereby recklessly inflicting substantial bodily harm. CP 128-146, Instruction No. 9. This also matched the information. CP 107. Thus, the jury was not instructed on uncharged alternative means of committing second-degree assault or assault of a child in the second degree.

In this case, the jury was given the three common law definitions of “assault” recognized by Washington courts. See, State v. Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994). Defendant argues that Instruction No. 7, which defined the term “assault,” instructed the jury on alternative means of committing assault. The defect in defendant’s argument is that definitional instructions do not create alternative means of committing an

offense. State v. Linehan, 147 Wn.2d 638, 646, 56 P.3d 542 (2002); State v. Smith, 124 Wn. App. 417, 102 P.3d 158 (2004), review granted, 154 Wn.2d 1020, 116 P.3d 399 (2005); State v. Laico, 97 Wn. App. 759, 763, 987 P.2d 638 (1999); State v. Strohm, 75 Wn. App. 301, 308, 879 P.2d 692 (1994).

While Division Three in State v. Bland, 71 Wn. App. 345, 860 P.2d 1046 (1993) did conclude that instructing on more than one of the common law definitions of assault creates alternate means of committing a single crime, Division II did not agree with its analysis. See, State v. Smith, supra.

In sum, defendant attempts to raise a non-constitutional claim regarding jury instructions for the first time on appeal without any attempt to explain how such a claim is properly before the court. Moreover, one of defendant's underlying legal claims is unsupported by any authority and runs contrary to well-established legal principles regarding the meaning of the word "assault" as used by the Legislature. Another of defendant's legal theories has previously been rejected by this court. The court should refuse to review this claim.

2. DEFENDANT WAS NOT IMPROPERLY LIMITED IN PRESENTING A DEFENSE WHEN, AFTER HEARING AN OFFER OF PROOF, THE COURT EXERCISED ITS DISCRETION TO LIMIT THE SCOPE OF CROSS EXAMINATION OF ONE WITNESS WHILE STILL ALLOWING DEVELOPMENT OF OTHER AREAS OF IMPEACHMENT EVIDENCE.

The admission or exclusion of relevant evidence is within the discretion of the trial court. State v. Swan, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651, review denied, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. Guloy, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. Rehak, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

The Sixth Amendment, applied to the states through the Fourteenth Amendment, guarantees criminal defendants a fair opportunity to present exculpatory evidence free of arbitrary state evidentiary rules. Rock v. Arkansas, 483 U.S. 44, 56, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); Washington v. Texas, 388 U.S. 14, 18, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). The right to present evidence is not absolute, however, and must yield to a state's legitimate interest in excluding inherently unreliable testimony. Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); State v. Baird, 83 Wn. App. 477, 482, 922 P.2d 157 (1996), review denied, 131 Wn.2d 1012 (1997).

A defendant has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. State v. Rehak, 67 Wn. App. 157, 162, review denied, 120 Wn.2d 1022 (1992); In re Twining, 77 Wn. App. 882, 893, 894 P.2d 1331, review denied, 127 Wn.2d 1018 (1995). Limitations on the right to introduce evidence are not constitutional unless they affect fundamental principles of justice. Montana v. Engelhoff, 518 U.S. 37, 116 S. Ct. 2013, 2017, 135 L. Ed. 2d 361 (1996) (stating that the accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence (quoting Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 653, 98 L. Ed. 2d 798 (1988))). Similarly, the Supreme Court has stated that the defendant's right to present relevant evidence may be limited by compelling government purposes. State v.

Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983) (discussing Washington's rape shield law).

The confrontation clause in the Sixth Amendment protects a defendant's right to cross-examine witnesses. State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). Generally, cross-examination is limited to the subject matter of direct examination and matters affecting the credibility of the witness. ER 611(b). A court may, in its discretion, allow inquiry into additional matters as if on direct examination. ER 611(b); State v. Robideau, 70 Wn.2d 994, 997, 425 P.2d 880 (1967) (scope of cross-examination is within the trial court's discretion). A defendant is allowed great latitude in cross-examination to expose a witness's bias, prejudice, or interest. State v. Knapp, 14 Wn. App. 101, 107-08, 540 P.2d 898, review denied, 86 Wn.2d 1005 (1975). Nevertheless, the trial court still has discretion to control the scope of cross-examination and may reject lines of questions that only remotely tend to show bias or prejudice, or where the evidence is vague or merely speculative or argumentative. State v. Jones, 67 Wn.2d 506, 512, 408 P.2d 247 (1965); State v. Kilgore, 107 Wn. App. 160, 184-185, 26 P.3d 308 (2001).

