82226-3

NO. 36186-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FILED
COURT OF APPEALS
DIVISION II
08 FEB 20 PM 1:48
STATE OF WASHINGTON
BY
DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

DANIEL MARSHALL AGUIRRE,

Appellant.

APPELLANT'S REPLY BRIEF

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ORIGINAL

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I. INTRODUCTION

The state has fairly brief responses to the claim that the trial court impermissibly excluded four sources of defense-proffered evidence. It does not respond at all to the argument that the trial court impermissibly limited cross-examination of Ms. Laughman – thus essentially admitting that this was error. Its entire response to the claim that the trial court impermissibly excluded Det. Wilkinson's testimony that Laughman admitted that she had already recanted one version of what occurred on the evening of the alleged rape, is that the trial court could bar defense counsel from eliciting this evidence because it barred the prosecution from eliciting it; the Response fails to cite any authority – in law or logic – for the notion that even-handed preclusion of exculpatory evidence is any better than one-sided exclusion of it. Finally, the Response mischaracterizes the record concerning whether excluded evidence from Daniel and Jimmy Aguirre was really proffered. Section II.

The state then responds to the claim that the domestic violence expert vouched for alleged victim Laughman's credibility by arguing that the defense objection was too general to count. But that defense objection identified the problem as "questions concerning how domestic violence works, the cycle of violence and what have you ...," and identified the error as impermissibly commenting on the believability of the key witness.

VRP:539 ("it could have the impact of essentially indirectly offering an opinion as to whether the victim was believable ..."). The trial prosecutor even characterized this as a "standing objection." VRP:537. Since this is precisely the claim that we raise on appeal, it is hard to figure out what part of the "standing objection" the Response didn't get. Section III.

The Response then agrees that, during deliberations, the jury asked for a definition of "unlawful force"; that the judge provided a definition then, for the first time, since none had previously been given; and that the definition of "unlawful force" given differed from the definitions for that phrase that we find in the WPIC's or controlling Washington caselaw, including State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997) and State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). Instead, the Response claims that those definitions do not apply because they are limited to the self-defense situation. But the Response provides no authority to support this argument, and no authority to support the very different definition of "lawful force" that was given. The Response's failure to cite legal authority defeats its argument. Section IV.

The state is correct that Instruction No. 21 states the defendant had to be "armed" with a deadly weapon. We apologize for the oversight. The state errs, however, in claiming that Instruction No. 21 contains the "nexus" element. Section V.

With regard to the double jeopardy claim, the parties agree that Division I has rejected this claim, but that neither Division II nor the Washington Supreme Court have yet spoken on it post-Blakely.[1] It therefore remains an open question for this Court. Section VI.

Finally, the state does not deny that the continuance requested to enable counsel to substitute in was a first request for a continuance and that it was for a reasonable amount of time, given the time it would take to obtain and review the transcript. The state does not argue that the victim could not have returned in 8 weeks to be present, that there would have been a loss of any witness or evidence, or that there was any other disadvantage to the state from waiting. Indeed, it does not deny that Mr. Aguirre would have remained in jail during the continuance. It argues, instead, that trial counsel did not need to be replaced because he was not ineffective; but under the most recent Supreme Court authority on this point, that is irrelevant. United States v. Gonzalez-Lopez, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). It argues, further, that the alleged victim was entitled to be present; but it does not claim that she could not have been present if the case were continued. It is true that the trial court has discretion, but convenience to the alleged victim, alone, is not sufficient to trump the constitutional right to a defense – and

[1] Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 296, 159 L.Ed.2d 403 (2004).

convenience to the victim, alone, is the only lawful justification presented for the court's decision. Section VII.

