

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 39598-3-II
)	(Consolidated)
)	
vs.)	STATEMENT OF ADDITIONAL
)	AUTHORITIES
MIKE MCCREVEN,)	
)	
Appellant.)	
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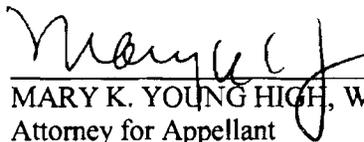
Pursuant to RAP 10.8, appellant respectfully cites the following authority regarding assignment of error 13 raised in the brief of appellant Carl Smith (pp. 2, 81-85), and adopted by appellant McCreven by December 06, 2010 RAP 10.1(g)(2) notice:

State v. Ryan, __ Wn.App. __, __ P.3d __, 2011 WL 1239796 at *1-3 (April 4, 2011.) (erroneous instruction requiring jury to be unanimous as to special verdict is manifest constitutional error and is not considered harmless even where jury expresses no confusion and returns a unanimous verdict in the affirmative)

A copy of the case is attached for this Court's convenience.

DATED this 20th day of April, 2011.

Respectfully Submitted,



MARY K. YOUNG HIGH, WSBA# 20123
Attorney for Appellant

I, Mary Benton, a person over the age of 18 years of age, electronically served the Pierce County Prosecutor's office Appeals division, 930 Tacoma Ave S, Room 946 Tacoma, WA 98402 a true copy of the document to which this certificate is affixed, on April 21, 2011 and electronically to appellate counsel Lise Ellner, Kathryn Russell Selk and Jennifer Winkler and by first class mail to Mike McCreven. DOC# 802726, Washington State Penitentiary, 1313 N 13th Ave, WallaWalla, Wa, 99362

Mary E Benton
Signature

Westlaw

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Only the Westlaw citation is currently available.

Court of Appeals of Washington,
 Division I.
 STATE of Washington, Respondent,
 v.
 George W. RYAN, Appellant.

No. 64726-1-1.
 April 4, 2011.

Background: Defendant was convicted in the Superior Court, King County, Richard D. Eadie, J., of assault and felony harassment. Defendant appealed.

Holdings: The Court of Appeals, Ellington, J., held that:

- (1) jury unanimity was not required for determination that there was reasonable doubt as to aggravating circumstances to support enhanced sentences;
- (2) error in instructing jury that jury unanimity was required for finding that there was reasonable doubt as to aggravating circumstance was manifest and of constitutional magnitude;
- (3) error in instructing jury that jury unanimity was required for finding that there was reasonable doubt as to aggravating circumstance was not harmless;
- (4) evidence that victim had stabbed defendant in prior incident two years prior was not relevant to establish victim did not have reasonable fear of defendant;
- (5) evidence was not to determination of victim's bias and whether she had motive to fabricate testimony regarding his threats to cut and kill victim; and
- (6) victim's testimony that she could not "physically do too much" to defendant did not open door to evidence that, two years prior, victim had been arrested for stabbing defendant.

Convictions affirmed; sentences vacated; remanded.

West Headnotes

[1] Criminal Law 110  **872.5**

110 Criminal Law
 110XX Trial
 110XX(K) Verdict
 110k872.5 k. Assent of Required Number of Jurors. Most Cited Cases

Jury unanimity was not required for determination that there was reasonable doubt as to aggravating circumstances to support enhanced sentences for assault and felony harassment. West's RCWA 9.94A.537(3).

[2] Criminal Law 110  **327**

110 Criminal Law
 110XVII Evidence
 110XVII(C) Burden of Proof
 110k326 Burden of Proof
 110k327 k. Extent of Burden on Prosecution. Most Cited Cases

Criminal Law 110  **561(1)**

110 Criminal Law
 110XVII Evidence
 110XVII(V) Weight and Sufficiency
 110k561 Reasonable Doubt
 110k561(1) k. In General. Most Cited Cases

Criminal Law 110  **872.5**

110 Criminal Law
 110XX Trial
 110XX(K) Verdict
 110k872.5 k. Assent of Required Number of Jurors. Most Cited Cases

The State's burden in a criminal case is to prove to the jury beyond a reasonable doubt that its allegations are established; if the jury cannot unanimously agree that the State has done so, the State has necessarily failed in its burden.

