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STATE OF WASHINGTON
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NO. 82226-3

SUPREME COURT OF THE STATE OF WASHINGTON

NO. 36186-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DANIEL MARSHALL AGUIRRE,

Petitioner

Respondent's
SUPPLEMENTAL BRIEF

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A. IDENTITY OF RESPONDENT

The State of Washington, Respondent, Thurston County Prosecutor's Office, by and through Special Deputy Prosecuting Attorney George O. Darkenwald.

B. COURT OF APPEALS DECISION

By a unanimous unpublished decision dated September 3, 2008, Division Two of the Court of Appeals affirmed a jury verdict convicting Petitioner of second degree assault with a deadly weapon enhancement and of second degree rape. By order dated March 31, 2009 this Court granted review.

C. ISSUES PRESENTED FOR REVIEW

1. Whether an investigating officer's description of her years of working with sexual assault victims constituted impermissible opinion testimony.

2. Whether, in a prosecution for rape, the trial court properly excluded proposed testimony that the victim tried to contact the defendant's brother after the incident on the ground that the testimony was an improper attempt to impeach the victim on a collateral issue.

3. Whether, when defendant did not claim self-defense at trial, it was error not to instruct the jury about self-defense.

4. Whether double jeopardy principles were violated in a second degree assault prosecution when the defendant's use of a deadly weapon was both an element of the charge and the basis for imposing a sentence enhancement.

5. Whether denial of Petitioner's motion for a continuance of the sentencing hearing to allow new counsel more time to prepare deprived him of his right to counsel of choice at sentencing.

D. STATEMENT OF THE CASE

Respondent accepts the Statement of Facts set forth in the decision of the Court of Appeals

E. ARGUMENT

1. The Trial Court properly exercised its discretion in permitting Thurston County Detective Sergeant Cheryl Stines to tell the jury about her years of working with victims of sexual abuse.

After Detective Stines testified, Petitioner's attorney renewed his standing objection to the line of questioning:

...I did object to the entire line of questioning—was not the concerns about establishing the officer's expertise, but because of the fact that it would have—it could have the impact of essentially indirectly offering an opinion as to whether the victim was believable, whether she was telling the truth or what have you. Because whether she acted in conformity with how you would expect a domestic violence victim to act. *Now, in all candor, Sergeant Stines was also very quick to point out at least two times during her answers to Mr. Skinder's question that everybody is different. So I have that. I do appreciate the candor.* (emphasis added) Vol. III RP 539.

The Court responded:

Thank you. And just for the record, the Court overruled that objection. The witness was testifying as to her expertise in the area of domestic violence and in area of sexual assault cases. She testified extensively as to her experience, her education and her training, *and she did not make any statements about the ultimate issue, and the State did not ask her to do so.* (emphasis added) Vol. III RP 541.

The detective's testimony referred to was as follows:

Well, you know, again, *everybody is different*, (emphasis added) and I have had victims of stranger rapes who are under control, who give incredible details about what happened, who, you know, although you can tell they're upset, they don't cry during the interview. And I've had victims who will come into the office and just break down and just cry uncontrollably where we can't do an interview because it's just too traumatizing for them. *So that would be from one extreme to the other.* (emphasis added) Vol. III RP 506, 8-18:

These comments were made prior to any questions about her meetings with the victim, Emily Laughman. The detective simply described her experiences during eleven years of meeting with victims of sexual assault. This included her depiction of the cycle of domestic violence and her observations that some victims feel guilty, and some simply don't want to testify, for a variety of reasons. Vol. III RP 502-504.

Although Detective Stines had a level of expertise based on her years of training and experience, she did not claim to be nor did the prosecutor attempt to qualify her as an "expert" as that term was used in *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1986). There this Court referred to the testimony which should not have been elicited by the prosecutor as tantamount to an assertion that the victim could not have consented because she was a victim of

“Rape Trauma Syndrome”, a syndrome with insufficient acceptance in the scientific community to be admissible in evidence.

The following year, in *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988), this Court approved as admissible under ER 702 the testimony of a witness qualified as an expert in “Battered Woman Syndrome” to assist the trier of fact in understanding the mental state of a crime victim, allowing the prosecutor to draw reasonable inferences from the evidence in argument.