II. THE STATE FAILS TO RESPOND TO THE ERROR OF LIMITING CROSS-EXAMINATION OF THE ALLEGED VICTIM; DEFENDS PRECLUSION OF THE DETECTIVE'S TESTIMONY ON IRRELEVANT GROUNDS; AND MISCHARACTERIZES THE RECORD CONCERNING THE OTHER EXCLUDED EVIDENCE AND OBJECTIONS THERETO

A. Summary of Defense Evidence Proffered and Excluded

The first issue raised in the Opening Brief concerned the trial court's preclusion of exculpatory evidence from four witnesses: testimony from Daniel Aguirre detailing the circumstances leading to his breakup with Ms. Laughman; testimony from his brother Jimmy Aguirre about how Ms. Laughman was trying to contact Daniel through him, after the time that she claimed she wanted to get away from Daniel; testimony from Officer Wilkinson that Ms. Laughman stated she was recanting prior statements about whether Mr. Aguirre had assaulted her; and cross-examination of Laughman herself.

The state's main response is that there was no clear proffer or no clear objection to the exclusion of evidence that was proffered.

We therefore begin by reiterating the proffers and objections. Defense counsel sought to cross-examine Laughman about dating (not

having sex with) other men. VRP:368-72. That motion was denied. VRP:372. Defense counsel proffered testimony that Jimmy Aguirre – who flew in from out of town and was waiting in the courtroom – would have offered. VRP:429-30. Defense counsel sought to elicit evidence from the Det. Wilkinson that Laughman admitted that she had previously recanted, but the state objected, moved to strike, and the court agreed. VRP:479-80. And the defense made a five page proffer about what Daniel Aguirre would say, *i.e.*, that he, not Laughman, was the one who wanted to end the relationship and the reason: largely because he found out she was going out with someone else behind his back. VRP:721-32.

B. <u>The Excluded Daniel Aguirre Testimony</u>

The state's first response is that they cannot figure out which Daniel Aguirre testimony was the subject of this claim, because "His brief does not cite to the Record." Response, p. 4.

This is surprising, since the Opening Brief specifically stated, concerning preclusion of Daniel's own proffered testimony, "As discussed above, the judge barred him from cross-examining Ms. Laughman about seeing another man and about how the impact of that caused him to pull back from their relationship, thus refuting the notion that she was the one who wanted to leave him. 2/13/07 VRP:368-71, 372." Opening Brief, p. 14. That brief continued, "The judge barred Mr. Aguirre himself from

testifying about this same information, as discussed in Statement of the Case Section III." Opening Brief, p. 15. The cross-reference is to Opening Brief pp. 6-12, explaining that the alleged victim was permitted to go into detail about how she wanted to break off the relationship but Aguirre was prevented from explaining that precisely the opposite was the case. The Response's first argument, that it cannot respond because the Opening Brief failed to provide record cites for its argument that the trial court impermissibly excluded Daniel Aguirre's testimony, must therefore fail.

The Response continues that the trial judge did not bar Daniel Aguirre from testifying about anything – the court permitted him to testify about one of the topics on which he gave a proffer and, on the other topic, the judge "said that counsel would have to wait to see whether the door opened on cross." Response, p. 4. The Response cites VRP:373 for this characterization, and then to VRP:722-31 for the defense proffer and VRP:745, 754 for the court's ruling.

A review of those pages belies this description. We attach the relevant transcript pages to this Reply, for the Court's convenience. Appendix A is the proffer, VRP:721-32; Appendix B is the ruling, VRP:744-54. They show a lengthy offer of proof from Mr. Aguirre about discovering that the alleged victim was two-timing him, and deciding for

that reason to break things off. VRP:722-27. They show that the trial court ruled that Aguirre's proof that Laughman was in another relationship was tantamount to proof of sex with someone else, and barred such testimony and proof. VRP:744-45. She ruled she would permit him to say only that he "believed" Laughman "was seeing someone else," VRP:745, 753, and as defense counsel said, testimony about such an uncorroborated *belief*, combined with preclusion of cross-examination of Laughman on this topic, makes him look "like a nut" who is "paranoid, jealous," and "plays right into" the state's theory. VRP:746. The trial court thus barred the exculpatory material on this topic, and permitted only material supporting the state's theory; the state errs in claiming that this ruling permitted him to give the exculpatory testimony he wanted to give. The state also errs in claiming that there was no definite ruling about this at all, but direction to see if the state "opened" some unspecified topic up on cross. VRP:754-55 shows a definite ruling, as does the clarification at VRP:752-53.