[3] Criminal Law 110  **798(.5)**

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110 Criminal Law
 110XX Trial
 110XX(G) Instructions: Necessity, Requisites, and Sufficiency
 110k798 Manner of Arriving at Verdict
 110k798(.5) k. In General; Unanimity.
 Most Cited Cases

Criminal Law 110 ↪ 1038.1(3.1)

110 Criminal Law
 110XXIV Review
 110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
 110XXIV(E)I In General
 110k1038 Instructions
 110k1038.1 Objections in General
 110k1038.1(3) Particular Instructions
 110k1038.1(3.1) k. In General.
 Most Cited Cases

Trial court's error in instructing jury that jury unanimity was required for finding that there was reasonable doubt as to aggravating circumstance, as grounds for enhancing sentences for assault and felony harassment, was manifest and of constitutional magnitude, and therefore permitted defendant to assert error for first time on direct appeal. West's RCWA 9.94A.537(3).

[4] Criminal Law 110 ↪ 1030(1)

110 Criminal Law
 110XXIV Review
 110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
 110XXIV(E)I In General
 110k1030 Necessity of Objections in General
 110k1030(1) k. In General. Most Cited Cases

Criminal Law 110 ↪ 1038.1(1)

110 Criminal Law
 110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
 110XXIV(E)I In General
 110k1038 Instructions
 110k1038.1 Objections in General
 110k1038.1(1) k. In General.

Most Cited Cases

Ordinarily, failure to timely object waives the claim on appeal, and this is so even with respect to instructional errors.

[5] Criminal Law 110 ↪ 1030(2)

110 Criminal Law
 110XXIV Review
 110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
 110XXIV(E)I In General
 110k1030 Necessity of Objections in General
 110k1030(2) k. Constitutional Questions. Most Cited Cases

A defendant may raise an issue for the first time on direct appeal if the error is both manifest and of constitutional dimension.

[6] Criminal Law 110 ↪ 1172.1(2)

110 Criminal Law
 110XXIV Review
 110XXIV(Q) Harmless and Reversible Error
 110k1172 Instructions
 110k1172.1 In General
 110k1172.1(2) k. Particular Instructions. Most Cited Cases

Trial court's error in instructing jury that jury unanimity was required for finding that there was reasonable doubt as to aggravating circumstance, as grounds for enhancing sentences for assault and felony harassment, was not harmless; jury unanimity was required only for affirmative finding of aggravating circumstance, and instruction implicated due process considerations and left jury without way to express reasonable doubt by fewer than all jurors. U.S.C.A. Const.Amend. 14; West's RCWA 9.94A.537(3).

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[7] Criminal Law 110 ⚡1139

110 Criminal Law
 110XXIV Review
 110XXIV(L) Scope of Review in General
 110XXIV(L)13 Review De Novo
 110k1139 k. In General. Most Cited
 Cases

Whether the trial court has violated the confrontation clause is a question of law, reviewed de novo. U.S.C.A. Const.Amend. 6.

[8] Criminal Law 110 ⚡661

110 Criminal Law
 110XX Trial
 110XX(C) Reception of Evidence
 110k661 k. Necessity and Scope of Proof.
 Most Cited Cases

Criminal Law 110 ⚡662.1

110 Criminal Law
 110XX Trial
 110XX(C) Reception of Evidence
 110k662 Right of Accused to Confront
 Witnesses
 110k662.1 k. In General. Most Cited
 Cases

Criminal Law 110 ⚡662.7

110 Criminal Law
 110XX Trial
 110XX(C) Reception of Evidence
 110k662 Right of Accused to Confront
 Witnesses
 110k662.7 k. Cross-Examination and
 Impeachment. Most Cited Cases

The rights to present a defense and to confront and cross-examine adverse witnesses are guaranteed by both the federal and state constitutions. U.S.C.A. Const.Amend. 6; West's RCWA Const. Art. 1, § 22.

[9] Criminal Law 110 ⚡338(1)

110 Criminal Law
 110XVII Evidence
 110XVII(D) Facts in Issue and Relevance
 110k338 Relevancy in General
 110k338(1) k. In General. Most Cited
 Cases

Criminal Law 110 ⚡662.7

110 Criminal Law
 110XX Trial
 110XX(C) Reception of Evidence
 110k662 Right of Accused to Confront
 Witnesses
 110k662.7 k. Cross-Examination and
 Impeachment. Most Cited Cases

A criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense, and the right to cross-examine adverse witnesses is not absolute. U.S.C.A. Const.Amend. 6 ; West's RCWA Const. Art. 1, § 22.

