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NO. 64726-1-I

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

REC'D

NOV 19 2010

King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

GEORGE RYAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Richard Eadie, Judge

COURT OF APPEALS
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REPLY BRIEF OF APPELLANT

HARLAN R. DORFMAN
CHRISTOPHER H. GIBSON
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ARGUMENT IN REPLY

1. THE RECORD IS SUFFICIENT TO REVERSE BASED ON THE TRIAL COURT'S DENIAL OF RYAN'S RIGHT TO PRESENT A COMPLETE DEFENSE.

An offer of proof is adequate if it informs the court of the specific nature of the evidence and the legal theory under which the evidence is being offered, and if it creates a record sufficient to permit review. State v. Ray, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991). "An offer of proof is not required, however, if the substance of the excluded evidence is apparent from the record." Id. at 539 (colloquy between prosecutor, court, and counsel created a sufficient record for review despite counsel's failure to make a formal offer of proof). Because the record below shows defense counsel informed the court about the nature of the proffered evidence and the legal theories under which it was being offered, the State's claim the offer of proof was inadequate is wrong. See Brief of Respondent (BOR) at 9-11.

To be clear, the evidence defense counsel ultimately wanted to elicit from White was that she had been arrested for stabbing Ryan. 2RP 380. The record in support of this fact had been provided to the State in discovery. 1RP 44-45. Ryan's counsel had received official documentation from the Seattle police department indicating the arrest had

occurred, and the trial prosecutor told the court the case had never been brought to trial. 1RP 44-45.

The State argues the offer of proof is inadequate because counsel had not asked White about the incident during the defense interview. BOR at 10-11. Given the record, however, counsel had no need to ask White anything more about the stabbing arrest. All counsel had to do was to ask whether White had been arrested for stabbing Ryan. Assuming White answered truthfully, counsel could then have used that evidence to rebut the reasonable fear element the State had to prove for each of the charged offenses.

The State argues White may have made a number of replies if asked about the arrest. BOR at 10-11. But the State cites no authority for the proposition that counsel must act as a fortune teller, predicting how a witness will answer an impeaching question, in order to make an offer of proof sufficient to permit review.

As discussed in the opening brief (BOA), the record shows a detailed pretrial discussion in which the State acknowledged the incident had been reported and told the court no charges had been laid because both Ryan and White refused to cooperate with police. BOA at 13-14; 1RP 44-45. This discussion was occasioned by the State's motion in limine to preclude testimony about this incident. CP 157; 1RP 44-48.

In the pretrial discussion, counsel presented two viable bases for inquiring about this incident; to challenge White's reasonable fear and White opening the door. 1RP 46. Thus, at that time the court had been informed about two legal theories to support admissibility. In addition, counsel presented the court with a witness statement to the effect that Ryan had been stabbed and White had acknowledged doing the stabbing. Pretrial Ex 10 (BOA at Appendix B). The State has never disputed this incident occurred, and actively engaged in argument about the relevance of the stabbing incident to White's reasonable fear. Thus, the court was aware of the factual basis for the proposed testimony and had heard argument on the legal bases for its admission. In addition, while disagreeing with counsel regarding the relevance of the stabbing to the reasonable fear element, the court reserved to see if White would open the door. 1RP 47-48. The record is adequate for this Court to determine the legal and factual issues presented below and to assess error. The State's argument to the contrary is not supported by the record before this Court.

The State also argues White's Fifth Amendment right against self-incrimination would have been implicated if Ryan had been allowed to question her about the stabbing incident. BOR at 11. Eliciting the mere fact of the arrest, however, would not have implicated White's Fifth Amendment right because the arrest was already a matter of public record.

The Fifth Amendment right would be implicated if counsel were to ask whether White had in fact stabbed him, but counsel had told the court she wanted to ask only if White had been arrested. 2RP 380. If the State wanted to elicit additional facts on redirect, the State has the power to grant transactional immunity. CrR 6.14;¹ see State v. Matson, 22 Wn. App. 114, 119-21, 587 P.2d 540 (1978) (discussing prosecution's sole discretion to grant immunity). Indeed, the State argued both below and here that there was little or no interest in prosecuting White based on this incident. CP 157; 1RP 44-45; 2RP 373; BOR at 14. Permitting Ryan to inquire only to the fact of the arrest and to non-incriminatory matters about that incident, while permitting the State to grant immunity if it wished to pursue further testimony would have protected both White's Fifth Amendment right and Ryan's right to a fair trial.