The Response then argues that if the trial court did bar Daniel Aguirre's testimony, the defense did not mind. It cites transcript pages concerning cross-examination of Laughman, though – not direct examination of Aguirre. Response, p. 4 (arguing that trial court admitted some of this testimony at VRP:372 and deferred ruling on the rest of it at

VRP:373). The only relevant transcript pages it cites on this point is at Response, p. 5, quoting defense counsel as saying, in response to court's order allowing only limited testimony after proffer, "the Defense can live with that," VRP:754.

Defense counsel's statement at VRP:754, however, is the equivalent of a pro forma "thank you." He did not withdraw the proffer and did not withdraw the objection to the preclusion of his client's testimony. Further, at the time he made this statement – after all discussion objection was complete – no further objection was necessary to preserve this claim.[2]

The Response thus provides no reasoning to support the exclusion of Daniel Aguirre's testimony, explaining that he, not she, wanted to break off the relationship, and providing the context that would have given it the ring of truth.

The trial court, however, did. The judge reasoned that allowing Mr. Aguirre to give any more than one line about Ms. Laughman going out with someone else would violate the rape shield statute. VRP:736.

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[2] See Meacham v. FM Industries, Inc., 2004 WL 1664863 (July 27, 2004) ("FM points to Meacham's counsel's statement, "I guess I can live with that," and argues that counsel thereby waived Meacham's objections to the applicability of McDonnell Douglas. However, our review of the record makes clear that the court had decided to adopt FM's proposed jury instructions that included the burden-shifting framework and that further objection from Meacham would have been futile.").

But defense counsel reiterated that he was not going to ask about sex. VRP:739. The judge also reasoned that defendant's testimony on this topic – of Laughman dating another man during the time period when Laughman claimed that she was dominated by Aguirre and barred from seeing her peers – had no probative value. VRP:741.

The state does not weigh in on these two points. It provides no response to the Opening Brief argument that the Rape Shield law is inapplicable because no one proffered anything about Laughman's sex life; and it provides no response to the Opening Brief argument that Laughman's bias, credibility, motive to lie, and attitudes towards Daniel were central to this case.

C. The Excluded Jimmy Aguirre Testimony

The state next turns to the exclusion of Jimmy Aguirre's testimony, arguing, "The record does not disclose the content of the message [to which Jimmy would have testified], if indeed there was one, or how it could be relevant to any issue in the case." Response, p. 5.

This is another incorrect characterization of the record. Jimmy Aguirre would have testified that Laughman was trying to chase Daniel Aguirre down, through Jimmy, by asking Jimmy (on his MySpace account) how to locate Daniel and "trying to get ahold [sic] of and find out why he [Daniel] wouldn't call her." VRP:587. The record shows why

this was relevant: Laughman was allowed to testify that she was not chasing Mr. Aguirre down; that she dumped him and not the other way around; and that she did not try to use Jimmy Aguirre to get in contact with Daniel. VRP: 429-30. Jimmy Aguirre would have directly contradicted Laughman's testimony on this point.

The only real question is whether the trial court was correct when it called this impeachment on a collateral issue. VRP:592. The Response does not offer any analysis of why Laughman chasing Aguirre was a collateral issue; it speculates that no one can tell what was really excluded so it must have been collateral: "It is not surprising that the court ruled the offer an attempt to impeach on a collateral matter." Response, p. 5.

