

W

~~85949-7~~
85789-0

SUPREME COURT NO. _____
COURT OF APPEALS NO. 64726-1-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

GEORGE RYAN,

Respondent.

FILED
APR 23 2011
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

2011 APR 21 PM 1:31

FILED
COURT OF APPEALS
CLERK

PETITION FOR REVIEW

DANIEL T. SATTERBERG
King County Prosecuting Attorney

BRIAN M. McDONALD
Senior Deputy Prosecuting Attorney
Attorneys for Petitioner

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>IDENTITY OF PETITIONER</u>	1
B. <u>ISSUES PRESENTED FOR REVIEW</u>	1
C. <u>STATEMENT OF THE CASE</u>	1
D. <u>REASONS WHY REVIEW SHOULD BE ACCEPTED</u>	5
1. THERE IS A CONFLICT BETWEEN THE DIVISIONS OF THE COURT OF APPEALS ON WHETHER A <u>BASHAW</u> CLAIM IS AN ISSUE OF CONSTITUTIONAL DIMENSION THAT MAY BE RAISED FOR THE FIRST TIME ON APPEAL.....	5
2. THIS PETITION INVOLVES ISSUES OF SUBSTANTIAL PUBLIC INTEREST	8
E. <u>CONCLUSION</u>	10

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Bashaw, 169 Wn.2d 133,
234 P.3d 195 (2010)..... 1, 3-10

State v. Davis, 163 Wn.2d 606,
184 P.3d 639 (2008)..... 9

State v. Goldberg, 149 Wn.2d 888,
72 P.3d 1083 (2003)..... 9

State v. Nunez, ___ Wn. App. ___,
248 P.3d 103 (2011)..... 4, 5, 6

State v. Ryan, No. 64726-1-I
(Wa. Ct. App. Div. I, filed April 4, 2011)..... 1, 4, 6, 8

Statutes

Washington State:

RCW 9.94A.537 8

Rules and Regulations

Washington State:

RAP 2.5..... 6

RAP 13.4..... 5, 8

Other Authorities

WPIC 160.00..... 3, 8

A. IDENTITY OF PETITIONER

The State of Washington seeks review of the published opinion filed in State v. Ryan, No. 64726-1-I (Wa. Ct. App. Div. I, filed April 4, 2011). Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. Whether a challenge to a jury instruction based upon State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010) qualifies as an issue of manifest constitutional error that may be raised for the first time on appeal.

2. Whether Bashaw's holding that jury unanimity is not required for a "no" finding on a sentencing enhancement applies to exceptional sentence aggravating circumstances.

3. Whether this Court should reconsider its holding in Bashaw.

C. STATEMENT OF THE CASE

Defendant George Ryan and Evette White had a very volatile relationship; they repeatedly broke up and then resumed their relationship. 2RP 308, 326, 333, 382. Over a ten-year period, there were numerous instances where Ryan assaulted White, and

the police responded. 2RP 310-33. On June 17, 2009, Ryan pointed a knife at White and threatened to kill her. 2RP 340-43, 355, 406-08.

Based upon this last incident, the State charged Ryan with second-degree assault and felony harassment. CP 115-16. On both counts, the State alleged the exceptional sentence aggravating circumstance that the offense involved domestic violence and there was evidence of a pattern of psychological, physical or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time. Id. On the felony harassment count, the State also alleged that Ryan was armed with a deadly weapon. CP 116.

Trial began in November of 2009. The trial court provided the jury with special verdict forms for the aggravating circumstance and the deadly weapon allegation. The instruction for the special verdict forms stated in pertinent part:

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

CP 79. This instruction is identical to WPIC 160.00. Ryan did not object or take exception to this instruction. 3RP 449-50.

A jury convicted Ryan as charged. CP 84-90. The court imposed an exceptional sentence of 70 months on the second-degree assault conviction and 60 months on the felony harassment conviction. CP 94.

After the trial in this case, this Court issued its decision in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010). In that case, this Court held that an instruction for a school bus stop sentencing enhancement was incorrect because it told the jury that they had to be unanimous to answer "no." Id. at 145-47. The Court explained that "a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence." Id. at 146.

On appeal, Ryan, citing Bashaw, challenged the instruction for the special verdict forms for the aggravating circumstance and the deadly weapon allegation. He argued that the instruction incorrectly told the jury that it had to be unanimous in order to answer "no." Brief of Appellant at 24-29.