“At the heart of this issue is the question of whether we will extend the benefit of concepts this court has applied to defendants charged with a crime to those who are victims of a crime. Neither logic nor law requires us to deny victims an opportunity to explain to a jury, through a qualified expert, the reasons for conduct which would otherwise be beyond the average juror’s understanding” *Ciskie*, 110 Wn.2d at 265.

Sergeant Stines described her role in the case as follows:

...and because she was unable to give Deputy Wilkinson a taped statement, I thought I would take a taped statement from her and just meet with her as *the detective working with her case*. So we met, and then I spoke with her that day for, I don’t remember how long, but it was awhile. She just was not able to talk to me at all...

A part of our job would be—I mean, *I’m not a certified counselor or social worker or anything*, but that kind of comes into the realm of the duties when you’re dealing with victims. So I talked a lot, she listened, and at the end of that discussion, she still didn’t know what she wanted to do. And so I told her to go home and think about it.(emphasis added). Vol. III RP 509.

As noted by the trial court, the prosecutor cautioned the detective prior to asking her about her two meetings with the victim.

O.K. I don't-- want you necessarily to get into the specifics of what she told you. But would you describe her demeanor on the one hand, I guess being vindictive, or on the other hand being forgiving or anywhere in between? How would you describe her demeanor toward the defendant? Vol. III RP 512-513. (Sept. 1st, 2006)

And, again, without going into the specifics of how she responded to your clarifying questions, how would you describe her demeanor throughout that process of going through the report and clarifying? Vol. III RP 516. (Sept. 6th, 2006).

As pointed out by the Court of Appeals, the detective was not asked to, nor did she testify, that she believed Laughman was telling the truth or was a victim of domestic violence, or that Aguirre had committed any crime of domestic violence. Petitioner asserts that the Detective: "...reiterated Ms. Laughman's testimony, and explained each bit of it", including how "her demeanor was consistent with Laughman being a victim of domestic violence, and with Aguirre being a perpetrator of violence". (Petition pg. 6-7). The record simply does not support this assertion.

Petitioner appears to find the following language of the Court of Appeals decision in conflict with *Black*. "Generally, no witness, lay or expert, may give a *direct* opinion about the defendant's innocence or guilt or about a victim's credibility, but if the testimony

does not directly comment on the defendant's guilt or veracity, helps the jury, and is based on inferences from the evidence it is not improper opinion testimony". *State v. Aguirre*, 2008 Wn. App. LEXIS 2202 at *25 This statement did not include the "whether by direct statement or *inference*" language used by this Court. *Black* 109 Wn.2d at 348. But that does mean there is conflict. First, the witness in *Black* was unqualified and his testimony no more than an unfounded implication, not the well founded inference from factual evidence in the record approved in *Seattle v. Heatley*, 70 Wn. App.573, 577-580, 854 P.2d 658 (1993), *review denied* 123 Wn.2d 1011 (1994), cited by *Aguirre*. Second, Detective Stines neither offered nor inferred any opinion at all and certainly did not imply one. Petitioner then argues that there is some "lurking conflict" between *Black* and later holdings of lower courts. But what lurks and where, he doesn't say.

Ciskie, supra involved a chillingly similar fact pattern: an ongoing sexual relationship, one of the rapes following a threat with a knife after a drinking session, a defendant apologetic after the incidents, continuing conversations after the incidents and a victim extremely reluctant to even contact the police, much less testify. A well recognized expert was allowed to explain to the jury that rape

victims don't always act the way we might expect them to. That is what Detective Stines did.

2. The trial court properly exercised its discretion in excluding proposed testimony that the victim tried to contact the defendant's brother after the incident on the ground that the testimony was an improper attempt to impeach the victim on a collateral issue.

The incident that led to Petitioner's convictions for rape and assault occurred August 26, 2006. During cross-examination Emily Laughman stated that earlier in the summer she had placed Petitioner's brother Jimmy on her MySpace friends list. Vol. II RP 429. That could not have been a surprise because she had earlier noted that she had been in an ongoing relationship with Petitioner, spending a considerable amount of time at his place until shortly before the incident. Vol. II RP 335. When asked whether she had attempted to contact Jimmy on MySpace after the incident her answer was clear and succinct. Q. "But it's your testimony that you never attempted to contact him after this incident occurred?" A. "Roger, Sir." Vol. II RP 430, 14-17.