The transcript, however, shows what was excluded: Jimmy Aguirre's testimony directly contradicting Laughman's claim that she was not chasing after Daniel, even after the alleged rape. This is not collateral. A subject is collateral if it is not related to the witness's direct testimony.[3]

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[3] United States v. Negrette-Gonzales, 966 F.2d 1277, 1280 (9th Cir. 1992) (defense witness takes responsibility for cocaine and exonerates defendants, but refuses to answer government's question on cross-examination to reveal the names of her suppliers due to fear of reprisal; treating this under the same analysis as a Fifth Amendment assertion, this Court ruled that "The identity of her source was collateral to the issues at trial and to her testimony on direct," so striking her testimony was reversible error); United States v. Lord, 711 F.2d 887 (9th Cir. 1983) (defense witness in cocaine conspiracy trial bolsters entrapment defense but, on cross-examination, refuses to name her suppliers, invoking Fifth Amendment; striking her testimony was error, because a court "may apply this sanction only when the question asked pertains to matters directly affecting the witness's testimony; the judge may not use the sanction when the privileged answer pertains to a collateral matter").

But who was trying to break up with whom was a key subject of Laughman's direct testimony; it formed the heart of her story. A subject is collateral if it is designed to test credibility only generally, rather than by specific reference to the issues concerning the case.[4] But whether Ms. Laughman was telling the truth about who was dumping whom, and who was chasing whom, formed the basis for her story. A subject is collateral if it concerns ER 404(b) "other crimes" or acts – acts about which there was no direct testimony.[5] But whether Aguirre was forcing himself on Laughman or vice versa was the central issue here.

D. The Excluded Det. Wilkinson Testimony

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[4] See United States v. Sturgis, 578 F.2d 1296, 1300 (9th Cir.), cert. denied, 439 U.S. 970 (1978) (question is "whether the questions propounded are designed to test sincerity and truthfulness or are 'reasonably related' to the subject covered on direct.").

[5] United States v. Yip, 930 F.2d 142, 147 (2d Cir.), cert. denied, 502 U.S. 868 (1991) (no error in district court's refusal to strike government witness' testimony "when witness refused on cross-examination to answer questions -- claiming his Fifth Amendment privilege -- regarding a check cashing and kickback scheme he was allegedly involved in ... . The scheme was not the subject of direct examination, and it was therefore a collateral matter bearing solely on [the witness'] credibility."); United States v. Zapata, 871 F.2d 616, 624-25 (7th Cir. 1989) (prosecution witness's invocation of Fifth Amendment on cross-examination was permissible, because "all of the unanswered questions did not go to the exculpation of Mr. Zapata from the July transaction with which he was charged, but rather, were directed at [witness's] prior involvement in drug trafficking in Miami and Chicago."); United States v. Williams, 626 F.2d 697, 699-702 (9th Cir.), cert. denied, 449 U.S. 1020 (1980) (lead government witness in robbery case testifies that she and the defendant robbed the bank and she had already plead guilty; on cross-examination she asserts the Fifth Amendment in response to questions about whether she committed other, prior burglaries and whether the getaway car was a stolen car; no error in trial court's failure to strike testimony because this was "other crimes" evidence under 404(b) and hence, not necessarily admissible and certainly "collateral").

The state's entire response to the exclusion of the Det. Wilkinson testimony is: "When Aguirre attempted to pursue a line of questioning with Detective Wilkinson about a statement from Ms. Laughman, the trial court's response was as accurate as it was succinct. She had earlier prohibited the Prosecutor from going into the details of this same statement and so, not surprisingly, denied Aguirre's request to do the same thing." Response, p. 6. The Response cites VRP:480 for this assertion.

Actually, at VRP:478-80, what we have is the *state* objecting to defense counsel's question, "you indicated [in your report] that one of the first things she [Laughman] told you she wanted to recant an earlier version of what she said," and the court sustaining the objection.

This does not support the Response's assertion that the state was barred from asking about Laughman's admission that she had previously recanted – all the prosecutor said in his objection was that the state had been barred from "going into details of the [Laughman] statement." VRP:480. Further, it is completely irrelevant that the judge precluded the prosecutor from going into unspecified portions of Laughman's statement – this matter was one that bolstered the defense case, not the state's, so it is covered by the constitutional right to present a *defense*. There is no equivocal constitutional right to present a *prosecution*.

