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STATE OF WASHINGTON
BY: 

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NO. 41307-8-II

STATE OF WASHINGTON,

Respondent,

vs.

KEITH BERLIN

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 10-1-00069-0

BRIEF OF RESPONDENT

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SERVICE	Mr. Eric Nielsen Nielsen, Broman & Koch 1908 E. Madison Street Seattle, WA 98122	This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left. I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: June 27, 2011, at Port Angeles, WA 
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I. ISSUE STATEMENTS:

1. Did the trial court err when it prohibited the defense from introducing allegations that the victim was biased/prejudiced against the defendant when (1) the allegations were not substantiated by admissible evidence, (2) the allegations were merely argumentative and speculative, (3) the late and surprising testimony offered to corroborate the allegations was only minimally relevant regarding the issue of bias, and (4) the trial court's ruling was harmless?
2. Did the trial court commit reversible error when it failed to instruct the jury that it need not be unanimous to answer two special verdict forms when (1) the defense failed to object to the challenged instruction, (2) the flawed instruction did not result in a manifest error affecting a constitutional right, and (3) the flawed instruction did not prejudice the defendant?

II. STATEMENT OF THE CASE:

Facts:

In October 2009, Keith Berlin (the defendant) lived in a small trailer in Port Angeles, Washington. RP (9/14/2010) at 79. Berlin invited Jacob Griffith to live with him until Griffith could get back on his feet. RP (9/14/2010) at 79; RP (9/15/2010) at 307-08, 352-53. While Griffith did not pay monthly rent, he occasionally gave Berlin a portion of the financial assistance he received from his family. RP (9/14/2010) at 109. However, Griffith often used his food stamps to purchase groceries for the two roommates. RP (9/14/2010) at 109; RP (9/15/2010) at 316, 353. The two roommates had good days and bad days together, but for the most part

their relationship was cordial. RP (9/14/2010) at 110; RP (9/15/2010) at 354.

On February 15, 2010, Griffith woke around 6:00 p.m. RP (9/14/2010) at 80. Griffith headed to the kitchen to find something to eat when he saw Berlin sitting at a computer desk and speaking on the phone. RP (9/14/2010) at 83, 111. When Berlin hung up the telephone, the two roommates exchanged a few abrupt words with each other, which prompted Berlin to exit the room in disgust.¹ RP (9/14/2010) at 84, 111, 113-15.

Griffith thought Berlin's behavior was odd so he followed Berlin to his bedroom to ask him what was wrong. RP (9/14/2010) at 85-86, 111-14. Berlin accused Griffith of being rude and disrespectful because Griffith had interrupted his telephone call. RP (9/14/2010) at 86, 112. Annoyed, Griffith returned to the living room and sat on the couch. RP (9/14/2010) at 86.

Griffith called his girlfriend, Erika Delgado. RP (9/14/2010) at 86-87, 132; RP (9/15/2010) at 324. Griffith told her something was bothering Berlin. RP (9/14/2010) at 87. Berlin then hurried into the room and glared

¹ Griffith may have asked Berlin why he was drinking alcohol, after the two had previously promised one another that they were going to stop drinking and partying, in order to lead a healthier lifestyle. RP (9/14/2010) at 115-16.

at Griffith. RP (9/14/2010) at 87. Griffith ended the call so he could speak with Berlin. RP (9/14/2010) at 87.

Again, Berlin accused Griffith of being rude and disrespectful. RP (9/14/2010) at 87. In response, Griffith accused Berlin of the same and the argument continued.² RP (9/14/2010) at 87-88. Berlin threatened to call Griffith's grandmother, and Griffith threatened to call Berlin's mother. RP (9/14/2010) at 89, 117-18. Berlin then informed Griffith that he was going to bed and wanted to be left alone. RP (9/14/2010) at 89.

Griffith phoned Delgado a second time. RP (9/14/2010) at 89, 132. Griffith told her he was having difficulty with Berlin and asked if he could move in with her. RP (9/14/2010) at 89, 134. Berlin heard Griffith speaking on the phone and, again, exited his bedroom. RP (9/14/2010) at 90. Berlin accused Griffith of calling his mother. RP (9/14/2010) at 90. Griffith replied that he was only speaking to his girlfriend. RP (9/14/2010) at 90.

Berlin demanded that Griffith move-out. RP (9/14/2010) at 90. Griffith informed him that he was trying to make such arrangements, but he could not leave that night. RP (9/14/2010) at 90. Berlin said Griffith had to be out that night. RP (9/14/2010) at 90.

² Berlin was intoxicated at the time of the argument. RP (9/14/2010) at 89; RP (9/15/2010) at 349-52, 367-69.