[10] Criminal Law 110 ⚡662.1

110 Criminal Law
 110XX Trial
 110XX(C) Reception of Evidence
 110k662 Right of Accused to Confront
 Witnesses
 110k662.1 k. In General. Most Cited
 Cases

Relevant evidence may be excluded without offending the defendant's confrontation rights if the State has a compelling interest in precluding evidence so prejudicial as to disrupt the fairness of the trial. U.S.C.A. Const.Amend. 6; West's RCWA Const. Art. 1, § 22.

[11] Assault and Battery 37 ⚡83(4)

37 Assault and Battery
 3711 Criminal Responsibility
 37II(B) Prosecution
 37k81 Evidence in General
 37k83 Admissibility
 37k83(4) k. Provocation, Justifica-

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tion, or Self-Defense. Most Cited Cases

Extortion and Threats 165 ⚡ **32**

165 Extortion and Threats

165II Threats

165k32 k. Evidence. Most Cited Cases

Evidence that victim had stabbed defendant in prior incident two years prior was not relevant, in trial for assault and felony harassment, to establish victim did not have reasonable fear of defendant, since instant charges were based on defendant, and not victim, being in possession of knife and threatening to cut and kill her. ER 401.

[12] Witnesses 410 ⚡ **374(1)**

410 Witnesses

410IV Credibility and Impeachment

410IV(C) Interest and Bias of Witness

410k374 Competency of Impeaching Evidence

410k374(1) k. In General. Most Cited Cases

Evidence that victim had previously been arrested for stabbing defendant was not relevant, in trial for assault and felony harassment, to determination of victim's bias and whether she had motive to fabricate testimony regarding his threats to cut and kill her; arrest occurred two years prior, victim had been released without charges, no prosecutor had ever spoken to her about incident, circumstances suggested that she acted in self-defense, and there was no evidence suggesting that victim was or believed herself to be in peril of prosecution. ER 401.

[13] Witnesses 410 ⚡ **269(12)**

410 Witnesses

410III Examination

410III(B) Cross-Examination

410k269 Limitation of Cross-Examination to Subjects of Direct Examination

410k269(2) Limitation as to Particular Subjects of Inquiry

410k269(12) k. Bodily Health,

Physical Condition, Mental Condition, or Intoxication. Most Cited Cases

Victim's testimony that she could not "physically do too much" to defendant did not open door to evidence on cross-examination that, two years prior, victim had been arrested for stabbing defendant, in trial for assault and felonious harassment; rather, testimony indicated that victim was capable of causing physical harm to defendant when she was armed with weapon. ER 401.

[14] Witnesses 410 ⚡ **269(1)**

410 Witnesses

410III Examination

410III(B) Cross-Examination

410k269 Limitation of Cross-Examination to Subjects of Direct Examination

410k269(1) k. In General. Most Cited Cases

The "open door rule" allows a party to introduce otherwise inadmissible evidence on cross-examination when a witness testifies about it on direct, but the evidence must still be relevant to some issue at trial.

[15] Criminal Law 110 ⚡ **1036.1(9)**

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1036 Evidence

110k1036.1 In General

110k1036.1(9) k. Exclusion of Evidence. Most Cited Cases

Defendant waived claim on direct appeal that evidence that victim had previously been arrested for stabbing defendant two years prior was relevant to establish dynamics of relationship, in trial for assault and felony harassment, where he did not raise claim at trial.

Appeal from King County Superior Court; Honor-

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able Richard D. Eadie, J.Christopher Gibson, Nielsen Broman & Koch PLLC, Seattle, WA, Harlan R. Dorfman, Attorney at Law, New Westminster, BC, for Appellant.

George W. Ryan, Walla Walla, WA, pro se.

Brian Martin McDonald, King County Prosecuting Attorney, Seattle, WA, for Respondent.

PUBLISHED IN PART

ELLINGTON, J.

*1 ¶ 1 Under *State v. Bashaw*, it is manifest constitutional error to instruct a jury that it must be unanimous in order to find the State failed to prove either an aggravating factor or the facts supporting a sentencing enhancement.^{FN1} Because the jury was so instructed in this case, we vacate George Ryan's exceptional sentences. We otherwise affirm.

