

63639-1

63639-1

NO. 63639-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ERIK BLAIR WILLIAMS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA MACK

BRIEF OF RESPONDENT

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A. ISSUES

1. In cases where the defendant claims self-defense, a first-aggressor jury instruction is appropriate if there was evidence that the defendant provoked the fight. In this case, there was credible evidence by the victim that Williams provoked the fight. Did the trial court properly give the first-aggressor instruction?

2. ER 613(b) requires that witnesses be given the opportunity to deny or explain any inconsistent statements attributed to them. In this case, the trial court required that the victim be given this opportunity either before or after any impeachment of him. Was the trial court's ruling proper?

3. A claim of ineffective assistance of counsel fails if either the conduct was strategic or it did not change the outcome of the trial. Defense counsel had various tactical reasons for not recalling the victim for impeachment. Moreover, at sentencing, the trial court described the case as having "overwhelming" evidence. Does Williams' claim of ineffective assistance fail?

4. A defendant generally cannot appeal a standard range sentence absent a valid constitutional claim. The defendant relies on an invalid constitutional claim to support his appeal. Is this issue properly raised on appeal?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Erik Williams was charged by information with Assault in the Second Degree for intentionally assaulting Ky Dewald, and recklessly inflicting substantial bodily harm. CP 1. A jury convicted him as charged. 2RP 597;¹ CP 67. The trial court imposed a standard range sentence.² 3RP 48; CP 269-73. Williams now appeals his conviction and sentence. CP 288-98.

2. SUBSTANTIVE FACTS.

The victim, Ky Dewald, described how August 22, 2008, began as a fun evening at the ballpark with co-workers. 2RP 136-37. He worked with Erik Williams, and they had a good relationship. 2RP 128-29. Dewald and Williams, along with others, were in a luxury suite together at the baseball game, drinking alcohol. 2RP 128-29, 137-38. This drinking continued at a restaurant after the game. 2RP 141-42, 261.

¹ The Verbatim Report of Proceedings will be referred to as follows: 1RP (03/31/09 pretrial motions); 2RP (04/1/09, 04/02/09, 04/06/09, 04/07/09 trial transcript referred to by appellant as VRP); 3RP (05/29/09 sentencing hearing).

² The trial court's denial of Williams' request for an exceptional sentence is discussed later in the brief at § C.4, infra.

Later that night, Dewald joined Williams and Williams' roommate, Nick Weaver, at their townhouse to play video games. 2RP 147-48. The three were having fun. 2RP 150. They drank some more at the encouragement of Williams. 2RP 150-51. Dewald then got sick from drinking and stopped. 2RP 151-52. Williams drank more Vodka, while Dewald went outside for a cigarette. Id.

When Dewald came back inside, Williams pushed him in the shoulder to let him know that it was his turn at the video game. 2RP 154-55. Bracing himself from the push, Dewald leaned into Williams. 2RP 155. Williams then pushed Dewald into the couch. 2RP 155. Thinking it was just roughhousing or horseplay, Dewald got off the couch, stood up, and tried to find the game controller. 2RP 157-58.

Williams then tackled Dewald from behind, taking him to the ground. 2RP 158. Williams wrapped his forearm around Dewald's neck. 2RP 160-61. Dewald yelled for help. 2RP 160. Williams tightened his grip around Dewald's neck. Id. Weaver then came in the room and yelled to "cut it out." Id. Dewald could not breathe or speak; he thought he was going to lose consciousness. 2RP

161. This continued for almost 45 seconds. 2RP 163. Dewald felt like his eyeballs were going to pop out, and that he was going to pass out. 2RP 162-63.

Williams finally let go, but in doing so, cut open Dewald's chin with his watch or ring. 2RP 163. As Dewald rolled over on his back, bleeding and gasping for air, Williams closed his fists and punched Dewald repeatedly in the face up to a dozen times. 2RP 165-69, 273. Weaver yelled, "Oh, my God," and grabbed Williams off Dewald. 2RP 167-68.

Dewald was taken to the emergency room where Dr. Samson Lee determined that most of Dewald's cheek bone was severely fractured. 2RP 194-95, 204. Dewald's eye was entrapped on the fractured bone, since it had fallen into his fracture and was not fully mobile, necessitating immediate surgery. 2RP 197-98. He had a permanent implant inserted to keep his eye from sinking, and experienced extended pain and numbness. 2RP 201-203.

Defense called Williams' high school friend and roommate, Weaver, who said that he saw Dewald fall into Williams, perhaps accidentally. 2RP 434, 481. In doing so, Dewald's arm or elbow hit Williams. 2RP 404, 438-39. Dewald and Williams then started

wrestling on the floor. 2RP 438-39. Weaver separated the two. 2RP 486. He stated that parts of his memory were fuzzy. 2RP 430-31.