Under ER 103(a)(2), error may not be asserted based upon a ruling that excludes evidence unless a substantial right of the party is affected, and the substance of the evidence was made known to the court by offer or was apparent from the context of the record. "An offer of proof serves three purposes: it informs the court of the legal theory under which the

offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review.” State v. Ray, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991). The party offering the evidence has the duty to make clear to the trial court: 1) what it is that he offers in proof; and, 2) the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling. Ray, 116 Wn.2d at 539, citing Mad River Orchard Co. v. Krack Corp., 89 Wn.2d 535, 537, 573 P.2d 796 (1978). Finally, if the ruling was a tentative ruling on a motion in limine, a defendant who does not seek a final ruling waives any objection to the exclusion of the evidence. State v. Riker, 123 Wn.2d 351, 369, 869 P.2d 43 (1994), citing State v. Carlson, 61 Wn. App. 865, 875, 812 P.2d 536 (1991).

Defendant argues that the court’s erred by excluding evidence which allegedly showed that the victim’s mother, Ms. Roach, had previously coached Z.R. into accusing defendant of assault, arguing that this went to her bias and motive to lie. In the issue statement and argument heading, defendant asserts that Ms Roach testified to “statements the child victim allegedly made to her,” perhaps in an effort to make the testimony of Ms. Roach seem more critical to the State’s case. Appellant’s brief at pp. 1, 10. The only testimony the state adduced from Ms. Roach regarding Z.R.’s statements was as follows:

Prosecutor: Did you ask [Z.R.] at all how he got the bruises?

Ms Roach: Um, I don't recall.

Prosecutor: ...Do you recall whether...he said anything about the bruises?

Ms Roach: He said something –something about his dad, but I don't recall what he had said.

RP 807-808. The jury heard considerably more detailed information from other witnesses about Z.R. disclosures regarding the defendant's assault on him. RP 456, 509-510, 528-529, 702-727, 867-868. Some of these disclosure were made prior to Z.R. visitation to his mother's house. RP 456, 867-868. On the whole, Ms. Roach's testimony was very limited and, generally, on matters that were not in dispute or for which there was corroborating evidence. She testified to: the ages and personalities of her two sons; some limited details regarding her separation from defendant and the ensuing custody disputes; and as to when she had last seen the boys prior to the visitation on August 14, 2004. RP 800-805. Ms Roach testified in more detail about the events of August 14 and how she had noticed the bruises on Z.R. and taken him to Mary Bridge Hospital. RP 805-809. She testified that she met with hospital social worker and the police that night and that she brought the boys back the following week to be interviewed at the Child Advocacy Center. RP 810. Ms. Roach testified that following those interviews, the boys had been placed in foster

care for nine months and ten days until they were returned to her custody on May 27, 2005. RP 811.

Thus, while defendant sought to focus attention on Ms. Roach as the instigator of the charges, a review of her testimony shows that it was not critical or even necessary to prove the State's case. She was not the first to see or report Z.R.'s bruising to the authorities. Facts that are not in dispute include the fact that Z.R. had serious bruising to his body. Z.R. told his day care providers that his father had caused the bruising. The bruising was severe enough for the day care to make a report of suspected abuse to CPS. At the time he made these disclosures, he had not had contact with his mother for nearly a month. These bruises were inflicted and reported to CPS before he visited his mother on August 14, 2005. While defendant may have wanted to confuse the jury by re-litigating the divorce proceedings in the context of a criminal trial, the court must keep in mind that Ms. Roach's testimony was not so damaging to the defendant for there to be a critical need to impeach her testimony.

Defendant filed a pretrial motion seeking the admission of considerable impeachment evidence, but not all of it was aimed at impeaching Ms. Roach. CP 20-106. The court made preliminary rulings on the admissibility of this evidence, but made it clear that its rulings were tentative. RP 373-393. Prior to Ms. Roach testifying, the court reiterated that any ruling excluding evidence was conditional depending on the testimony. RP 799. Midway through the examination of Ms. Roach, the

court expressed its concern about straying too far afield from the central issue in the case by going through a detailed history of the parents' relationship. RP 838. The court then asked defense to be specific about what he was trying to address on cross-examination. RP 840. Defense counsel indicated that he sought to admit evidence concerning three areas: 1) a 2002 trip to the hospital where a social worker indicated in the record that Ms. Roach appeared to be prompting Z.R. to name his father as the source of an injury; 2) Ms. Roach's call to the police in May 2004 which prompted the guardian ad litem (GAL) to require a written note from Ms. Roach that she would not call the police if allowed visitation; and 3) inquiry into a letter written by Sally Gray over Ms. Roach's claim that another boy in the day care had given Z.R. a black eye and her efforts to document that injury by taking him to a fire station. RP 840-841, 851-853. The court ruled that the written note with Ms. Roach's promise not to call the police would be admissible. RP 848. The court found that the Sally Gray letter did not involve any claim where Ms. Roach was trying to indicate defendant had caused injury to Z.R. and, therefore, was irrelevant and should be excluded. The court heard an offer of proof regarding the June 2002 hospital visit, Ms. Roach's conversation with Sally Gray, and whether Ms. Roach called the police in May of 2004. RP 883. In the offer of proof, Ms. Roach had no recollection of calling the police in May of 2004. RP 884. Ms. Roach recalled taking her children to the hospital but no recollection of taking them to the police. RP 885. Ms. Roach had a

vague recollection about talking with Sally Gray about “something with the daycare” but could not recall what it was about. RP 886-887. She had no recollection speaking with a fireman. RP 887. Ms. Roach recalled taking Z.R. into the hospital in 2002 for an injury near his ear, but could not recall what he had told the staff at intake about the cause of the injury. RP 887. She did not recall suggesting to Z.R. that he should tell the social worker who hit him. RP 888. She denied ever trying to get the children to disclose reports against the defendant. RP 888.