BACKGROUND

¶ 2 The charges in this case arose from an incident in June 2009. George Ryan and Evette White had been engaged in a long and tumultuous relationship marked by repeated breakups and numerous reports to police of domestic violence. On this occasion, Ryan had been drinking. He was talking with White as he toyed with a knife. When White indicated she wished to end their relationship, Ryan pointed the knife at her, bringing it within a few inches of her face, and threatened to cut and to kill her. He told her their two daughters would not have a mother.

¶ 3 Instead, Ryan accidentally cut his own leg and then left the house. White immediately locked the door, hid in another room and called police, who arrived in seconds.

¶ 4 Based on information from White, officers found Ryan laying under a tarp in a nearby vacant lot. He appeared intoxicated and had a cut on his leg. He claimed he had not been involved in any incident and had not been in the house for three days. During a search, officers found the knife on Ryan's person.

¶ 5 The State charged Ryan with second degree assault and felony harassment. The State alleged two aggravating circumstances: that the offense involved domestic violence and there was evidence of a pattern of abuse manifested by multiple incidents over a prolonged period. In addition, the State alleged Ryan committed the felony harassment offense while armed with a deadly weapon.

¶ 6 The jury found Ryan guilty as charged. The court imposed exceptional sentences of 70 months on the second degree assault conviction and 60 months on the felony harassment conviction. Ryan appeals, challenging the propriety of the jury instructions on the special verdicts for sentencing and the exclusion of certain evidence at trial. We address the jury instructions in the published portion of this opinion.

DISCUSSION

Special Verdicts

[1] ¶ 7 The court instructed the jury to use special verdict forms on the sentencing issues, and that it must be unanimous to answer the special verdicts:

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no." ^[FN2]

Ryan argues for the first time on appeal that this instruction was error.

¶ 8 In *Bashaw*, the jury had to determine whether the State had proven a fact giving rise to a sentence enhancement.^{FN3} In explaining the special verdict forms, the trial court gave the standard unanimity instruction. Our Supreme Court held the instruction erroneous for sentencing verdicts and reversed:

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*2 Though unanimity is required to find the *presence* of a special finding increasing the maximum penalty, it is not required to find the *absence* of such a special finding. The jury instruction here stated that unanimity was required for either determination. That was error.^[FN4]

[2] ¶ 9 The instruction here was likewise error. The State's burden is to prove to the jury beyond a reasonable doubt that its allegations are established. If the jury cannot unanimously agree that the State has done so, the State has necessarily failed in its burden.^[FN5] To require the jury to be unanimous about the negative—to be unanimous that the State has not met its burden—is to leave the jury without a way to express a reasonable doubt on the part of some jurors.^[FN6]

[3][4][5] ¶ 10 Ryan did not object to the instructions below. Ordinarily, failure to timely object waives the claim on appeal.^[FN7] This is so even with respect to instructional errors.^[FN8] But an appellant may raise an issue for the first time on appeal if the error is both manifest and of constitutional dimension.^[FN9] Though the State contends the instructional error here meets neither condition, *Bashaw* compels the conclusion the error is both manifest and constitutional.

¶ 11 The State points out that neither *Goldberg* nor *Bashaw* articulated a constitutional rationale, and relies on a footnote in *Bashaw* in which the court observed that its holding is “not compelled by constitutional protections against double jeopardy ... but rather by the common law precedent of this court, as articulated in *Goldberg*.”^[FN10] The State contends this footnote establishes that the error is not of constitutional magnitude. The State also points to the *Bashaw* court's emphasis on concerns about judicial economy, cost and finality, which are not constitutional concerns.

¶ 12 In a thoughtful and thorough opinion, Division Three of this court recently came to that conclusion, holding that the same error was not of constitutional magnitude and cannot be raised for the

first time on appeal.^[FN11]

[6] ¶ 13 We reach the opposite conclusion. The *Bashaw* court strongly suggests its decision is grounded in due process. The court identified the error as “the procedure by which unanimity would be inappropriately achieved,” and referred to “the flawed deliberative process” resulting from the erroneous instruction.^[FN12] The court then concluded the error could not be deemed harmless beyond a reasonable doubt, which is the constitutional harmless error standard. The court refused to find the error harmless even where the jury expressed no confusion and returned a unanimous verdict in the affirmative.^[FN13] We are constrained to conclude that under *Bashaw*, the error must be treated as one of constitutional magnitude and is not harmless.