The State claims the court's refusal to permit testimony about the stabbing incident was within the court's discretion. BOR at 12-18. As

¹ CrR 6.14 – Immunity – provides:

In any case the court on motion of the prosecuting attorney may order that a witness shall not be excused from giving testimony or producing any papers, documents or things, on the ground that such testimony may tend to incriminate or subject the witness to a penalty or forfeiture; but the witness shall not be prosecuted or subjected to criminal penalty or forfeiture for or on account of any transaction, matter, or fact concerning which the witness has been ordered to testify pursuant to this rule. The witness may nevertheless be prosecuted for failing to comply with the order to answer, or for perjury or the giving of false evidence.

discussed in the opening brief, however, the exercise of that discretion must be considered within the context of the constitutional interests implicated by the right to cross-examine. See BOA at 11-13 (and cases cited).

In regard to White's potential bias resulting from the uncharged stabbing incident, the State argues Ryan presented no evidence to show White was motivated to curry favor. BOR at 14. In Davis v. Alaska, however, the Court framed the question in part as "whether the Confrontation Clause requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness' probationary status[.]" Davis v. Alaska, 415 U.S. 308, 309, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) (emphasis added).

In Davis, like here, there was no direct evidence of explicit dealings between the State and the witness regarding potentially beneficial or detrimental implications of testimony. In Davis, the Court observed defense counsel sought to show the existence of possible bias and prejudice as potential factors in a faulty identification theory. Id. at 317. Regarding that theory, the Court said:

“We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the witness’s] testimony[.] . . . The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of [the witness’s] vulnerable status as a probationer[.]

Id. at 317-18

Here, the same claim of potential bias fell on White as a person who had been arrested for a potential criminal offense, but had not been charged. The trial court erred under Davis v. Alaska by prohibiting cross-examination regarding White’s stabbing arrest.

The State also argues the court did not abuse its discretion when it ruled White had not opened the door because her testimony was a “passing reference.” BOR at 14-16. The State relies on two cases to support this argument, State v. Stockton, 91 Wn. App. 35, 955 P.2d 805 (1998) and State v. Harstad, 153 Wn. App. 10, 218 P.3d 624 (2009). BOR at 15. Those cases are distinguishable.

In Stockton, the defendant was charged with unlawful possession of a firearm, and the sole issue at trial was the necessity defense. Stockton, 91 Wn. App. at 37, 41. Stockton testified he was walking down the street when a group of men tried to sell him drugs, and subsequently

started beating him. Id. at 38-39. Over objection, the State was permitted to ask about Stockton's knowledge of how to purchase drugs on the street, and Stockton answered he had done so years previously, but not in the area of the charged incident. Id. at 39. The Court held Stockton's passing reference to his belief the person who first accosted him was trying to sell him drugs did not open the door to the prosecutor's cross-examination regarding his prior drug use. Id. at 40. The Court said, however, that if the prosecutor had asked how Stockton had known the men were trying to sell him drugs, and he had denied knowing about drugs, the prosecutor could then have impeached that denial with his prior drug use. Id. at 40-41.

Here, White denied being able to "physically do too much to [Ryan]." 2RP 328. This denial opened the door to impeachment with her prior arrest for the stabbing.

In Harstad, the defendant was charged with multiple counts of sex offenses allegedly committed against three sisters. Harstad, 153 Wn. App. at 15, 18-19. Arguing ineffective assistance of counsel, Harstad challenged counsel's failure to offer evidence that another person had abused one of the sisters when the testimony of another of the sisters referred to something that happened "some other time, about a different

person.” Id. at 28-29. As the Harstad Court noted, “the prosecutor did not do anything to make evidence of prior abuse relevant.” Id. at 28.

The passing remark in Harstad involved an amorphous reference to an unknown third party without any relationship to that case. Here, White as the complaining witness is directly involved. Further, unlike in Harstad, the prosecutor here brought in evidence of Ryan’s other offenses against White. As discussed in the opening brief, the relevance of the stabbing incident was magnified by the court’s decision to admit Ryan’s priors for the purpose of assessing White’s credibility. BOA at 17-18.