And the excluded evidence certainly did help the defense – it

undermined Laughman's credibility because it showed she was willing to recant about what happened even to law enforcement. Laughman's awareness of her own recantation is tantamount to consciousness of fabrication.

Finally, the evidence of Laughman's awareness of her own fabrication was proffered through an unbiased law enforcement officer, not one of the parties. It was therefore more believable than evidence coming from one of the parties with a stake in the outcome of the trial.

E. The Excluded Laughman Testimony

The trial court barred defense counsel from cross-examining Laughman about seeing another man, and about how that caused Aguirre to pull back from their relationship; this material was relevant to her claim that she was the one who wanted to leave him. VRP:368-71, 372.

The Response does not even mention the trial court's preclusion of cross-examination on this subject in its section devoted to the right to present a defense, Response at pp. 5-6. The closest it gets to this topic is this characterization of Laughman's testimony: "He put the knife to her throat. Then he raped her. The jury believed her. It did not believe Aguirre. That is how our system works." Response, p. 6.

Actually, that is not quite how our system works. The adversary system works because cross-examination is the greatest engine for the

discovery of truth.[6] Even without complete cross-examination in this case, the jury chose not to believe Ms. Laughman completely – it *acquitted* Aguirre of one count of assault that she claimed occurred. It is therefore impossible to argue that preclusion of cross-examination of this same witness concerning the basis of her claim – that is, that Aguirre was trying to dominate her and prevent her from ending the relationship – would not have further undermined her already damaged credibility.

F. The State Does Not Dispute the Fact that the "Rape Shield" Statute Rationale Upon Which the Trial Court Relied Does Not Apply – Because None of This Testimony Was About Sex

The trial court excluded evidence that Laughman went out with someone else because of the "rape shield" law. The Opening Brief argued, however, that that statute, RCW 9A.44.020, limits admission of "past sexual behavior" of the complaining witness and the defense did not offer that. It offered evidence that she dated someone else, with no mention of sex.

The state provides no response. They have conceded that point.[7]

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[6] 5 John Henry Wigmore, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367 (3d ed. 1940) (cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth").

[7] Washburn v. Beatt Equipment Co., 120 Wn.2d 246, 270, 840 P.2d 860 (1992) (failure to provide response to point about damages in brief concedes that point).

III. THE STATE ARGUES THAT THE OBJECTION TO THE TESTIMONY OF THE DOMESTIC VIOLENCE EXPERT WAS TOO GENERAL; BUT IT IDENTIFIED THE OBJECTIONABLE TESTIMONY AND THE PROBLEM AS THE ONE RAISED ON APPEAL, VOUCHING FOR WITNESS CREDIBILITY

The Response argued that the objection to the domestic violence "expert" was too "non-specific and general" to count. Response, pp. 7-8. It belittles the notion that there was a standing objection, based on vouching.

But at trial, the prosecutor acknowledged that there was. He reminded the court, "I just believe Mr. Steele wanted to make a record of his standing objection" to the expert. VRP:537.

Defense counsel then objected to "questions concerning how domestic violence works, the cycle of violence and what have you ...." VRP:538. He did so because "it could have the impact of essentially indirectly offering an opinion as to whether the victim was believable, whether she was telling the truth," VRP:538. That, of course, is the definition of vouching,[8] which is precisely the claim that we raise on

[8] United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1993), amended 4/15/93. See United States v Weatherspoon, 410 F.3d 1142 (9th Cir. 2005); State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996), vacated and remanded on other grounds, 142 Wn.2d 868 (2001); State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59, review denied, 100 Wn.2d 1003 (1983) ("A statement by counsel clearly expressing his personal belief as to the credibility of the witness or the guilt or innocence of the accused is forbidden.") (citation omitted).

appeal.