The State responded that the claimed error was waived because it was not of constitutional magnitude and Ryan had not objected to the instruction. Brief of Respondent at 20-23. The State further argued that even if the issue was not waived, the rule announced in Bashaw did not apply to an exceptional sentence aggravating circumstance because an exceptional sentence statute expressly required jury unanimity for a "no" finding. Id. at 23-25. Finally, the State, seeking to preserve the issue for this Court, argued that the holding in Bashaw was incorrect. Id. at 25-27.

Shortly before oral argument in Ryan, Division III issued a decision holding that a defendant, by not objecting at trial, waived his Bashaw challenge to an instruction requiring jury unanimity to acquit defendant of a sentencing enhancement. State v. Nunez, ___ Wn. App. ___, 248 P.3d 103 (2011). The court reasoned that the error was not manifest constitutional error and could not be raised for the first time on appeal. 248 P.3d at 106-10.

On April 4, 2011, Division I issued its decision in this case, affirming Ryan's convictions, but vacating his sentences. Slip op. at 2-7. Disagreeing with Division III's decision in Nunez, Division I held that a Bashaw claim was an issue of constitutional magnitude and could be raised for the first time on appeal. Id. at 4-5. The

court further held that Bashaw applied to aggravating circumstances. Id. at 5-7.

The State now seeks review.

D. REASONS WHY REVIEW SHOULD BE ACCEPTED

1. THERE IS A CONFLICT BETWEEN THE DIVISIONS OF THE COURT OF APPEALS ON WHETHER A BASHAW CLAIM IS AN ISSUE OF CONSTITUTIONAL DIMENSION THAT MAY BE RAISED FOR THE FIRST TIME ON APPEAL.

Under RAP 13.4(b)(2), this Court will accept review "[i]f the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals." Review should be accepted because Division I's opinion in this case is in clear conflict with Division III's opinion in State v. Nunez, ___ Wn. App. ___, 248 P.3d 103 (2011).¹

In Bashaw, this Court recently held that an instruction for a school bus stop sentencing enhancement was incorrect because it told the jury that they had to be unanimous to answer "no." 169 Wn.2d at 145-47. The Court did not announce any constitutional basis for its decision, and instead, cited policy justifications for this rule. Id. at 146-47. There is no indication that the State objected to Bashaw raising the issue for the first time on

¹ A petition for review has been filed in Nunez.

appeal, and this Court did not consider whether the challenge was barred under RAP 2.5.

In Nunez, the defendant, citing Bashaw, sought to vacate his school bus zone sentencing enhancement. The instruction in Nunez's case required jury unanimity in order to acquit Nunez of the sentencing enhancement. 248 P.3d at 106. Division III observed that "[i]nstructional error is not automatically constitutional error" and that "there is no textual support in [the Washington Constitution] for a right to nonunanimous acquittal of any criminal charge or consequence." Id. at 107-08. Division III further noted that in Bashaw this Court "did not identify a constitutional provision violated by the concluding instruction challenged in that case." Id. at 108. The court concluded that the Bashaw claim was not preserved for review, holding that "[t]he trial court's failure to instruct the jury that it could acquit Mr. Nunez of the aggravating factor nonunanimously is... not an error of constitutional dimension." Id. at 108.

In contrast, in Ryan, Division I disagreed with Division III and held that Ryan could challenge the jury instruction for the first time on appeal. Slip op. at 5. In a brief discussion, the court explained:

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

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

Slip op. at 4-5 (footnotes omitted).

Because two Divisions of the Court of Appeals are in clear conflict on the issue of whether a defendant's challenge to a jury instruction under Bashaw presents an issue of constitutional magnitude that can be raised for the first time on appeal, this Court should grant review and resolve the conflict.

**2. THIS PETITION INVOLVES ISSUES OF
SUBSTANTIAL PUBLIC INTEREST.**

Under RAP 13.4(b)(4), this Court will accept review "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." The issues presented in this petition are of substantial public interest. The jury instruction in this case was the standard WPIC concluding instruction for sentencing enhancements and aggravating circumstances. See WPIC 160.00. Under the logic of the Ryan decision, in any case where this standard instruction was used, the defendant may be entitled to re-sentencing and vacation of the sentencing enhancement. The sentences in many criminal cases, involving some of the worst offenders, are placed at risk by the holding in Ryan.

In addition, Bashaw did not involve an exceptional sentence aggravating circumstance, and this Court has not considered whether jury unanimity is required for a "no" finding in such cases. The statute governing exceptional sentence aggravating circumstances expressly requires jury unanimity for any verdict. See RCW 9.94A.537(3) ("The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory"). This

Court generally defers to the legislature's policy judgment with respect to the exceptional sentence procedures,² and the Court should decide whether Bashaw applies to aggravating circumstances.