Griffith threatened to involve Berlin's mother, claiming she would allow him to stay one more night. RP (9/14/2010) at 91. The two roommates continued to argue. RP (9/14/2010) at 91. Berlin eventually retreated to his bedroom. RP (9/14/2010) at 91.

Soon after, Berlin exited the trailer. RP (9/14/2010) at 92. Griffith observed Berlin get into his car. RP (9/14/2010) at 92. Griffith warned Berlin that he had been drinking and should not drive. RP (9/14/2010) at 93. The two continued to bicker with each other until Griffith went back inside the trailer. RP (9/14/2010) at 94.

When Berlin came back inside the trailer, Griffith got off the couch, walked over to Berlin, grabbed his shoulders, and asked him what was wrong. RP (9/14/2010) at 94. According to Griffith, he proceeded to hug Berlin in an effort to calm him down. RP (9/14/2010) at 95. According to Berlin, Griffith threatened to kill him. RP (9/15/2010) at 332.

Berlin pushed Griffith away. RP (9/14/2010) at 95. Berlin warned Griffith never to touch him again. RP (9/14/2010) at 95, 122. Berlin threatened to call the police. RP (9/14/2010) at 95, 122. Griffith then returned to his seat on the couch and called his girlfriend. RP (9/14/2010) at 95.

Griffith informed Berlin that he was going to move out that night. RP (9/14/2010) at 95-96. Griffith also told Berlin that Delgado would be picking him up the next morning. RP (9/14/2010) at 97. Berlin did not believe Griffith. RP (9/14/2010) at 97.

Griffith put Delgado on the speakerphone so Berlin could confirm the report. RP (9/14/2010) at 97, 135; RP (9/15/2010) at 325-26. Delgado confirmed Griffith could live with her and that she was traveling to Port Angeles the next morning to pick him up. RP (9/14/2010) at 98, 135, 144-45. Berlin asked if she was willing to accept Griffith, even though he had “laid hands on [him.]”³ RP (9/14/2010) at 98, 135, 143. Delgado said she was and would pick Griffith up the next morning. RP (9/14/2010) at 98, 135. Berlin said “okay” or “fine” and exited the room. RP (9/14/2010) at 98-99, 135; RP (9/15/2010) at 326.

Griffith and Delgado continued to speak with one another via the speakerphone. RP (9/14/2010) at 99, 132, 136. As the two discussed the time that Delgado would arrive in Port Angeles, there was a loud “bang.” RP (9/14/2010) at 99, 132, 136.

Berlin had silently approached Griffith from behind with a .22 caliber rifle loaded with birdshot. RP (9/14/2010) at 100; RP (9/15/2010)

³ According to Berlin, he asked Delgado if she was willing to have someone live with her that had just threatened to kill him. RP (9/15/2010) at 326.

at 333. Berlin fired the rifle 2-4 feet away from Griffith, who was sitting on the couch.⁴ RP (9/14/2010) at 100; RP (9/15/2010) at 283, 293-94. Delgado could be heard screaming over the phone. RP (9/14/2010) at 101.

Berlin dropped the rifle at the foot of the couch. RP (9/14/2010) at 101. Berlin then picked up a knife and threatened to kill Griffith.⁵ RP (9/14/2010) at 102, 137. Griffith cried for Delgado to call the police and fled the trailer. RP (9/14/2010) at 102, 124, 134, 137.

Mr. Griffith received medical treatment of “a small caliber gunshot wound to the right side of his face.” RP (9/14/2010) at 60. He suffered “a number of very small puncture wounds to the face. A number of them had gone through his sinus, and a few of them had crossed the mid portion of his nose.” RP (9/14/2010) at 61. *See also* RP (9/14/2010) at 66. Law enforcement located Berlin at his residence and placed him under arrest. RP (9/15/2010) at 342.

According to Griffith, he never threatened to kill Berlin that evening.⁶ RP (9/14/2010) at 99, 123, 128. Berlin acknowledged that Griffith was unarmed at the time of the shooting. RP (9/15/2010) at 365.

⁴ According to Berlin, he was six feet away. RP (9/15/2010) at 359.

⁵ Berlin never struck at Griffith with the knife, but brandished it while standing over him. RP (9/14/2010) at 102.

⁶ Griffith did explain that he and Berlin often made threats to one another in the past, but in the manner that brothers make against one another. RP (9/14/2010) at 123, 127-28. *See also* RP (9/15/2010) at 322.

Procedural History:

The State charged Berlin with attempted murder in the second degree and assault in the first degree. CP 99; RP (9/13/2010) at 10.