The state's main argument about this claim therefore fails. The "standing objection" to the expert's vouching for Laughman certainly preserved this issue. State v. Black, 109 Wn.2d 336, 340, 745 P.2d 12 (1987) (despite lack of specific challenge to "rape trauma syndrome" evidence, defense counsel's general objection to expert's testimony sufficiently preserved issue for appeal).

The only remaining question is whether the trial court's decision to overrule that objection was error. The state claims it was not, because the expert never gave a "focused individualized opinion about Aguirre [being guilty]." Response, p. 9. But the witness gave an indirect opinion about whether Laughman was believable, and that is just as bad – because this trial was a credibility contest between Aguirre and Laughman.[9]

The Response finally observes that defense counsel "did not even question the qualifications of Sergeant Stines as an expert in working with victims of domestic violence." Response, p. 7.

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[9] The Response avoids this conclusion by mischaracterizing some of the decisions cited in the Opening Brief. For example, it argues that in State v. Black, 109 Wn.2d 336, the error identified by the Court was that a social worker was impermissibly allowed to give certain testimony about "the defendant on trial" and whether he was guilty. Response, pp. 8-9 ("social worker was impermissibly allowed to testify that the defendant on trial fit the profile of a victim of domestic violence"). Actually, the Court in Black ruled that testimony that an alleged victim fit the profile of a rape victim was impermissible opinion testimony, since "constitutes an opinion as the guilt of the defendant." Black, 109 Wn.2d 336, 348. That was the same sort of indirect credibility evidence as we have here.

Correct. Stines might have been the best domestic violence "expert" in the world. The claim we raise is that Stines' testimony bolstered the alleged victim's believability, not that Stines lacks credentials to work with victims in the first place.

IV. THE STATE ARGUES WITHOUT CITATION THAT THE CASELAW AND WPIC DEFINITIONS OF "UNLAWFUL FORCE" DID NOT APPLY HERE BUT PROVIDES NO SUPPORT FOR THE DEFINITION OF "UNLAWFUL FORCE" THAT THE JURY WAS GIVEN.

The Response agrees that, during deliberations, the jury asked: "Define 'unlawful force' as used in Instruction #12." CP:61. The Response agrees that "unlawful force" had not been previously defined in the instructions. The Response agrees that the court answered, in part: "Unlawful force as used in Instruction #12 refers to any force alleged to have occurred that was not consented to ...." CP:61.

The Response provides no cases or WPIC's to support this definition, specifically, the "any force alleged to have occurred that was not consented to" part.

The Response provides no cases to contradict the different, approved, definition of "lawful force" provided in the Opening Brief, and supported by Washington law.[10] The Response correctly observes that

[10] See State v. Walden, 131 Wn.2d 469, 473 (1997) (citing State v. LeFaber, 128 Wn.2d 896, 900 (1996)); WPIC 17.2 and 17.04.

those definitions were developed in the context of self-defense. But the Response provides no authority for the notion that this definition of "lawful force" must always be limited to that context.

Thus, the Response provides no legal argument – and cites no cases – to contradict the key point we made, that is, the trial court did not give an approved definition, but made up one that was wrong. The Response's failure to cite legal authority at all is fatal to its claim.[11]

Instead, the Response asserts that the two issues raised in the Opening Brief concerning this issue – giving an erroneous definition of "lawful force" and giving it as a supplemental instruction – cannot now be raised. It bases this on the trial court's statement, "counsel have agreed that the Court should answer ... as follows." VRP 952-53.

The Response does not explain whether it construes this as a waiver, or as a failure to raise the issue in the trial court. In fact, the Response cites no legal doctrine or case at all in its portion of the brief devoted to this issue, *i.e.*, Response pp. 9-10.

If the state means that defense counsel failed to raise this claim in the trial court, that is true. But, as the Washington Supreme Court explained in State v. Deal, 128 Wn.2d 693, 911 P.2d 996 (1996), under

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[11] Ang v. Martin, 154 Wn.2d 477, 487, 114 P.3d 637 (2005); State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171, cert. denied, 439 U.S. 870 (1978); RAP 10.3(b), 103(a)(6) (requiring responsive brief to provide supporting authority).