The next day of trial, Petitioner's attorney stated that he planned to call Jimmy as a witness. The prosecutor objected, noting that although defense counsel had provided him with a list of witnesses, "...there is no written record that this witness has anything that he would testify to." Vol. III RP 589. The only

testimony of Laughman available to rebut was her simple denial of any attempt to contact Jimmy after August 26. Counsel made no claim that the proposed testimony would be independently admissible. Clearly it was not. It would have been hearsay not subject to any established exception. Nor was Ms. Laughman's reputation for veracity at issue, opening the door to evidence of specific instances of lying. ER 405. See *State v. Alexander*, 52 Wn. App. 897, 901, 765 P.2d.321 (1988), *citing State v. Oswalt* 62 Wn.2d 118, 381 P.2d 617 (1963). Whether MySpace contacts on a web page can be retrieved as email was not discussed.

The offer of proof was limited.

"Basically, he would testify that he was on a friend's list, a MySpace list, that Ms. Laughman sent him a message through that web page, trying, sometime after, he doesn't recall the exact date, sometime after this incident - - this alleged - - concerning her and Sergeant Aguirre of the assaults, trying to get a hold and find out why he wouldn't call her." Vol. III RP 588.

The Court ruled as follows: "...based on an offer of proof that was made, it is impeachment on a collateral matter and it's inadmissible, and I'm not going to allow that witness to testify as to that." Vol. III RP 592.

Division II (Judges Hunt, Van Deren and Penoyar) affirmed, citing to its own recent opinion (Judges Quinn-Brintall, Armstrong and Penoyar) "A witness cannot be impeached on an issue

collateral to the issues being tried.” *State v. Fankouser*, 133 Wn. App. 689, 693, 138 P.3d 140 (2006), *citing* numerous authorities including *State v. Oswald*, 62 Wn. 2d 118, 381 P.2d 617 (1963).

In *Oswald* this Court pointed out that a principal purpose of the rule is to avoid undue confusion of issues, which is precisely what a trial judge is expected to do, and which is precisely what Judge Hirsch did. She declined to let the jury be distracted by arguments about whether or not Ms. Laughman attempted to contact the defendant’s brother. There was no time or context to the alleged contact in the offer and room for nothing but speculation about its motive. It would have added little if anything. Ms. Laughman had already admitted to contacting Petitioner after the incident, including text messaging him about going to a movie together, and even going to his place. Vol. II RP 414-419 The alleged matter to impeach was collateral because it had no purpose other than contradiction.

The *Aguirre* panel did not misinterpret the *Fankouser* panel just because the latter panel reversed a conviction. It simply applied the long-standing principles set forth in *Oswald* and other decisions of this Court to a substantially different set of facts. In *Fankouser*, the prosecutor violated a pre-trial order in asking the confidential informant about an alleged prior buy from defendant. Defendant

should have been allowed to let his witness to say no such earlier buy occurred because the alleged crime was identical and the informant's bias/motivation patent. A clearly non-collateral matter.

In *State v. Fisher*, 165 Wn.2d 727 (2009), Defendant testified and denied the charge of *sexually* abusing a former step-daughter. To impeach, the prosecutor was improperly allowed to produce evidence of *later physical* abuse of other later step-children, evidence irrelevant because physical abuse is not always sexual and collateral because the later incidents had nothing to do with the conduct charged. Defendant's claim that the trial court improperly limited his attempts to explore the bias of witness against him was rejected. *Fischer* at 752-753 The rationale and application of long established guidelines for the trial court in *Fankhauser* and *Fischer* support the trial court's discretionary ruling here. She carefully used rather than abused her discretion, and even if one were to claim error is abuse, it was certainly not manifest. "The Sixth Amendment to the United States Constitution guarantees a defendant a fair trial but not a trial free from error." *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984) cited in *Fischer* at 746.