Prior to trial, the State moved the superior court to preclude the defense from introducing an out-of-court statement written by Berlin's deceased mother.⁷ RP (9/13/2010) at 26-27. This written statement alleged Griffith had solicited bribes from Berlin's mother in exchange that (1) he recommend a lenient sentence, (2) he agree not to file a civil suit, and (3) he testify that the defendant did not know the gun was loaded and shot him by accident.⁸ Exhibit 55. The defense argued that it had a "good faith basis to inquire of Mr. Griffith whether he in fact solicited Mr. Berlin's mother for money in order to change or shape his testimony." RP (9/13/2010) at 28. The deputy prosecutor expressed her concern that if the victim denied soliciting bribes the allegation would be "basically out there in front of the jury, and I don't have a way to amend that." RP (9/13/2010) at 29.

The trial court reserved its ruling regarding the alleged evidence of bias:

⁷ The defendant's mother died August 17, 2010. RP (9/13/2010) at 27, 30. The mother provided the defense with a written statement on May 27, 2010. Exhibit 55.

⁸ The defendant's mother refused to cooperate with the State's investigation to explore the veracity of the allegations. RP (9/13/2010) at 28-30

My concern yesterday was there's no way, one way or the other to substantiate that since Mrs. Berlin is now deceased. And I believe it would be inappropriate to suggest to the jury that a witness is willing to sell his testimony without the ability to substantiate such a suggestion or an ability to rebut or disprove it. I think the jury is left only with the ability to speculate and to draw conclusions without any proof or substance to the issue.

So it appears to me the proper way to proceed – and I think this also, if you look at the rules in regard to impeachment and – on bias and so forth that if you're using external – not external but extrinsic evidence of a prior act to do that, then if a witness gets up and says, no, it didn't happen, that's the end of the inquiry, at least on impeachment purposes.

So it seems to me that Mr. Griffith, I think we can call Mr. Griffith outside the presence of the jury. Mr. Oakley can ask him the question he wants to ask him. If he says yes, then I think it's open for further inquiry in front of the jury. If he says no, then I'm not going to allow you to ask him on cross-examination because there's no way, as I said, to substantiate that. It's basically thrown out there for the jury to speculate on, and I don't think on that basis it's even relevant if the jury just has to speculate on the issue.

RP (9/14/2010) at 50-51. *See also* RP (9/13/2010) at 31. The defense objected to the trial court's ruling. RP (9/14/2010) at 53.

When the defense claimed they could substantiate the allegations apart from Griffith's testimony, *see* RP (9/14/2010) at 53, the trial court inquired further:

The Court: All right. And your position is really you don't have anything other than a hearsay statement by

the mother and anything she might have said to you or anybody else about it?

Mr. Oakley: That's correct.

The Court: It'd all be hearsay? Correct?

Mr. Oakley: Yes, and we believe that's a good faith basis.

The Court: Well, I'm not arguing with the fact that you've raised the issue on good faith. I mean, I think you've got – you've got the statement by her. I guess my issue is there's no way to prove it at this point and no way to present any testimony to substantiate one way or the other, disprove it or prove it without hearsay testimony, which would be improper.

So just to raise the question, it sounds like a “are you still beating your wife” type issue. I mean, there's no way to say – to get over that, and it's pointing something to the jury that I don't think is – unless you've got something to substantiate it with, I don't think it's proper to bring it because it just causes speculation on their [the jurors] part.

RP (9/14/2010) at 53-54. The trial followed this inquiry. RP (9/14/2010) at 54.

Before Griffith testified, the trial court excused the jury. RP (9/14/2010) at 72. The defense then examined the witness. RP (9/14/2010) at 75-78. Griffith admitted he had stayed in contact with the defendant's mother after the incident, often communicating his hope that Berlin would not be punished too harshly. RP (9/14/2010) at 76. However, Griffith denied that (1) he offered to sign a written statement asking the Court not

to impose a maximum sentence, (2) he promised to testify that the defendant believed the gun was empty, and (3) he solicited bribes to change his testimony at trial. RP (9/14/2010) at 76-77. After Griffith denied the mother's out-of-court allegations, the trial court prohibited the defense from making any inquiry into the subject during cross-examination. RP (9/14/2010) at 77. The defense objected to the ruling. RP (9/14/2010) at 78. After Griffith testified, both the State and the defense excused him from the proceeding.⁹ RP (9/14/2010) at 130.