Williams testified on his own behalf. 2RP 480. He was drunk that night. 2RP 521. After Dewald came back from smoking, Dewald tripped on a table and fell into him. 2RP 495-96. He said that this initial contact with Dewald may have been accidental, but during it, Dewald's open hand hit him. 2RP 495, 509. As a result, Williams intentionally grabbed Dewald and brought him to the ground. 2RP 511. They were "grappling" on the floor. 2RP 496. Weaver yelled "cut it out" twice, so "real quick" after that, Williams released Dewald. 2RP 497. Dewald hit him in the face after this release, so Williams punched him four or five times in the face with both fists. 2RP 513-14. He hit each side of Dewald's face, and then each eye. 2RP 514. Williams said that, looking at it now, he may have overacted to the situation. 2RP 504.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY GAVE THE FIRST-AGGRESSOR JURY INSTRUCTION.

Williams claims that the court improperly gave the first-aggressor jury instruction.³ Specifically, he argues that since the jury ultimately found him to be the sole aggressor, it was improper for the trial court to give the first-aggressor instruction at trial. Because there was credible evidence that Williams attacked Dewald first in this self-defense case, the instruction was proper, and his claim fails.

Jury instructions are appropriate where they “permit each party to argue his theory of the case and properly inform the jury of the applicable law.” State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999) (quoting State v. Bowerman, 115 Wn.2d 794, 809, 802 P.2d 116 (1990)). A first-aggressor instruction is appropriate when there is some credible evidence from which a jury can reasonably determine that the defendant who is claiming self-defense engaged in conduct that precipitated the fight and provoked the need to act in self-defense. Riley, 137 Wn.2d at 909. The trial court may give a first-aggressor instruction despite conflicting evidence about

³ The Respondent is responding to the issues in an order different than the appellant's brief.

whether the defendant's conduct in fact precipitated the fight. Id. at 910 (citing State v. Davis, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992)). To determine whether there is sufficient evidence to support giving the instruction, this Court views the evidence in the light most favorable to the party requesting the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

A trial court's decision regarding a jury instruction is reviewed for abuse of discretion if the decision is based on factual issues, but is reviewed de novo where the decision is based on a ruling of law. State v. Walker, 136 Wn.2d 767, 771-73, 966 P.2d 883 (1998) (citing State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by State v. Berlin, 133 Wn.2d 541, 544, 947 P.2d 700 (1997)). Here, the analysis first turns on whether the facts supported the giving of a first aggressor instruction and is a matter of trial court discretion. The next issue is whether the trial court correctly interpreted the law in applying this discretion, and thus, is reviewed de novo.

After all the testimony in this case, the court addressed jury instructions with the parties. 2RP 526-27. Defense proposed a self-defense instruction. Id. The court said it was "assuming there will be some argument on that," and turned to the State. 2RP 527.

The State opposed a self-defense instruction, referencing that Williams himself never testified that he reasonably believed he was going to be injured by Dewald. 2RP 528. The State argued that if a self-defense instruction were to be offered, then a first-aggressor instruction should accompany it, since Dewald's testimony indicated that Williams started the altercation with his pushing and subsequent chokehold. 2RP 529. The court granted both the self-defense and first aggressor⁴ instructions. 2RP 540; CP 57, 58.

Williams claimed self-defense at trial. 2RP 527. He took the stand to support this claim. 2RP 476. He and Weaver testified that Dewald initially hit Williams during the altercation. 2RP 404, 438-39, 495-96, 509, 513-14. Specifically, Williams claimed that after he took Dewald to the ground, and after releasing him, Dewald hit him again in the face. 2RP 513-14. Williams said this is why he then repeatedly punched Dewald, fracturing his face. 2RP 513-14. As a result, in closing, defense claimed it was a "mutual fight," a

⁴ "No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense." WPIC 16.04; CP 58.

wrestling match. 2RP 584. He concluded with, "I'd ask you to find a mutual fight, self-defense in the home of Mr. Williams that night." 2RP 586.

There was conflicting evidence in this case. Dewald testified that Williams started things by pushing him into the couch and then attacked him from behind, knocking him to the ground, and strangling him. 2RP 157-63. This evidence of Williams' initial provocation in his self-defense case supports the first-aggressor instruction. See Riley, 137 Wn.2d at 909-10. Thus, the trial court did not abuse its discretion in issuing its first-aggressor instruction.