¶ 14 The State next contends *Bashaw* applies only to special verdicts on sentencing enhancements, not aggravating circumstances.^[FN14] The State relies on the statute governing jury determination of aggravating circumstances. Unlike statutes pertaining to sentence enhancements, which say nothing about unanimity, RCW 9.94A.537(3) states, in pertinent part: “The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory.”

*3 ¶ 15 The State reads this provision to require jury unanimity to render *any* verdict about aggravating circumstances, whether affirmative or negative. We do not.

¶ 16 Reading the quoted section together with other provisions of the statute, as we must, convinces us that unanimity is required only for an affirmative finding.^[FN15] Subsection 6 empowers the court to sentence a defendant to the maximum term of confinement “*if* the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence.”^[FN16] This language plainly contemplates the possibility that the jury will not be

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unanimous, in which case the court may not impose the aggravated sentence.

¶ 17 But the State contends the statute permits retrial if the jury is not unanimous about aggravating circumstances. The State points to the *Bashaw* court's emphasis on concerns about judicial economy, cost, and finality to support its conclusion that a nonunanimous "no" verdict was final as to sentencing enhancements, and contends these economic interests do not weigh as heavily with respect to aggravating circumstances.^{FN17} The State also points to RCW 9.94A.537(2), which empowers courts to impanel juries to retry alleged aggravating circumstances when an exceptional sentence is reversed on appeal.

¶ 18 But the amendments codified in RCW 9.94A.537(2) responded to *Blakely v. Washington*.^{FN18} after which aggravated sentences were reversed because, consistent with prior law, judges rather than juries had found the predicate facts.^{FN19} The provision reveals nothing about the legislature's intent concerning retrial in these circumstances.

¶ 19 We find no basis on which to distinguish *Bashaw*. Accordingly, we vacate Ryan's exceptional sentences and remand for further proceedings consistent with this opinion.

¶ 20 The balance of this opinion having no precedential value, the panel has determined it should not be published in accordance with RCW 2.06.040 .

FURTHER DISCUSSION

Limitation on Cross-Examination

¶ 21 Before trial, the State moved to exclude evidence related to an incident in May 2007 in which White allegedly stabbed Ryan. White was arrested, but no charges were filed. Based upon her review of the records, the prosecutor in this case believed White had had a colorable self-defense claim.

¶ 22 Ryan opposed the motion, arguing the incident was relevant to whether White reasonably feared him and because White might open the door to the subject in direct examination. The court reserved its ruling and directed counsel to raise the issue before beginning cross-examination on that topic.

¶ 23 During a break in cross-examination of White, defense counsel sought permission to inquire into the stabbing. Counsel argued White's arrest was relevant because it established bias and motivation to fabricate to curry favor with the State and was probative of whether White feared Ryan. Counsel also argued White had opened the door by testifying she ran away once when Ryan slapped her because "I can't physically do too much to George."^{FN20} The court denied Ryan's request.

*4 ¶ 24 Ryan contends the court violated his right to present a complete defense and to cross-examine witnesses by excluding evidence of the stabbing. For the first time on appeal, he argues also that the evidence was admissible to provide the jury with a complete picture of White's relationship with Ryan.

[7] ¶ 25 Whether the trial court has violated the confrontation clause is a question of law, reviewed de novo.^{FN21} We review a trial court's ruling on the admissibility of evidence for abuse of discretion, and will not disturb a court's limitation on the scope of cross-examination absent a manifest abuse of discretion.^{FN22} Abuse exists when the trial court's exercise of discretion is "manifestly unreasonable or based upon untenable grounds or reasons."^{FN23}

[8][9][10] ¶ 26 The rights to present a defense and to confront and cross-examine adverse witnesses are guaranteed by both the federal and state constitutions.^{FN24} But a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense, and the right to cross-examine adverse witnesses is not absolute.^{FN25} Even relevant evidence may be excluded without

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offending the defendant's confrontation right if the State has a compelling interest in precluding evidence so prejudicial as to disrupt the fairness of the trial.^{FN26}

¶ 27 The question here is whether evidence of the stabbing was relevant to any issue at trial. "Relevant evidence" under Evidence Rule 401 means evidence which tends to make the existence of any fact of consequence more probable or less probable. We find none of Ryan's arguments persuasive.

[11] ¶ 28 *Reasonable Fear*. Central to the charges was whether or not White had a reasonable fear that Ryan would hurt her or carry out his threat to kill her.^{FN27} Ryan contends evidence that White had once stabbed him is relevant to this question because it makes it less likely that she reasonably feared he would hurt or kill her on this occasion. But the alleged stabbing occurred more than two years before, under circumstances suggesting self-defense. Even if White stabbed Ryan without provocation, the incident has no bearing on her fear when he was the one with the knife.