On the third day of trial, the defense informed the court of a new development:

Yesterday evening I found – I checked my cell phone and found that I had received two phone calls at approximately between 5:30 and 6:30 yesterday evening from my clients' (sic) siblings asking why we weren't calling Robert Haines, our client's cousin, as a witness because he had information regarding Mr. Griffith. ...

I hadn't heard of Mr. Haines before, so I decided to call back the number at approximately 8:30 yesterday evening. I spoke to Mr. Haines. Mr. Haines told me that he was familiar with Mr. Griffith, and Mr. Griffith was a very manipulative person and would manipulate Mr. Berlin.

⁹ During motions *in limine* pertaining to allegations that the victim regularly used methamphetamine, *see* RP (9/13/2010) at 23-26, the defense informed the court that it might want Griffith to stay in attendance after his testimony. RP (9/13/2010) at 26. Because the victim resided outside the area, the State informed the trial court that the defense would need to make arrangements for his hotel and transportation if it wanted him to remain in the area throughout the trial. RP (9/13/2010) at 26.

Mr. Haines also told me that in May he was visiting his aunt, Evelyn Berlin, who is our client's deceased mother, and – in May, and she received a phone call from Mr. Griffith. Mr. – Mrs. Berlin was very hard of hearing so she had Mr. Haines listen to the phone call, and Mr. Griffith said that he offered to change his testimony in exchange for \$1,500.

RP (9/15/2010) at 191-92. Despite the several months counsel had worked the case, he claimed he had no prior knowledge of Haines or this “surprise” testimony. RP (9/15/2010) at 192-93.

The State expressed its frustration:

You can imagine that I'm not happy. I don't even – I (inaudible) the victim is still in town. He had a bus to catch. And it would have been nice, if this was going to be offered, if I at least had the opportunity to have him available to either refute or deny these kind of statements. It puts me in a very, very bad position (inaudible).

RP (9/15/2010) at 192. The trial court, also, relayed its frustration:

The Court: Well, why wasn't it provided? That's what I want to know. I want to know why it wasn't provided – everybody knew about this situation. I'm not blaming the attorneys for this at this point. But why didn't somebody come forward and indicate that this was going on? I mean, everybody knew about it, and all of a sudden we've got an individual that's left – who's testified and left and could counter this to some degree or have some type of response. Now he's gone up in Bellingham, and we're presenting somebody that nobody's talked to until this morning.

Mr. Oakley: I don't know – I have no answer for the Court's question.

The Court: Even in your discussions with Mr. Berlin's mother, she never mentioned the fact that this individual was there and that she had put him on the phone?

Mr. Oakley: Not to me, your Honor.

The Court: Anything in her statement that says that? You said you had a written statement.

Mr. Oakley: Yes.

Ms. Lundwall. Just to clarify, is there indication when in May this phone call happened?

Mr. Oakley: No. He wasn't – he couldn't be any more specific than that.

Ms. Lundwall: Your Honor?

The Court: Let me finish reading, please.

Ms. Lundwall: Yes, sir.

The Court: At the end of the statement it says, "My daughter Kathy was present during one of Jacob's phone calls. My granddaughter Kindra was present during another one." And who is this, this Mr. Hahn?

Mr. Oakley: Haines.

The Court: Haines? And he was supposedly present – even though she didn't mention him, he was supposedly present during the 5/14 call?

Mr. Oakley: I don't know, your Honor.

RP (9/15/2010) at 193-94. The State emphasized the defense had been investigating the alleged phone calls since April 29, 2010, and had

instructed the defendant's mother to keep track of the dates Griffith allegedly called. RP (9/15/2010) at 196. The State continued:

It appears incredibly convenient all of a sudden to have this witness appear in the middle of trial with this kind of testimony, especially since she [the mother] appears to be very careful as to say who was around, who heard. And as far as being hard of hearing, she seems to be able to take her own phone calls and recount what was said.

RP (9/15/2010) at 196. The trial court refused to reconsider its earlier decision, reasoning it needed more information regarding Haines' proffered testimony. RP (9/15/2010) at 196.

After interviewing Haines¹⁰, the defense made the following offer of proof:

Mr. Oakley: Pretty much what I'd said. He [Haines] was visiting his aunt when Mr. Griffith phoned. Mr. Griffith offered or – offered to alter his testimony in exchange for \$1,500.

The Court: Well, what did he say and what altered his testimony? Did he go into any further detail than that?

Mr. Oakley: He would say that Mr. Berlin didn't mean to shoot or hurt him and that a sentence of three to five years would be appropriate.

The Court: Okay. So it was – apparently, looking at Ms. Berlin's testimony, then it was not the May 14...

Mr. Oakley: Um –

¹⁰ Haines has a criminal record, which includes a crime of dishonesty. RP (9/15/2010) at 375, 380.