Petitioner argues that where a complaining witness's credibility is crucial, her possible motive to lie is not a collateral issue, citing *State v. Lubers*, 81 Wn. App. 614, 915 P.2d 1157

(1996). In a sense this is a tautology. One claiming rape always puts her credibility on the line. Lubers, like Petitioner, offered to impeach the victim by evidence of motive to lie; a feud between the victim's family and his girlfriend was, he claimed, the reason she falsely accused him of rape. This was properly deemed irrelevant, collateral and wholly speculative. *Lubers*, 81 Wn. App. at 623, citing *State v Whyde*, 30 Wn. App 162, 632 P.2d 913 (1981), *State v. Carlson*, 61 Wn. App. 865, 812 P.2d 536 (1991), and *State v. Roberts*, 25 Wn. App. 830, 834-5, 611 P.2d 1297 (1980).

In *Carlson, supra*, defendant was accused of abusing a child whose mother reported him. The trial court refused to allow him to present evidence she had been a cocaine user even after she took the stand and denied the use, because the alleged use was before the report. This was held proper exclusion of an attempt to impeach on a collateral issue with evidence tending only remotely to show bias or prejudice.

In conclusion, the cases above are consistent in their statement of applicable law and support the decision of the Court of Appeals affirming Judge Hirsch's exercise of discretion.

3. The trial court properly instructed the jury on the meaning of the term assault.

During deliberations the jury asked: "Define 'unlawful' force as used in Instruction #12." CP 61 After consultation with counsel, the court responded: "Unlawful force as used in Instruction #12 refers to any force alleged to have occurred that was *not consented to* and that otherwise meets the definition of assault as contained in Instruction #12." CP 61 (emphasis added). It should be noted at the outset that this language was actually redundant. The last paragraph of Instruction #12 reads as follows: "An act is not an assault if it is done *with the consent* of the person alleged to be assaulted". (Emphasis added). Vol. IV RP 8 80,11-13.

A trial judge has discretion to give further instructions to the jury after deliberations have started. *State v. Ng*, 110 Wn.2d 32, 42, 750 P.2d 632 (1988). Claims of erroneous jury instructions are reviewed de novo. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). The Court will consider the instructions as a whole, reading the challenged portions in the context of all the instructions given. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Jury instructions are sufficient if they allow the parties to argue their theories of the case and, when read as a whole, properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

The petition and reply cite three cases: *State v. Walden*, 131 Wn.2d 469, 932 P.2d 1237 (1997), *State v. LeFaber*, 128 Wn.2d 900, 913 P.2d 369 (1996) and *State v. Prado*, 144 Wn. App. 227, 181 P.3d 901 (2008). All of these cases involved the affirmative defense of self-defense and questioned the instructions on that issue. "To be entitled to a jury instruction on self-defense, the defendant must produce some evidence demonstrating self-defense. *Walden* at 473. See also *State v. Jensen*, 149 Wn. App. 393,401 (2009), *citing City of Bremerton v. Widell*, 146 Wn.2d 561, 51 P.3rd 733, *cert. denied*, 537 U.S. 1007 (2002), for the proposition that only when a defendant sufficiently asserts one of the statutory defenses to a crime does the burden to disprove the defense fall on the State.

Petitioner would not have been entitled to an instruction in the language of WPIC 17.02 (explaining self-defense to an assault charge) even had he asked for it, which he did not. Nor would he have been entitled to an instruction employing the language of RCW 9A.16.020 (Use of force, when lawful), "Force is not unlawful ... (3) whenever used by a person about to be injured." The reason is simple. There is nothing in the record to support an assertion of self-defense. In direct examination concerning the incident that led to the assault charge, he testified as follows:

Q. "All right. My next question is, once you got back to your home, was there any type of altercation with anybody?"

A. "No, there was not."

Q. "Okay. And that includes Ms. Laughman?"

A. "That does include Sergeant Laughman."

Vol. IV RP 779, 15-20.

His attorney then questioned him about the so-called "combatives" he said he and Laughman sometimes engaged in. Q. "Okay. Were you doing any of these combatives in the – in your house that evening?" A. "Once we got back into the bedroom, we play-wrestled on the bed for a little bit." Vol. IV RP 782, 9-12. Laughman had testified that the assault with the knife took place before they went into the bedroom.