The court indicated that based on the offer of proof it was not inclined to allow inquiry on cross examination into any of the three areas because Ms. Roach had virtually no recollection about them. The court inquired whether defendant would bring in author of the 2002 medical report to testify, but would not give defense counsel a ruling as to whether such extrinsic evidence would be admissible. RP 889-890. Defendant made no attempt to introduce testimony from the author of the 2002 medical report who thought Ms. Roach had prompted Z.R. to name his father as a cause of his injury. Thus, it is unknown whether the court would have excluded such evidence. Defendant’s failure to get a definitive ruling on the admissibility of the testimony of the author of the 2002 medical report means that this aspect of the ruling has not been preserved for review. The same is true regarding any extrinsic evidence that Ms. Roach called the police in May of 2004 regarding the defendant.

None was offered by the defense so none was formally excluded by the court.

The court rulings excluding cross-examination on the listed topics was within its discretion. The court correctly determined that the Sally Gray incident was not relevant as it did not involve Ms. Roach making an allegation about the defendant. Ms. Roach did not have sufficient recollection as to the other matters for the inquiry to be useful in demonstrating bias or motive. Such cross-examination would not be fruitful in producing any helpful impeachment.

Defendant was allowed considerable leeway in cross-examination to show bias and motive to lie in other ways. Defendant did ask Ms. Roach a question seeking to confirm that one of the reasons she took the children to the advocacy center for interviews was that the GAL was going to bring a contempt motion to have the children returned to the defendant. RP 823, 830-831. Ms. Roach acknowledged that the GAL was trying to get the children returned to defendant because he “was totally against [her].” RP 830, 832. Defense asked several questions as to whether she had coached the children into saying the defendant had bruised Z.R. RP 824, 834-835. Ms Roach admitted that in order to get visitation for Z.R.’s birthday in July 2004 that she had to sign a note for the GAL promising

that she would not contact the police.<sup>3</sup> RP 824. Ms. Roach acknowledged that prior to August 2004, defendant had custody of the children and she had visitation. RP 832, 893. She admitted that she now had custody of the children, but did not know what would happen regarding defendant's visitation if he were to be convicted. RP 893-894. In the defense case, defendant also adduced evidence regarding the nature of the divorce proceedings through the GAL. The GAL testified that he was skeptical about the charges because of his knowledge of the divorce proceedings and because Ms. Roach had a "history of influencing the children." RP 1136-1139. He also testified that her reputation in the community for truthfulness and veracity around May 2004 was "bad." RP 1095.

In short, defendant fails to demonstrate any abuse of discretion in the court's evidentiary rulings. In light of the weakness of the impeachment evidence adduced in the proffer and the other means that defendant had to impeach Ms. Roach, the court acted within its discretion in limiting the scope of cross-examination. Moreover, because Ms. Roach's testimony was not critical to the State's case, defendant cannot show that - had the court allowed the questioning - the outcome of the trial would have been different. Thus, any error would be harmless.

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<sup>3</sup> Defense had convinced the court to allow this letter to be admitted into evidence because the GAL had required that Ms. Roach sign the letter. RP 394-395. However, the GAL testified that he wanted the letter only because the proposed visitation wasn't on the written schedule and that he had no input over the content of the letter. RP 1061.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the conviction below.

DATED: FEBRUARY 20, 2007

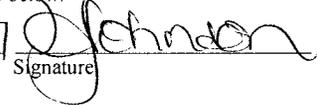
GERALD A. HORNE  
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Prosecuting Attorney



KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/20/07   
Date Signature

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STATE OF WASHINGTON  
BY  DEPUTY

**APPENDIX "A"**

*Jury Instruction No. Nine*

INSTRUCTION NO. 9

A person commits the crime of assault in the second degree when under circumstances not amounting to assault in the first degree he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm.

## **APPENDIX “B”**

*Jury Instruction No. 14*

INSTRUCTION NO. 14

To convict the defendant of the crime of assault of a child in the second degree, each of the following elements must be proved beyond a reasonable doubt:

- (1) That during the period between the 10th day of August, 2004 and the 14th day of August, 2004, the defendant committed the crime of assault in the second degree against Z.R.;
- (2) That the defendant was eighteen years of age or older and Z.R. was under the age of thirteen; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

## **APPENDIX “C”**

*Jury Instruction No. Seven*

INSTRUCTION NO. 7

An assault is an intentional touching or striking of another person with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive, if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.