The Court: Because she never mentions \$1,500 there.

Mr. Oakley: Well, your Honor, this is his recollection four months later. He didn't write notes. He didn't make a statement.

The Court: Oh, he got on the telephone line with Mr. Griffith and actually spoke with Mr. Griffith?

Mr. Oakley: No, your Honor. My understanding is that – after speaking to him is that because Mrs. Berlin was hard of hearing, she turned the volume on her phone all the way up and he could hear it.

The Court: Okay. So he overheard a conversation about \$1,500 and changing the sentencing? Was that part of it?

Mr. Oakley: Yes.

The Court: His recommendation with regard to sentencing?

Mr. Oakley: Um-hum.

The Court: Okay. Anything more than that?

Mr. Oakley: That's my recollection of the conversation. I don't – Mr. Commeree was present. I don't know if he has anything to add or any different recollection.

Mr. Commeree: As to that, no, I agree.

RP (9/15/2010) at 263-64.

The trial court precluded the defense from eliciting any testimony from Haines regarding the alleged bribes:

At this point it appears that Mr. Haines is – can only testify about the \$1,500, which is basically an agreement or an offer for Mr. – by Mr. Griffith to settle the matter and ask for leniency, basically, with Mr. Berlin if he’s convicted. I don’t see that – I see that of minor relevance to the issues here involved, you know, whether or not he’s going to give a recommendation or not a recommendation. He seems to think he’s got some authority over that. But also he’s trying to settle a civil suit against them that he might have against Mr. Berlin for being shot in the face.

So I find that to be of relevant – of minimal relevance, and I think at that point when he comes up at the last second and we find out he’s testifying when we’ve dealt with this issue since Monday – and I know Mr. Berlin’s family has been in here since Monday, and to find out today, this morning that we have another witness that’s not – nobody has even talked about – Mr. Griffith is now gone. Mr. Griffith is up in Bellingham, which is, I assume, where he lives. So I think it’s actually a late issue with a minimal relevance to that particular issue. Now, the other thing – so I’m not going to allow it. ...

[W]hat bothers me is we started this conversation on Monday. Everybody has been here. Everybody has known this has been an issue. And then suddenly we’ve got a witness that comes up after Mr. Griffith is sent home. Everybody excused him. He’s not been given an opportunity to address the issue. So that’s what bothers me[.]

RP (9/15/2010) at 265-66, 269.

Berlin testified he acted in self-defense. According to Berlin, he previously told Griffith that he was not willing to spend any more money to support their methamphetamine habit. RP (9/15/2010) at 314. *See also*

RP (9/15/2010) at 380. This pronouncement allegedly made Griffith angry because he believed it was unfair that Berlin would purchase alcohol for himself, but no methamphetamine for Griffith. RP (9/15/2010) at 319-20.

On the night in question, Berlin explained Griffith became agitated when he saw Berlin drinking whiskey and threatened to kill him. RP (9/15/2010) at 321-22, 325. It was this threat that motivated Berlin to tell Griffith to move-out of the trailer. RP (9/15/2010) at 321.

According to Berlin, he took the threat seriously and was afraid of Griffith due to his youth, strength, and alleged training as a Navy SEAL.¹¹ RP (9/15/2010) at 325, 327, 329-30. Berlin explained he located his rifle, intending to shoot Griffith in the shoulder to deter any attack and disable his potential attacker. RP (9/15/2010) at 333-35. After shooting Griffith in the face, Berlin brandished his pocketknife because he did not believe that he had sufficiently disabled Griffith. RP (9/15/2010) at 336. Berlin stood over Griffith with the knife, saying “[g]et out, and don’t make me finish it.” RP (9/15/2010) at 336.

The State introduced extensive testimony that the .22 caliber rifle was a firearm, which could inflict death with birdshot cartridges. *See e.g.* RP (9/14/2010) at 67-68, 71; RP (9/15/2010) at 245-50, 260-61, 279-86.

¹¹ Interestingly, the defense never sought to confirm on cross-examination whether Griffith had military training or served in the Special Forces.

The defense never challenged the fact that the defendant used a firearm to commit the offense. *See e.g.* RP (9/14/2010) at 68-70, 152-53; RP (9/15/2010) at 211-12, 251, 253-55, 286-93, 333-36. Additionally, the defense did not dispute that Berlin and Griffith were roommates. *See e.g.* RP (9/15/2010) at 307-08, 352-53.

When the defense rested its case, it never challenged the trial court's instructions on the basis that it failed to inform the jury that in need not be unanimous to answer "no" to the special verdict forms. *See* RP (9/16/2010) at 393-98.