Instruction #12 explains the three definitions of assault recognized by the common law: actual striking, attempting to injure, and conduct intended to create apprehension and fear. The term "unlawful force" was included in each definition. In *State v. Elmi*, 166 Wn.2d 209, 215 (2009) this Court discussed the three common law definitions because assault is not defined in our criminal code, setting them forth as follows: (1) an unlawful touching (actual battery); (2) an attempt *with unlawful force* to inflict bodily injury upon another, intending but failing to accomplish it; and (3) putting another in apprehension of harm. (emphasis added). It is notable

that the term *unlawful force* is omitted from (1) and (3) apprehension assault, the type of assault involved in this case. Based on *Elmi*, the inclusion of the term in instruction No. 11, as well as the trial court's follow-up explanation of it, may have been unnecessary and superfluous.

Petitioner's claim here appears to be that the trial court should have *sua sponte* provided a self-defense instruction where one was neither requested nor supported by the record. The cases cited do not support the claim of some subjective component to the definition of assault. There is simply nothing in the record to support any assertion that Petitioner believed he was in actual danger of great bodily harm and defending himself as the Petition's reference to WPIC 17.04 suggests.

4. Double jeopardy principles were not violated in a second degree assault prosecution when the defendant's use of a deadly weapon (a combat knife with a blade longer than three inches) was both an element of the charge and the basis for imposing a deadly weapon sentence enhancement.

Count II charged assault in the second degree with a deadly weapon, a combat knife with a blade longer than three inches. RCW 9A.36.021 (1) (c). A deadly weapon enhancement was included. Count III charged rape in the second degree by forcible compulsion RCW 9A.44.050 (1) (a). The date was the night of August 26-27, 2006. CP 9.

Jury instruction #14 defined second degree assault with a deadly weapon. Vol. IV RP 881. Jury instruction #21 explained that a knife with a blade longer than three inches is a deadly weapon and directed the jury to return a special verdict if it found that the defendant was armed with such a deadly weapon. Vol. IV RP 886. Jury instructions 15-18 defined rape in the second degree.

On February 12, 2006, the jury found Petitioner guilty of Counts II and III and entered a special verdict that he was armed with a deadly weapon while committing the assault charged in Count II. Sentencing took place April 12, 2007. Following the recommendations in a Pre-Sentence Investigation, the judge imposed the high end of the sentencing range (respectively 12-14 months for the assault and 95-125 months for the rape) for both counts. Stating that "there is a weapons enhancement that the court believes applies to both charges", she added the deadly weapon enhancement to both counts. No objection was made to the procedure. RP Sentencing 24.

This was all in compliance with applicable Washington statutes. RCW 9.94A.602 requires a special jury verdict that a defendant was armed with a deadly weapon at the time of the crime and includes a knife with a blade longer than three inches in the definition of deadly weapon. RCW 9.94A.533 (4) (effective July

2004) provides that enhancements for one offense shall be added to the others charged concurrently and run consecutively.

State v. DeSantiago, 149 Wn.2d 402, 416, 68 P.3d 1065 (2003), sets forth a detailed history and explanation of this statutory procedure. Without question, subject to constitutional constraints, the legislature has the absolute power to define criminal conduct and assign punishment. *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). Double jeopardy is only implicated when the court exceeds the authority granted by the legislature and imposes multiple punishments where multiple punishments are not authorized. *Id* at 776.

Although *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct., 159 L. Ed. 2d 403 (2004), was not a double jeopardy case, but rather dealt with factual determinations by a judge that should be made by a jury (U.S. Const. 6th Amendment), Petitioner cites to it (and to *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005), *rev'd on other grounds*, 548 U.S. 212 (2006) to buttress his claim that a sentencing enhancement acts as the functional equivalent of an element of the crime. This argument is flawed. *Blakely* merely held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a

reasonable doubt.” *Blakely*, 542 U.S. at 301-02. The allegation that Petitioner was armed with a deadly weapon, a combat knife, at the time of the assault was submitted to the jury and proved beyond a reasonable doubt.

As candidly noted by Petitioner, his claim was clearly rejected by Division One in *State v. Nguyen*, 134 Wn. App. 863, 142 P.3d 1117 (2006). *State v. Tessema*, 139 Wn. App. 483, 162 P.3d 420 (2007), recently clearly reaffirmed that decision.