The State asserts Ryan presents a “new argument in support of admissibility” not made below when discussing the relevance of the stabbing incident within the context of the court’s rulings on admissibility of the other prior incidents. BOR at 17. This assertion misstates the argument and the record. Ryan's opening brief notes it was the trial court that introduced this issue in its ruling to broaden the rationale for admission of priors established in State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008). See BOA at 17 (citing 1RP 136-40). This decision by the court to permit the jury to consider prior acts of domestic violence for purposes of assessing the credibility of a non-recanting victim established the lines of relevance for the admission of all prior incidents. The argument in the opening brief merely asserts that the relevance of the

stabbing incident on cross-examination should be assessed according to those boundaries. This is not a new argument, but rather recognition of the ground rules for determining relevance established by the court below and insistence those rules be fairly applied.

Finally, the State argues the trial court's error in excluding evidence of the stabbing incident was harmless. BOR at 18-19. As discussed in the opening brief, however, this constitutional error was highly prejudicial. BOA at 20-23.

Ryan was denied the right of effective cross-examination when the court prohibited counsel from exposing facts to the jurors, from which they could appropriately assess White's testimony, especially regarding her degree of objectively reasonable fear. Davis v. Alaska, 415 U.S. at 318. This denial was a constitutional error of the first magnitude." Id. This Court should reverse.

2. THE ERRONEOUS JURY UNANIMITY INSTRUCTION PRESENTS A CONSTITUTIONAL ISSUE AND REQUIRES REVERSAL OF THE AGGRAVATOR AND ENHANCEMENT FINDINGS AND VACATION OF THE SENTENCE.

The State argues Ryan waived the challenge to the erroneous unanimity instruction by not raising the issue below. BOR at 20-23. The State, however, mischaracterizes the instructional error in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), as non-constitutional error. BOR at

22. Because the instructional error here is of constitutional dimension, and because it presents an even more egregious error than that in Bashaw, the issue is properly before this Court.

The State is correct in its assertion that the error addressed in Bashaw, and in State v. Goldberg, 149 Wn.2d 888, 72 P.3d 924 (2004), did not implicate constitutional protections against double jeopardy. BOR at 22 (citing Bashaw, 169 Wn.2d at 146 n.7). But double jeopardy does not exhaust the full range of constitutional protections, violation of which permits a criminal defendant to raise the issue for the first time on appeal. See RAP 2.5(a)(3) (“a party may raise the following claimed errors for the first time in the appellate court . . . (3) manifest error affecting a constitutional right).

In Bashaw, the Court applied the constitutional test for harmless error. See Bashaw, 169 Wn.2d at 202-03 (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). In its analysis of why giving an instruction requiring unanimous special verdicts was prejudicial error, the Bashaw Court cited “the procedure by which unanimity would be inappropriately achieved” and “the flawed deliberative process.” Bashaw, 169 Wn.2d at 202-03. Clearly, the Supreme Court believed it was dealing with constitutional error

implicating the right to due process of law. In addition, the decision from the Court of Appeals reversed by Bashaw explicitly states no objection was made to the challenged unanimity instruction. State v. Bashaw, 144 Wn. App. 196, 198-99, 182 P.3d 451 (2008), reversed, 169 Wn.2d 133, 234 P.3d 195 (2010).

The issue of the erroneous instruction on jury unanimity is properly before this Court. Because the error is identical to that in Bashaw, the error is manifest. And because, the Bashaw Court could not determine this same manifest error to be harmless beyond a reasonable doubt, this Court should reverse the special verdict findings.

The State argues Bashaw does not apply because the statutory provisions authorizing jury verdicts on aggravating circumstances require unanimous verdicts. BOR at 23-24 (citing RCW 9.94A.537(3)²). As an initial matter, this argument does not apply to the deadly weapon enhancement applied to Count II because the statute authorizing the enhancement is silent regarding the unanimous verdict requirement. See RCW 9.94A.602.³

² RCW 9.94A.537 (3) provides in part, "The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory."