After listening to the parties closing remarks, the jury found the defendant guilty of assault in the first degree. RP (9/16/2010) at 448. The jury then began its deliberations with respect to the special verdict forms at 2:45 p.m.. RP (9/16/2010) at 449. Ten minutes later, the jury affirmatively answered "yes" on two special verdict forms, finding (1) Berlin was armed with a firearm at the time he committed the assault, and (2) Berlin and Griffith were members of the same household. CP 25-26; RP (9/16/2010) at 450. The trial court polled the jury, and each juror affirmed this was the result of the deliberations. RP (9/16/2010) at 451-453.

The trial court sentenced Berlin to 153 months confinement, which included a 60-month firearm enhancement. RP (10/14/2010) at 464. Berlin appeals.

III. ARGUMENT:

A. THE TRIAL COURT PROPERLY EXCLUDED THE PROFFERED TESTIMONY.

Berlin argues the trial court erred when it prohibited him from introducing evidence that the victim allegedly solicited bribes in exchange for his testimony. *See* Brief of Appellant at 12-17. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *State v. Ortiz*, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). Here, the trial court did not abuse its discretion when it excluded the alleged evidence of bias because (1) admissible evidence did not substantiate the allegation, (2) the allegations were simply argumentative and speculative, (3) the proffered corroborating testimony of a witness not previously disclosed was minimally relevant, and (4) the trial court's ruling was harmless.

A criminal defendant has a constitutional right to confront the witnesses against him/her through cross-examination.¹² U.S. Const. amend

¹² The Sixth Amendment ensures "the accused shall enjoy the right to ... be confronted with the witnesses against him." Article 1, Section 22 guarantees the accused has "the right to ... meet the witnesses against him face to face."

VI; Wash. Const. art. I, section 22; *Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *State v. Fisher*, 165 Wn.2d 727, 752, 202 P.3d 937 (2009). This includes the right to confront a witness with evidence of bias.¹³ *Fisher*, 165 Wn.2d at 752. A defendant enjoys wide latitude to expose the bias of a key witness. *Fisher*, 165 Wn.2d at 752.

However, the right to cross-examine adverse witnesses is not absolute. *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002); *State v. Classen*, 143 Wn. App. 45, 58, 176 P.3d 582 (2008). The right is subject to limitations that the evidence sought must be relevant for a proper purpose. *State v. Reed*, 101 Wn. App. 704, 706, 6 P.3d 43 (2000). ER 403 gives the trial court discretion to exclude relevant evidence:

[I]f its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

See also Van Arsdall, 475 U.S. at 752; *Fisher*, 165 Wn.2d at 752.

Additionally, a trial court may reject cross-examination where the

¹³ “Bias includes that which exists *at the time of trial*, for the very purpose of impeachment is to provide information that the jury can use, during deliberations, to test the witness’s accuracy *while the witness was testifying*.” *Fisher*, 165 Wn.2d at 752 (quoting *State v. Dolan*, 118 Wn. App. 323, 327-28, 73 P.3d 1011 (2003)).

circumstances only remotely tend to show bias or prejudice of the witness, where the evidence is vague, or where the evidence is merely argumentative and speculative. *Classen*, 143 Wn. App. at 58. Finally, there is no constitutional right to admit irrelevant or otherwise inadmissible evidence. *State v. Darden*, 145 Wn.2d, 612, 624, 41 P.3d 1189 (2002); *Classen*, 143 Wn. App. at 60. This Court upholds a trial court's ruling on the scope of cross-examination absent a finding of manifest abuse of discretion. *Fisher*, 165 Wn.2d at 752; *Classen*, 143 Wn. App. at 58-59.

Here, the trial court did not abuse its discretion when it prohibited the defense from questioning Griffith in front of the jury regarding the alleged evidence of bias. At the time of Griffith's cross-examination, the defense had no admissible evidence to substantiate the allegation that he solicited bribes to change his testimony. RP (9/14/2010) at 53-54. The defense only had a written statement from the defendant's deceased mother. Exhibit 55, RP (9/14/2010) at 53-54. Generally, an out-of-court statement offered for the truth of the matter asserted is inadmissible hearsay. ER 801; ER 802.

The trial court recognized the defense had a legitimate interest in trying to substantiate the claim. RP (9/13/2010) at 31. Thus, it permitted

the defense to confront Griffith regarding the alleged solicitation outside the presence of the jury:

I think we can call Mr. Griffith outside the presence of the jury. Mr. Oakley can ask him the question he wants to ask him. If he says yes, then I think it's open for further inquiry in front of the jury. If he says no, then I'm not going to allow you to ask him on cross-examination because there's no way, as I said, to substantiate that. It's basically thrown out there for the jury to speculate on, and I don't think on that basis it's even relevant if the jury just has to speculate on the issue.