[12] ¶ 29 *Bias And Motive To Fabricate*. Ryan also contends White's arrest was relevant to her bias or motive to fabricate because White may have testified for the State to avoid prosecution for the stabbing. He relies on *Davis v. Alaska*, in which the Supreme Court held the defense was entitled to cross-examine an adverse witness on his status as a probationer to demonstrate his potential bias.^{FN28}

¶ 30 In *Davis*, the witness was on probation for burglary.^{FN29} He was testifying against individuals charged with burglary for stealing a safe, which was discovered on the witness's property.^{FN30} The witness's record and probation status thus implicated both his enthusiasm to cooperate with the State and his possible motivation to fabricate in an effort to deflect suspicion of his own involvement.^{FN31}

*5 ¶ 31 This case is unlike *Davis*. White's arrest was two years before. She had been released

without charges. No prosecutor had ever spoken to her about the incident. Given the circumstances suggesting self-defense, it is unlikely any charges would ever be filed. There is no evidence from which a jury could reasonably infer that White was or believed herself to be in peril of prosecution. Evidence of White's arrest was not relevant to her bias or motivation to fabricate.

[13] ¶ 32 *Open Door*. On direct examination of White, the State was permitted to introduce evidence of six other instances of domestic violence, including one that occurred on August 4, 2003. White testified Ryan slapped her in the face, so "I [took] off running. I mean, I can't physically do too much to George."^{FN32} Ryan contends White's statement that she cannot "physically do too much" to him opened the door to evidence that she was once arrested for stabbing him.

[14] ¶ 33 The open door rule allows a party to introduce otherwise inadmissible evidence on cross-examination when a witness testifies about it on direct.^{FN33} But the evidence must still be relevant to some issue at trial.^{FN34}

¶ 34 Ryan argues the evidence was relevant to White's credibility because she denied being capable of "doing too much" to him when in fact she had once caused him serious injury. This presents no inconsistency that would undermine White's credibility. At best, the stabbing shows only that White was capable of doing Ryan physical harm when she was armed with a weapon. There is no evidence White had a weapon during the August 4, 2003 episode or the incident giving rise to the current charges.

[15] ¶ 35 *Dynamics Of Relationship*. The court allowed the State to present evidence of a number of instances of domestic violence based upon on *State v. Magers*, which held that "prior acts of domestic violence, involving the defendant and the crime victim, are admissible in order to assist the jury in judging the credibility of a recanting victim."^{FN35} Ryan argues that evidence of the

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stabbing was relevant for the same purpose. But Ryan never made this argument below, and has therefore waived it.^{FN36} Further, White was not a recanting victim.

CONCLUSION

¶ 36 Because the stabbing incident was not relevant, its exclusion did not deprive Ryan of his right to present a defense or to confront adverse witnesses.^{FN37} The State's interest in seeking a just trial by preventing evidence of little probative value from distracting the jurors was sufficient to justify exclusion of the evidence.^{FN38} The court's ruling excluding the evidence and limiting cross-examination were not manifestly unreasonable and present no abuse of discretion.

¶ 37 We affirm Ryan's convictions. Because of the instructional errors addressed above, we vacate his exceptional sentence and remand for further proceedings.

WE CONCUR: APPELWICK and COX, JJ.

FN1. 169 Wash.2d 133, 145–48, 234 P.3d 195 (2010).

FN2. Clerk's Papers (CP) at 79.

FN3. 169 Wash.2d at 145, 234 P.3d 195.

FN4. *Id.* at 147, 234 P.3d 195 (citing *State v. Goldberg*, 149 Wash.2d 888, 893, 72 P.3d 1083 (2003)).

FN5. *Id.*

FN6. In *Goldberg*, the jury was instructed to answer “no” if it could not unanimously answer “yes”. *Goldberg*, 149 Wash.2d at 893, 72 P.3d 1083 (“In order to answer the special verdict form ‘yes’, you must unanimously be satisfied beyond a reasonable doubt that ‘yes’ is the correct answer. If you have a reasonable doubt as to the question, you must answer ‘no.’” (emphasis omitted)). The Supreme Court vacated the

exceptional sentence in that case not because of a faulty instruction but because of the trial court's insistence that the jury be unanimous to answer “no.” *Id.* at 894, 72 P.3d 1083.