³ RCW 9.94A.602 provides in part:

In a criminal case wherein there has been a special allegation and evidence establishing that the accused . . . was armed with a deadly

The State attempts to distinguish Bashaw and Goldberg based on the statutory language of RCW 9.94A.537(3), which requires “the verdict on the aggravating factor must be unanimous.” BOR at 23-24. The State notes that Goldberg was decided under the aggravated murder provisions of Chapter 10.95 RCW, which, absent a special sentencing proceeding for the imposition of capital punishment, does not specify a unanimous jury verdict for the aggravating circumstances. BOR at 23 n.3. Goldberg, however, was not a capital punishment case, and the aggravating circumstance was addressed to whether the defendant would receive a mandatory sentence of life without parole. Goldberg, 149 Wn.2d at 890-92.

The jury procedures described by the Goldberg Court regarding the aggravating factor are the same as those in this case; jury deliberations on the underlying charge, with consideration of the special verdict only if the jury convicts on that charge. CP 79; Goldberg, 149 Wn.2d at 890-92. The only difference is that the Goldberg Court found the unanimity requirement in the constitution, while the requirement in this case is also found in statute. Compare Goldberg, 149 Wn.2d at 892-93 (citing Const.

weapon at the time of the commission of the crime, . . . the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not the defendant . . . was armed with a deadly weapon at the time of the commission of the crime.

art. I, § 21; “Washington requires unanimous jury verdicts in criminal cases.”), with RCW 9.94A.537(3) (special interrogatory verdict must be unanimous).

The Bashaw Court, however, did not render its decision based on the particular statutory provisions involved in either that case or Goldberg. Rather the Court applied broad language. “[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.” Bashaw, 169 Wn.2d at 146.

In addition, the State’s argument regarding the legislative intent behind the unanimous jury finding on special verdicts for aggravating circumstances goes beyond the legislatures own expression of intent in passing that provision. RCW 9.94A.537 was enacted in response to the United States Supreme Court’s decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), where the Court invalidated the prior provisions for imposing exceptional sentences, requiring such sentences to be based on findings by a jury beyond a reasonable doubt. See Laws of 2005, ch. 68 § 1 (statement of legislative intent for the “Blakely fix”). In that statement, the legislature’s only stated intent regarding the jury was, “The legislature intends that aggravating facts, other than the fact of a prior conviction, will be placed before the

jury.” Id. There is nothing to indicate that the legislature intended to create any more stringent standard for finding an aggravating factor had not been proven in that chapter than in any other sentencing enhancement provision.

The State correctly concedes this Court is bound by Bashaw. BOR at 25. The State is also correct in its observation that “When enacting sentencing enhancement statutes, the legislature is presumed to be familiar with the court’s rulings on jury unanimity.” BOR at 26. What the State does not note, however, is the fact that Goldberg had been decided two years before the legislature drafted the original version of RCW 9.94A.537 in 2005. Thus, it is presumed the legislature was familiar with Goldberg and its implications when it drafted that statute. Further, the legislature amended RCW 9.94A.537 in 2007, again without addressing Goldberg.

Bashaw controls. The deadly weapon finding in Count II must be reversed, and the sentencing enhancement vacated. In addition, the aggravating factor findings for Counts I and II must be reversed, and the exceptional sentence vacated.

B. CONCLUSION

For the reasons above, and in the opening brief, this Court should reverse Ryan's convictions because the court denied him his right to present a complete defense. And because the special verdicts in this case were the product of an erroneous instruction, this Court should vacate the special aggravator findings on Counts I and II, and the deadly weapon enhancement on Count II. This Court should also reverse the exceptional sentence.

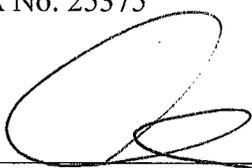
DATED this 19th day of November 2010.

Respectfully submitted,

NIELSEN, BROMAN, & KOCH



HARLAN R. DOREMAN
WSBA No. 25375



CHRISTOPHER H. GIBSON
WSBA No. 25097
Office ID No. 91051

Attorneys for Appellant

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DIVISION ONE**

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Respondent,)	
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v.)	COA NO. 64726-1-I
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GEORGE RYAN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19TH DAY OF NOVEMBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GEORGE RYAN
DOC NO. 795324
MONROE CORRECTIONAL COMPLEX
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF NOVEMBER, 2010.

x *Patrick Mayovsky*

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