Finally, the State respectfully requests that the Court re-consider its holding in Bashaw. For its holding, the Court relied upon one prior case, State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), which did not involve a challenge to a jury instruction and did not clearly mandate the holding in Bashaw. The Court's opinion appears to be grounded on purely policy considerations; the Court reasoned that jury unanimity should not be required for a "no" finding because, in the Court's opinion, the costs and burdens of conducting a second trial on a sentencing enhancement outweighed the interest in imposing the additional penalty on a defendant. 169 Wn.2d at 146-47.

But the Court's concern about the costs is overstated; sentencing enhancements have existed for decades, and there is no evidence that any appreciable number of second trials have been conducted on sentencing enhancements alone. In addition,

² State v. Davis, 163 Wn.2d 606, 614, 184 P.3d 639 (2008).

this Court did not consider the costs of imposing this new rule on cases that had already been tried. In all cases where the standard WPIC instruction was given, the court and the parties now face the costs of appellate litigation and new sentencing hearings. Criminal defendants stand to receive a windfall in the form of a reduced sentence, even though the jury unanimously found the elements of the crime and the sentencing enhancement. Accordingly, this Court should grant review in order to reconsider its holding in Bashaw.

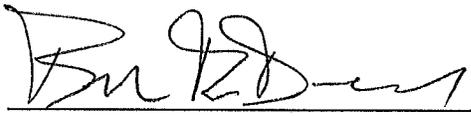
E. CONCLUSION

For all the foregoing reasons, this Court should grant review.

DATED this 21st day of April, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
BRIAN M. McDONALD, WSBA #19986
Senior Deputy Prosecuting Attorney
Attorneys for Petitioner
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Harlan Dorfman and Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the PETITION FOR REVIEW, in STATE V. GEORGE RYAN, Cause No. 64726-1-I, in the Court of Appeals, Division I, for the State of Washington.

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

Name
Done in Seattle, Washington

Date

APPENDIX A

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

2011 APR -4 AM 10:20

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

STATE OF WASHINGTON,)	No. 64726-1-I
)	
Respondent,)	
)	
v.)	
)	
GEORGE W. RYAN,)	PUBLISHED IN PART
)	
Appellant.)	FILED: April 4, 2011

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

BACKGROUND

The charges in this case arose from an incident in June 2009. George Ryan and Evette White had been engaged in a long and tumultuous relationship marked by repeated breakups and numerous reports to police of domestic violence. On this occasion, Ryan had been drinking. He was talking with White as he toyed with a knife. When White indicated she wished to end their relationship, Ryan pointed the knife at

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

No. 64726-1-1/2

her, bringing it within a few inches of her face, and threatened to cut and to kill her. He told her their two daughters would not have a mother.

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

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

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

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

DISCUSSION

Special Verdicts

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

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."^[2]

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

In Bashaw, the jury had to determine whether the State had proven a fact giving rise to a sentence enhancement.³ In explaining the special verdict forms, the trial court gave the standard unanimity instruction. Our Supreme Court held the instruction erroneous for sentencing verdicts and reversed:

Though unanimity is required to find the *presence* of a special finding increasing the maximum penalty, it is not required to find the *absence* of such a special finding. The jury instruction here stated that unanimity was required for either determination. That was error.^[4]

The instruction here was likewise error. The State's burden is to prove to the jury beyond a reasonable doubt that its allegations are established. If the jury cannot unanimously agree that the State has done so, the State has necessarily failed in its burden.⁵ To require the jury to be unanimous about the negative—to be unanimous that the State has not met its burden—is to leave the jury without a way to express a reasonable doubt on the part of some jurors.⁶

² Clerk's Papers (CP) at 79.

³ 169 Wn.2d at 145.

⁴ Id. at 147 (citing State v. Goldberg, 149 Wn.2d 888, 893, 72 P.3d 1083 (2003)).

⁵ Id.

⁶ In Goldberg, the jury was instructed to answer "no" if it could not unanimously answer "yes". Goldberg, 149 Wn.2d at 893 ("In order to answer the special verdict form 'yes', you must unanimously be satisfied beyond a reasonable doubt that 'yes' is the correct answer. If you have a reasonable doubt as to the question, you must answer 'no'." (emphasis omitted)). The Supreme Court vacated the exceptional sentence in that case not because of a faulty instruction but because of the trial court's insistence that the jury be unanimous to answer "no." Id. at 894.

Ryan did not object to the instructions below. Ordinarily, failure to timely object waives the claim on appeal.⁷ This is so even with respect to instructional errors.⁸ But an appellant may raise an issue for the first time on appeal if the error is both manifest and of constitutional dimension.⁹ Though the State contends the instructional error here meets neither condition, Bashaw compels the conclusion the error is both manifest and constitutional.