FN7. RAP 2.5(a); *State v. Kirkman*, 159 Wash.2d 918, 926, 155 P.3d 125 (2007).

FN8. *See, e.g., State v. Williams*, 159 Wash.App. 298, 312–13, 244 P.3d 1018 (2011).

FN9. *State v. O'Hara*, 167 Wash.2d 91, 98, 217 P.3d 756 (2009).

FN10. *Bashaw*, 169 Wash.2d at 146 n. 7, 234 P.3d 195 (citation omitted).

FN11. *State v. Nunez*, No. 28259–7–III, 2011 WL 505335 at *5–*16 (Wash.Ct.App. February 15, 2011).

FN12. *Bashaw*, 169 Wash.2d at 147, 234 P.3d 195.

FN13. *Id.* at 147–48, 234 P.3d 195; *see also State v. Brown*, 147 Wash.2d 330, 341, 58 P.3d 889 (2002) (The “test for determining whether a constitutional error is harmless [is] ‘whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” (internal quotation marks omitted) (quoting *Neder v. United States*, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999))).

FN14. The State does not concede that *Bashaw* correctly states the law with respect to sentencing enhancements, but acknowledges this court is bound by the decision.

FN15. *In re Pers. Restraint of Skylstad*, 160 Wash.2d 944, 948, 162 P.3d 413 (2007) (“When we read a statute, we must

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read it as a whole and give effect to all language used.”).

FN16. RCW 9.94A.537(6) (emphasis added).

FN17. *Bashaw*, 169 Wash.2d at 146–47, 234 P.3d 195 (“Retrial of a defendant implicates core concerns of judicial economy and finality. Where, as here, a defendant is already subject to a penalty for the underlying substantive offense, the prospect of an additional penalty is strongly outweighed by the countervailing policies of judicial economy and finality.”).

FN18. 542 U.S. 296, 303–04, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (holding the Sixth Amendment requires the State to prove to the trier of fact beyond a reasonable doubt facts supporting an exceptional sentence).

FN19. LAWS OF 2007, ch. 205, §§ 1, 2.

FN20. Report of Proceedings (RP) (Nov. 17, 2009) at 328.

FN21. *State v. Jones*, 168 Wash.2d 713, 723–24, 230 P.3d 576 (2010).

FN22. *State v. Darden*, 145 Wash.2d 612, 619, 41 P.3d 1189 (2002); *State v. Campbell*, 103 Wash.2d 1, 20, 691 P.2d 929 (1984).

FN23. *Darden*, 145 Wash.2d at 619, 41 P.3d 1189 (quoting *State v. Powell*, 126 Wash.2d 244, 258, 893 P.2d 615 (1995)).

FN24. U.S. CONST. amend VI; WASH. CONST. art. 1, § 22; *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *State v. Hudlow*, 99 Wash.2d 1, 15, 659 P.2d 514 (1983).

FN25. *Hudlow*, 99 Wash.2d at 15, 659 P.2d 514; *Darden*, 145 Wash.2d at 620, 41 P.3d 1189; see also ER 611(b) (court has discretion to determine scope of cross-examination).

FN26. *Hudlow*, 99 Wash.2d at 15, 659 P.2d 514.

FN27. See CP at 69 (jury instruction defining “assault” as an act done with intent to create fear that “in fact creates in another a reasonable apprehension and imminent fear of bodily injury”); CP at 72 (to convict instruction on felony assault requiring jury to find that “the words or conduct of the defendant placed Evette White in reasonable fear that the threat to kill would be carried out”).

FN28. 415 U.S. 308, 317–18, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

FN29. *Id.* at 311.

FN30. *Id.* at 309.

FN31. *Id.* at 313–14, 317.

FN32. RP (Nov. 17, 2009) at 328.

FN33. *State v. Stockton*, 91 Wash.App. 35, 40, 955 P.2d 805 (1998).

FN34. *Id.*

FN35. 164 Wash.2d 174, 186, 189 P.3d 126 (2008).

FN36. See *State v. Jordan*, 39 Wash.App. 530, 539, 694 P.2d 47 (1985) (defendant failed to preserve review based on one evidentiary rule by objecting based on another).

FN37. See *Hudlow*, 99 Wash.2d at 15–16, 659 P.2d 514.

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FN38. *Id.*

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