Where the constitutionality of a statute is challenged, the statute is presumed constitutional, and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt. Courts are generally hesitant to strike a duly enacted statute unless fully convinced that the statute violates the constitution. If possible, a statute should be construed as constitutional. *Tessema*, 139 Wn.App. at 488.

Nguyen noted that it is well settled that sentence enhancements for offenses committed with weapons do not violate double jeopardy, even where the use of a weapon is an element of the crime. Defendant Nguyen contended that the rule needed to be reexamined in light of *Blakely*. Like *Tessema*, Nguyen argued that the voters did not consider the problem of redundant punishment when they passed Initiative 159, but Nguyen's double jeopardy

argument was dismissed. Unless the question involves the consequences of a prior trial, double jeopardy analysis is an inquiry into legislative intent. The intent underlying the mandatory firearm enhancement is unmistakable: the use of firearms to commit crimes shall result in longer sentences unless an exemption applies. Consequently, double jeopardy was not implicated. *Tessema*, 139 Wn. App. at 492.

Petitioner says that prior decisions holding there is no double jeopardy problem *must* be reconsidered. He doesn't say why. Nor does he question the fact that the Legislature has made its intent unmistakably clear. "Current law does not sufficiently stigmatize the carrying and *use* of deadly weapons by criminals". (Emphasis added.) Laws, 1995, Ch.129, Sec.1 Petitioner argues that principles of double jeopardy were violated because he was "convicted" of second-degree assault with a deadly weapon and being armed with a deadly weapon while committing the assault, two punishments for the same crime. Petition 23. This argument focuses on what at first glance may appear to be a tautology. However, *non semper ea sunt quae videntur*. The criminal code, RCW 9A, establishes liability for certain conduct. The Sentencing Reform Act, RCW 9.94A, establishes punishment. These are two separate acts with two separate purposes. *State v. Shepherd*, 95 Wn. App. 787,793,

977 P.2d 635 (1999). Although the term “deadly weapon” appears in both RCW 9A.36.021 (1) (c), (“assaulting another *with* a deadly weapon”, the crime charged here), and in RCW 9.94A.533, RCW 9.94.602, and 9.95.040, the statutes dictating enhanced penalties for committing certain crimes while *armed with* a deadly weapon (emphasis added), the term has a considerably broader term in the criminal code. There are any number of instruments of assault which may be “likely to produce bodily harm” (former RCW 9.11.020, defining second degree assault) or even lethal for purposes of the crime of the assault, but which are not “deadly” as defined by the sentencing enhancement statutes. Deadly weapons requiring enhanced penalties are to be distinguished from instruments likely to produce bodily harm under the assault statute. See *State v. Ross*, 20 Wn. App. 448, 453-454, 580 P.2d 1110 (1978) *citing to State v. Jackson*, 70 Wn.2d 498, 502, 424 P.2d 313 (1967). See also *State v. Thompson*, 88 Wn.2d 546,549, 564 P.2d 323 (1977). One can easily think of many such instrumentalities with which one does not “arm” oneself in the dictionary sense, e.g. boats, bulldozers, screwdrivers, shards of glass, shovels etc. The instrumentality in *Ross* (Division III) happened to be an automobile, in *Jackson* it was a knife with a blade *less* than three inches, neither “deadly” under the sentencing enhancement statutes. The

applicable section of the statute defining second degree assault was later amended to read "assaults another with a deadly weapon", RCW 9A.36.020(1) (c), but the same analysis was followed with strong approval by Division II in *State v. Shepherd*, 95 Wn. App. 787, 793, 977 P.2d 635 (1999), another case involving an assault with a car. Although the deadly weapon sentencing enhancement was stricken, the underlying deadly weapon assault charge stood.

The criminal code defines an assault with *any* deadly weapon as second degree assault, a class B felony, but the Sentencing Reform Act includes only *some* instrumentalities as deadly for the purposes of sentencing enhancement. This is not double punishment for the same crime, but a legislative decision that some second degree assaults are *deadlier* than others. "The legislature intended to impose a greater penalty upon those who, armed with a deadly weapon when committing a felony, are thereby more likely to cause grievous bodily harm or death." *Ross, supra*, at 454. To put it another way, one does not "arm" (see discussion in *Ross*) oneself in the dictionary sense with a bulldozer, boat or boulder but can certainly use them with lethal (deadly) force. Note that the sentencing enhancement statutes use the term "armed with". The statute defining assault does not.