RP (9/14/2010) 51. After Griffith denied the accusation, *see* RP (9/14/2010) at 76-77, the trial court properly denied any further inquiry into the matter because the allegations could not be substantiated. RP (9/14/2010) at 77. *See also* RP (9/13/2010) at 31; RP (9/14/2010) at 50-51. The trial court did not error when it excluded evidence that was merely argumentative and speculative. *Classen*, 143 Wn. App. at 58.

Additionally, the trial court was justifiably concerned that the defense had conveniently located a "surprise" witness to corroborate the out-of-court allegations only after the victim had been excused from further proceedings. The trial court has discretion to exclude a defense witness as a sanction for a discovery violation. *State v. Venegas*, 155 Wn. App. 507, 521, 228 P.3d 813 (2010). Evidence exclusion is an extraordinary remedy. *Venegas*, 155 Wn. App. at 521. Here, the trial court

did not prohibit the defense from calling Haines as a witness, but it properly placed constraints on his surprise testimony. The trial court prevented Haines from testifying that he was present when Griffith allegedly contacted the defendant's mother because (1) the defense had apparently been investigating the allegations for four months, but only informed the court and the deputy prosecutor that it had a corroborating witness on the third day of trial, (2) the defendant's mother never identified Haines as being present during the alleged phone calls, despite receiving instructions from the defense to make notes regarding each call and having previously noted which family members were present at the time of those calls, and (3) the defendant's family members had been observing the trial proceedings the last several days and knew corroboration was problematic for the defense. RP (9/15/2010) at 193-94, 196, 265-66, 269. The trial court did not abuse its discretion when it placed limits on the surprise testimony.

Furthermore, the trial court recognized that Haines' proffered testimony had minimal relevance. When the defense made its offer of proof, counsel stated Haines was only present when Griffith allegedly sought \$1,500 in exchange for (1) asking the judge to impose a lenient sentence upon conviction, and (2) settling any potential civil suit out-of-court. RP (9/15/2010) at 191-92, 263-64. Haines was unable to

corroborate that Griffith purportedly sought bribes to change his testimony. RP (9/15/2010) at 191-92, 263-64. Thus, the trial court properly concluded the proffered testimony had minimal relevance. RP (9/15/2010) at 265-66. The trial court did not err by rejecting cross-examination that only remotely showed bias/prejudice of the witness. *Classen*, 143 Wn. App. at 58.

Assuming, without conceding, that the proffered inquiry/testimony was admissible to show bias, the error was harmless beyond a reasonable doubt. Under the Confrontation Clause, any error in excluding bias evidence “is presumed prejudicial but is subject to a harmless error analysis.” *Van Arsdall*, 475 U.S. at 684; *State v. Spencer*, 111 Wn. App. 401, 408, 45 P.3d 209 (2002). Here, the defense wanted to discredit Griffith’s testimony.

The defense was able to impeach Griffith regarding his use of methamphetamine. On cross-examination, Griffith reluctantly admitted he had used methamphetamine on two or three occasions while residing with Berlin. RP (9/14/2010) at 110. Berlin testified Griffith regularly used methamphetamine at the trailer. RP (9/15/2010) at 314-19. Berlin and Haines both testified that Griffith was angry after the defendant refused to further subsidize Griffith’s drug habit. RP (9/15/2010) at 314, 319-21, 380.

This impeachment was vital to the defense's theory of the case. The defense argued Berlin was forced to act in self-defense because he feared the bigger, stronger, younger Griffith was going to attack him after he refused to provide him with methamphetamine. RP (9/16/2010) at 425-26, 428-31. The jury heard the relevant impeachment evidence and was able to make its own credibility determination. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) ("Credibility determinations are for the trier of fact and cannot be reviewed on appeal.")

Finally, any error was harmless because the facts do not support the conclusion that the defendant acted in self-defense. In Washington, the use of force upon or toward the person of another is lawful if "used by a party about to be injured ... in preventing or attempting to prevent an offense against his or her person ... [and] the force is not more than necessary." RCW 9A.16.020(3).