The State points out that neither Goldberg nor Bashaw articulated a constitutional rationale, and relies on a footnote in Bashaw in which the court observed that its holding is “not compelled by constitutional protections against double jeopardy . . . but rather by the common law precedent of this court, as articulated in Goldberg.”¹⁰ The State contends this footnote establishes that the error is not of constitutional magnitude. The State also points to the Bashaw court’s emphasis on concerns about judicial economy, cost and finality, which are not constitutional concerns.

In a thoughtful and thorough opinion, Division Three of this court recently came to that conclusion, holding that the same error was not of constitutional magnitude and cannot be raised for the first time on appeal.¹¹

⁷ RAP 2.5(a); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

⁸ See, e.g., State v. Williams, 159 Wn. App. 298, 312–13, 244 P.3d 1018 (2011).

⁹ State v. O’Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

¹⁰ Bashaw, 169 Wn.2d at 146 n.7 (citation omitted).

¹¹ State v. Nunez, No. 28259-7-III, 2011 WL 505335 at *5–*16 (Wash. Ct. App. February 15, 2011).

We reach the opposite conclusion. The Bashaw court strongly suggests its decision is grounded in due process. The court identified the error as “the procedure by which unanimity would be inappropriately achieved,” and referred to “the flawed deliberative process” resulting from the erroneous instruction.¹² The court then concluded the error could not be deemed harmless beyond a reasonable doubt, which is the constitutional harmless error standard. The court refused to find the error harmless even where the jury expressed no confusion and returned a unanimous verdict in the affirmative.¹³ We are constrained to conclude that under Bashaw, the error must be treated as one of constitutional magnitude and is not harmless.

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

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

¹² Bashaw, 169 Wn.2d at 147.

¹³ Id. at 147–48; see also State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (The “test for determining whether a constitutional error is harmless [is] ‘whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” (internal quotation marks omitted) (quoting Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999))).

¹⁴ The State does not concede that Bashaw correctly states the law with respect to sentencing enhancements, but acknowledges this court is bound by the decision.

Reading the quoted section together with other provisions of the statute, as we must, convinces us that unanimity is required only for an affirmative finding.¹⁵

Subsection 6 empowers the court to sentence a defendant to the maximum term of confinement “[i]f the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence.”¹⁶ This language plainly contemplates the possibility that the jury will not be unanimous, in which case the court may not impose the aggravated sentence.

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

¹⁵ In re Pers. Restraint of Skylstad, 160 Wn.2d 944, 948, 162 P.3d 413 (2007) (“When we read a statute, we must read it as a whole and give effect to all language used.”).

¹⁶ RCW 9.94A.537(6) (emphasis added).

¹⁷ Bashaw, 169 Wn.2d at 146–47 (“Retrial of a defendant implicates core concerns of judicial economy and finality. Where, as here, a defendant is already subject to a penalty for the underlying substantive offense, the prospect of an additional penalty is strongly outweighed by the countervailing policies of judicial economy and finality.”).

But the amendments codified in RCW 9A.537(2) responded to Blakely v. Washington,¹⁸ after which aggravated sentences were reversed because, consistent with prior law, judges rather than juries had found the predicate facts.¹⁹ The provision reveals nothing about the legislature's intent concerning retrial in these circumstances.

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

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

FURTHER DISCUSSION

Limitation on Cross-Examination

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

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

During a break in cross-examination of White, defense counsel sought permission to inquire into the stabbing. Counsel argued White's arrest was relevant

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

¹⁹ LAWS OF 2007, ch. 205, §§ 1, 2.

because it established bias and motivation to fabricate to curry favor with the State and was probative of whether White feared Ryan. Counsel also argued White had opened the door by testifying she ran away once when Ryan slapped her because "I can't physically do too much to George."²⁰ The court denied Ryan's request.

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

Whether the trial court has violated the confrontation clause is a question of law, reviewed de novo.²¹ We review a trial court's ruling on the admissibility of evidence for abuse of discretion, and will not disturb a court's limitation on the scope of cross-examination absent a manifest abuse of discretion.²² Abuse exists when the trial court's exercise of discretion is "manifestly unreasonable or based upon untenable grounds or reasons."²³

The rights to present a defense and to confront and cross-examine adverse witnesses are guaranteed by both the federal and state constitutions.²⁴ But a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her

²⁰ Report of Proceedings (RP) (Nov. 17, 2009) at 328.

²¹ State v. Jones, 168 Wn.2d 713, 723–24, 230 P.3d 576 (2010).

²² State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002); State v. Campbell, 103 Wn.2d 1, 20, 691 P.2d 929 (1984).