RAP 2.5(a)(3) a party can raise for the first time on appeal a claim that an erroneous jury instruction permitted conviction where the statute did not, because it is "based upon constitutional grounds." Indeed, when the Washington courts have been presented with claims that an instruction diminished the state's burden – on an element concerning the defendant's intent, as in Deal and in this note[15], or on an element concerning the defendant's acts, as in this note[16] – the courts have consistently ruled that the issue might be reviewed for the first time on appeal.

If the state instead means that the error was invited, then a different standard would apply. State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). But the record does not show defense counsel himself proposing this instruction, so it is unlikely that this doctrine applies.

In any event, the state did not even bother to say which doctrine it

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[15] State v. Byrd, 72 Wn. App. 774, 868 P.2d 158 (1994), aff'd 125 Wn.2d 707 (1995) (reversing assault conviction due to failure to instruct jury properly on intent element, even though this basis for reversal was raised for the first time on appeal, citing RAP 2.5(a)(3); failure to give the instruction on the state's burden of proving this element "prejudicially relieve[d] the state of its burden of proof or prejudicially deprive[d] the defendant of the benefit of having the jury pass upon a significant and disputed issue" and impacted the right to a fair trial, 72 Wn. App. 774, 782-83).

[16] State v. Stark, 48 Wn. App. 245, 251 n.4, 738 P.2d 684, review denied, 109 Wn.2d 1003 (1987) ("in a multiple acts case where the issue is raised for the first time on appeal, the court held 'a defective verdict which deprives the defendant of his fundamental constitutional right to a jury trial may be raised for the first time on appeal'"); State v. Gitchel, 41 Wn. App. 820, 821-22, 706 P.2d 1091, review denied, 105 Wn.2d 1003 (1985) (in a multiple incidents case in which the defendant failed to raise the issue of a jury unanimity at trial, the court held "the right to a unanimous verdict is derived form the fundamental constitutional right to a trial by jury, and the issue may be raised for the first time on appeal").

was arguing (invited error or silence) or to cite any supporting authority. Those failures should preclude consideration of its response concerning the trial court's supplemental "lawful force" instruction.[12]

V. THE STATE IS CORRECT THAT INSTRUCTION NO. 21 CONTAINED THE "ARMED" ELEMENT, BUT INCORRECT ABOUT IT CONTAINING THE "NEXUS" ELEMENT.

The state is correct that Instruction No. 21 states that the defendant had to be "armed" with a deadly weapon. We apologize for the oversight.

The state errs, however, in claiming that Instruction No. 21 contains the "nexus" element. That instruction stated, in full: "For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime in Count II. A knife having a blade longer than three inches is a deadly weapon." CP:95. It said nothing about "nexus." Neither did any other instruction.

VI. WHETHER CHARGING SECOND-DEGREE ASSAULT BASED ON USE OF A DEADLY WEAPON AS WELL AS A DEADLY WEAPON ENHANCEMENT FOR THAT SAME WEAPON CONSTITUTES DOUBLE JEOPARDY, REMAINS AN OPEN QUESTION IN THE WASHINGTON SUPREME COURT.

The parties agree that Division I has rejected this double jeopardy

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[12] Ang v. Martin, 154 Wn.2d 477, 487; State v. Young, 89 Wn.2d 613, 625.

claim, but that neither Division II nor the Washington Supreme Court have spoken on it post-Blakely. It therefore remains an open question for this Court, despite State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006), review pending, 2007 Wash. LEXIS 102 (2007).

VII. DENIAL OF THE MOTION TO CONTINUE TO ALLOW SUBSTITUTION OF COUNSEL DEPRIVED MR. AGUIRRE OF HIS RIGHT TO COUNSEL OF CHOICE.

On this point, the state begins by arguing that the Opening Brief asserted an "absolute right to substitute counsel at sentencing," and there is no such absolute right. Response, p. 14.