Here, the jury was properly instructed that the defendant's use of force was justified if it found he "reasonably believed" he was in imminent danger of being killed or injured, and he only employed "such force and means as a reasonably prudent person would use under the same or similar conditions." *See* CP 57, 59, 61. However, Berlin testified that he approached Griffith from behind while he was sitting on the couch talking to his girlfriend. RP (9/15/2010) at 334-35, 360, 362, 365. Berlin said he

pulled the rifle's trigger without issuing any type of warning to his unsuspecting victim. RP (9/15/2010) at 335. Berlin admitted that he intended to shoot Griffith. RP (9/15/2010) at 334-35; RP (9/16/2010) at 423. Berlin affirmed that Griffith was unarmed when he shot his roommate in the face. RP (9/15/2010) at 365. Under these facts, the jury clearly rejected Berlin's claim that he reasonably believed he was in imminent danger and that he employed a reasonable amount of force. Any error was harmless.

There was no violation of the defendant's right to confrontation. The trial court afforded the defendant an opportunity to substantiate the allegations that the victim had solicited bribes to change his testimony. When the defense was unable to substantiate the allegations, the trial court properly excluded the alleged evidence of bias because it was merely speculative. When the defense tried, in the eleventh hour, to corroborate the allegations with a surprise witness, the trial court properly concluded (after considering an offer of proof) that the witness's testimony was minimally relevant on the issue of bias. Finally, any error was harmless because (1) the defense was able to impeach the victim's testimony, and (2) the facts did not support a reasonable belief the defendant acted in self-defense. This Court should affirm.

B. THE UNANIMITY INSTRUCTION DOES NOT REQUIRE REVERSAL.

For the first time on appeal, Berlin challenges the trial court's instruction that the jury must be unanimous to answer "yes" on the special verdict forms. *See* Brief of Appellant at 17-22. Because the instruction did not instruct the jury that they did not need to be unanimous to answer "no", *see* CP 64, he argues that the proper remedy is to vacate the two sentencing enhancements. *See* Brief of Appellant at 17-22 (citing *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010); *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003)). This argument is unpersuasive because (1) the flaw did not constitute a manifest error affecting a constitutional right that can be raised for the first time on appeal, and (2) the flaw did not prejudice the defendant.

RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988); *State v. Nunez*, 160 Wn. App. 150, 157, 248 P.3d 103 (2011). However, a "manifest error affecting a constitutional right" is one of the exceptions that can be raised for the first time on appeal. RAP 2.5(a)(3).

To demonstrate that an error qualifies as manifest constitutional error the defendant must "identify a constitutional error and show how the

alleged error actually affected [his] rights at trial.” *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009); *Nunez*, 160 Wn. App. at 157-58. An appellate court does not assume that an error is of constitutional magnitude. *O’Hara*, 167 Wn.2d at 98; *Nunez*, 160 Wn. App. at 158.

If the claimed error is of constitutional magnitude, the appellate courts must determine whether the error is manifest. “ ‘Manifest’ in RAP 2.5(a)(3) requires a showing of actual prejudice.” *O’Hara*, 167 Wn.2d at 99; *Nunez*, 160 Wn. App. at 158. To demonstrate actual prejudice there must be a “ ‘plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.’ ” *O’Hara*, 167 Wn.2d at 99; *Nunez*, 160 Wn. App. at 158.

Instructional error is not automatically constitutional error. *Nunez*, 160 Wn. App. at 159. Furthermore, a trial court’s failure to instruct the jury that it could acquit Berlin of the aggravating factor nonunanimously is not an error of constitutional dimension. *Nunez*, 160 Wn. App. at 159-65 (addressing *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010); *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003)). This Court should hold Berlin cannot challenge the unanimity instruction for the first time on appeal.

Most importantly, the challenged instruction did not prejudice Berlin. The jury was able to make all of the findings required and apply

the proper burden of proof under the instructions given. *See O'Hara*, 167 Wn.2d at 108; *Nunez*, 160 Wn. App. at 163-64. Additionally, it was undisputed that (1) Berlin used a firearm when he shot Griffith, *see e.g.* RP (9/14/2010) at 68-70, 152-53; RP (9/15/2010) at 211-12, 251, 253-55, 286-93, 333-36; and (2) Berlin and Griffith were roommates at the time of the offense, *see e.g.* RP (9/14/2010) at 79; RP (9/15/2010) at 307-08, 352-53. As such, the jury needed only ten minutes to answer "yes" to the two special verdicts. CP 25-26; RP (9/16/2010) at 450.

Because the instructional error does not constitute a manifest constitutional error this Court need not consider the matter for the first time on appeal. Furthermore, because the error did not prejudice the defendant, this Court should affirm.

IV. CONCLUSION:

Based upon the arguments above, the State respectfully requests that this Court affirm Mr. Berlin's conviction for assault in the first degree.

DATED this 27th day of JUNE, 2011.

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