Acceptance of Petitioner's argument would lead to a clearly anomalous result. Suppose hypothetically that a defendant were charged under another subsection of RCW 9A.36.021 and happened to have his combat knife in his leg sheath or within arm's reach. The sentencing enhancement would clearly apply. But if he put the knife to the victim's throat, bringing him under subsection (c), assaulting with a deadly weapon, the enhancement would *not* apply.

5. Whether the trial court's denial of newly retained appellate counsel's request for an eight week delay of the sentencing hearing already scheduled two months after trial violated Petitioner's Sixth Amendment rights.

While the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers. *State v. Roberts*, 142 Wn.2d 471, 515, 14 P.3d 713 (2000), citing *Wheat v. United States*, 486 U.S. 153, 158-59, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). See also *Morris v. Slappy*, 461 U.S. 1, 13-14, 103 S.Ct. 1610, 1617-1618, 75 L.Ed.2d 610 (1983); *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)).

In *Wheat*, defendant's request for a new lawyer two days before trial was denied for clear conflict of interest. (The attorney he wanted was already representing two co-defendants in the plea bargaining process). Despite the waivers of conflict by all involved defendants, the Court rejected a claim of Sixth Amendment violation.

In *Morris*, after a rape trial was under way, defendant moved for a continuance, claiming that his newly assigned attorney did not have time to prepare the case. The experienced attorney, however, told the court that he was fully prepared and "ready" for trial, and the court denied a continuance. The Circuit Court reversed, holding that the Sixth Amendment guarantees a right to counsel with whom the accused has a "meaningful attorney-client relationship," and that the state trial judge abused his discretion. Chief Justice Burger's comments in summarily rejecting this "novel" reading of the Sixth Amendment are particularly apropos here.

In its haste to create a novel Sixth Amendment right, the court wholly failed to take into account the interest of the victim of these crimes in not undergoing the ordeal of yet a third trial in this case. Of course, inconvenience and embarrassment to witnesses cannot justify failing to enforce constitutional rights of an accused: When prejudicial error is made that clearly impairs a defendant's constitutional rights, the burden of a new trial must be borne by the prosecution, the courts and the witnesses: the

Constitution permits nothing less. But in the administration of criminal justice, courts may not ignore the concerns of victims. Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities; this is especially so when the crime is one calling for public testimony about a humiliating and degrading experience such as was involved here.

Morris, 461 U. S. at 14.

In this case, two months after trial, the trial court had the Pre-Sentence report and all was ready for the long scheduled sentencing hearing when newly retained counsel for appeal appeared and asked for an eight week continuance so that the record could be typed and she could review it. Nothing in the record shows any problem or concern by Petitioner about his trial counsel's competence to proceed with sentencing. The victim, flown across the country to be present pursuant to RCW 7.69.030, emphatically asked the prosecutor to object to the continuance. RP Sentencing 5,11-12.

Petitioner also cites to *U.S. v. Walters*, 309 F.3d 589, (9th Cir.2002), *cert. denied*, 540 U.S. 846 (2003) This case actually supports the trial court. A nationally-recognized expert in federal criminal sentencing applied unsuccessfully to the district court to appear *pro hac vice* for sentencing. Applying a local *pro hac vice* rule, the trial court refused. Critical of a mechanistic application of a

local *pro hac vice* rule, the circuit court found a violation of defendant's Sixth Amendment rights. Nevertheless, it found the error harmless because the denial of counsel impacted only the sentencing phase, not the guilt phase, the record showed defendant was well represented at sentencing and any error was harmless.

There was no critique here about counsel, no request for an exceptional sentence nor any claim of procedural error. Unsupported speculation that a different attorney at sentencing would have made a difference is insufficient basis for reversal.

F. CONCLUSION

Respondent State of Washington requests this Court to affirm the Court of Appeals's affirmance of Petitioner's conviction.

Respectfully submitted this 28th day of August, 2009.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Supplemental Brief, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 28 day of August, 2009, at Olympia, Washington.



CAROLINE JONES