That is a straw man argument. We raised a "qualified" right to retain counsel of choice, that is constitutional in nature. Opening Brief, p. 44. The Response does not disagree. Indeed, the Response could not disagree. Controlling authority holds that there is a qualified right to retain counsel of choice that is of constitutional magnitude.[13]

The state argues, next, that there is authority that a court need not continue a previously set hearing to accommodate counsel if the demand for counsel "is untimely, or otherwise unwarranted," and that "the rationale clearly applies" here. Response, p. 14 (citing State v. Bandura, 85 Wn. App. 87, 98, 931 P.2d 174, review denied, 132 Wn.2d 1004

[13] *See, e.g.*, United States v. Gonzales-Lopez, 548 U.S. 140; Caplin & Drysdale v. United States, 491 U.S. 617, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989).

(1997)).

The request in Bandura was likely untimely because that defendant went through about half a dozen lawyers – some retained and at least one appointed – and even more continuances before he got to sentencing. In Mr. Aguirre's case, in contrast, this was the first motion to substitute retained counsel and the only motion to continue for that purpose. Mr. Aguirre's prior retained counsel, Mr. Steele, had entered his notice of appearance on Sept. 28, 2006, early in the case, and remained on the case without interruption. In addition, undersigned counsel's motion to substitute and for a continuance, along with supporting declaration, was filed on April 4, 2007 (CP:113-15, 116-19), six days before the scheduled April 10, 2007, sentencing; it was not raised for the first time at sentencing, as the Response suggests.

In addition, the continuance requested was reasonable – it was based on the court reporter's estimate of the time it would take to produce transcripts of the trial so that substituting counsel could familiarize herself with the case before appearing. 4/10/07 VRP:4-5.

Thus, the abuses and untimeliness in Bandura were absent here.

The Response also quotes the portion of Bandura stating that a request for new counsel need not be honored if it is "unwarranted," appearing to condition substitution of retained counsel on a determination

that the retained counsel whom defendant wants to fire is in some way deficient. The state then makes a big deal about the fact that there was no claim that Aguirre's retained counsel was ineffective, and that that should weigh against substitution. Response, p. 14.

But the Supreme Court's most recent decision on this issue rejects the argument that an alleged violation of the right to counsel of choice is not "complete" unless the defendant can show that lawyer he wants to get rid of was ineffective. Gonzalez-Lopez, 1165 L.Ed.2d 409, 414.

The Response therefore errs in setting up the straw man argument that we claimed there was an unlimited right to retain counsel of choice; it errs in claiming that the request for a continuance was untimely, or made for purposes of delay, or done for other improper purposes; and it errs in harping on the fact that there was no ineffectiveness claim against prior counsel. None of that matters.

The only thing that matters is balancing the defendant's constitutional right to counsel of choice, against the interest asserted by the state in moving forward immediately since the alleged victim was there – despite the fact that the continuance motion was filed almost a week earlier with time to counsel the victim that there might be a change of date before she flew in.

The trial court ruled that the balance weighed against a continuance, because the victim was entitled to be present. But there was no proof of any kind that the victim could not be present if a single continuance of eight weeks were granted (while Mr. Aguirre remained incarcerated). The Response offered only speculation. Response, p. 14.

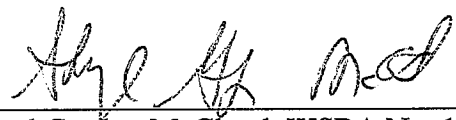
Delay is certainly a factor to be considered. But the only thing that is prohibited is undue delay – not other unavoidable delays. State v. Roth, 75 Wn. App. 808, 824, 881 P.2d 268 (1994), review denied, 126 Wn.2d 1016 (1995). Speculation does not constitute proof that the delay here would have been "undue."

VIII. CONCLUSION

For all of the foregoing reasons, the convictions should be reversed. Alternatively, the case should be remanded for resentencing.

DATED this 19th day of February, 2008.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 19th day of February, 2008, a copy of the APPELLANT'S REPLY BRIEF was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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