²³ Darden, 145 Wn.2d at 619 (quoting State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

²⁴ U.S. CONST. amend VI; WASH. CONST. art. I, § 22; Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); Davis v. Alaska, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

defense, and the right to cross-examine adverse witnesses is not absolute.²⁵ Even relevant evidence may be excluded without offending the defendant's confrontation right if the State has a compelling interest in precluding evidence so prejudicial as to disrupt the fairness of the trial.²⁶

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

Reasonable Fear. Central to the charges was whether or not White had a reasonable fear that Ryan would hurt her or carry out his threat to kill her.²⁷ Ryan contends evidence that White had once stabbed him is relevant to this question because it makes it less likely that she reasonably feared he would hurt or kill her on this occasion. But the alleged stabbing occurred more than two years before, under circumstances suggesting self-defense. Even if White stabbed Ryan without provocation, the incident has no bearing on her fear when he was the one with the knife.

Bias And Motive To Fabricate. Ryan also contends White's arrest was relevant to her bias or motive to fabricate because White may have testified for the State to avoid prosecution for the stabbing. He relies on Davis v. Alaska, in which the Supreme

²⁵ Hudlow, 99 Wn.2d at 15; Darden, 145 Wn.2d at 620; see also ER 611(b) (court has discretion to determine scope of cross-examination).

²⁶ Hudlow, 99 Wn.2d at 15.

²⁷ See CP at 69 (jury instruction defining "assault" as an act done with intent to create fear that "in fact creates in another a reasonable apprehension and imminent fear of bodily injury"); CP at 72 (to convict instruction on felony assault requiring jury to find that "the words or conduct of the defendant placed Evette White in reasonable fear that the threat to kill would be carried out").

Court held the defense was entitled to cross-examine an adverse witness on his status as a probationer to demonstrate his potential bias.²⁸

In Davis, the witness was on probation for burglary.²⁹ He was testifying against individuals charged with burglary for stealing a safe, which was discovered on the witness's property.³⁰ The witness's record and probation status thus implicated both his enthusiasm to cooperate with the State and his possible motivation to fabricate in an effort to deflect suspicion of his own involvement.³¹

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

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

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

²⁹ Id. at 311.

³⁰ Id. at 309.

³¹ Id. at 313–14, 317.

³² RP (Nov. 17, 2009) at 328.

The open door rule allows a party to introduce otherwise inadmissible evidence on cross-examination when a witness testifies about it on direct.³³ But the evidence must still be relevant to some issue at trial.³⁴

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

Dynamics Of Relationship. The court allowed the State to present evidence of a number of instances of domestic violence based upon on State v. Magers, which held that "prior acts of domestic violence, involving the defendant and the crime victim, are admissible in order to assist the jury in judging the credibility of a recanting victim."³⁵ Ryan argues that evidence of the stabbing was relevant for the same purpose. But Ryan never made this argument below, and has therefore waived it.³⁶ Further, White was not a recanting victim.

³³ State v. Stockton, 91 Wn. App. 35, 40, 955 P.2d 805 (1998).

³⁴ Id.

³⁵ 164 Wn.2d 174, 186, 189 P.3d 126 (2008).

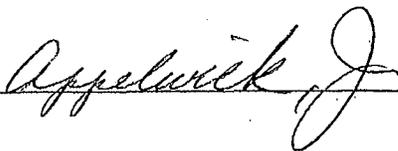
³⁶ See State v. Jordan, 39 Wn. App. 530, 539, 694 P.2d 47 (1985) (defendant failed to preserve review based on one evidentiary rule by objecting based on another).

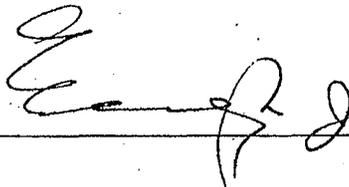
CONCLUSION

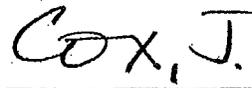
Because the stabbing incident was not relevant, its exclusion did not deprive Ryan of his right to present a defense or to confront adverse witnesses.³⁷ The State's interest in seeking a just trial by preventing evidence of little probative value from distracting the jurors was sufficient to justify exclusion of the evidence.³⁸ The court's ruling excluding the evidence and limiting cross-examination were not manifestly unreasonable and present no abuse of discretion.

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

WE CONCUR:







³⁷ See Hudlow, 99 Wn.2d at 15-16.

³⁸ Id.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Harlan Dorfman and Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the PETITION FOR REVIEW, in STATE V. GEORGE RYAN, Cause No. 64726-1-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

04-21-11
Date