Williams is not contesting on appeal that he provoked the fight. Instead, he is arguing that Dewald never fought back, making the instruction legally improper. He argues the instruction was in error because all the credible evidence shows Dewald used "lawful force or no force at all," and because "in such a situation the defendant has no right to respond with force at all." Appellant's Brief at 28. He points out that the sentencing court mentioned that the jury found Williams to be the sole aggressor. Williams says, "Given the absence of credible evidence of mutual combat or of Mr. Dewald responding with sufficient force to provoke the use of force in defense, the trial court erred in giving the first aggressor

instruction." Appellant's Brief at 29-30. Essentially, Williams contends now on appeal that there was no credible evidence to support his *self-defense* claim. This position is contrary to his defense at trial and confuses the application of the instruction.

The fact that the jury later found Dewald's testimony more credible has no bearing on whether the trial court had credible evidence before it to give its self-defense and first-aggressor instructions. Given the conflicting testimony, both instructions were appropriate. Thus, the trial court properly gave the first-aggressor jury instruction.

2. THE TRIAL COURT PROPERLY APPLIED ER 613(b).

Williams claims that the trial court misapplied ER 613(b) when it ruled that a defense impeachment witness could not testify unless the victim who made the "inconsistent" statement also testified. Williams argues now, as he did at trial, that he should have been able to impeach Dewald without giving him a chance "to deny or explain it." Appellant's Brief at 17.

Williams first claims that the court abused its discretion when it did not admit the statement in the "interests of justice," because the impeachment was unique and that following the foundational requirements of ER 613(b) would be a "waste of time." Appellant's Brief at 20-22. Williams next claims that the trial court may have trampled his constitutional right to present a defense, because he was inhibited from impeaching Dewald in order to show bias or rebut the State's evidence.

Because the court properly applied ER 613(b) and there are no constitutional implications as applied to this case, his claim fails.

a. Relevant Facts.

During his initial investigation, King County Sheriff's Detective Mike Mellis met with various potential witnesses in the case. 2RP 304. Det. Mellis said that he met Williams and Dewald's boss, James Dainard, who was not willing to give a statement. 2RP 315. Dainard was with Williams and Dewald at the baseball game, but not at the townhouse where the assault happened. 2RP

128. Defense counsel proffered pretrial that Dainard would testify that Dewald told Dainard that he first struck Williams.⁵ 1RP 11, 2RP 340.

Dewald testified in the State's case-in-chief. 2RP 216. At the start of the defense case, counsel said he wanted to use the alleged statement to Dainard for "impeachment evidence" because Dewald said he never hit Williams. 2RP 354-55. The State objected to the defense calling Dainard just for impeachment when Dewald had never testified about having a conversation with Dainard. 2RP 340. While the alleged statement would be inconsistent if true, the prosecutor said that Dainard had repeatedly failed to appear for pretrial interviews, and she believed that no conversation between Dewald and Dainard ever happened. 2RP 353-56, 465.

After first requesting that Dewald not be excused after his testimony so he could be recalled in their case, defense counsel

⁵ Williams indicates in his briefing that the alleged statement was that Dewald "had thrown the first punch." Appellant's Brief at 18. Trial counsel simply said that Dainard would testify that Dewald told Dainard he struck Williams. 2RP 340. Pretrial, he indicated that Dainard would testify for impeachment purposes to establish that Dewald admitted to initiating the melee with either an elbow or hand to Williams' face. 1RP 11. While this may be inconsistent with Dewald's testimony that he never hit Williams at all, it is different from "throwing the first punch."

later indicated that he did not want to recall Dewald. 2RP 275, 354. Defense argued that ER 613(b) did not mean that Dewald needed to admit or deny the statement in order to be impeached with it. 2RP 466.

The trial court clarified ER 613(b), and ruled that in order to call Dainard, "there has to be a foundation for the statement to come in." 2RP 469. The court clarified that "I think there is some flexibility, in that the [impeachment] statement can come in before or after, but the foundation has to be laid." Id. Defense did not call Dainard or recall Dewald. Id. Defense called Weaver who testified that he saw what might have been Dewald's arm or elbow hitting Williams as Dewald initially fell into Williams. 2RP 404, 438-39. Williams then testified that during this initial contact with Dewald, Dewald's open hand hit him as he fell. 2RP 495, 509.

b. The Trial Court Did Not Abuse Its Discretion.

Extrinsic evidence of a prior inconsistent statement is "not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity

to interrogate the witness thereon. . . ." ER 613(b). Aspects of this rule may be waived if the "interests of justice" require it. Id.

The purposes of the foundational requirement of ER 613(b) is to: (1) avoid unfair surprise to the adverse party, (2) to give the witness a chance to explain; and (3) to save time, as an admission by the witness may make extrinsic proof unnecessary. State v. Johnson, 90 Wn. App. 54, 70 n.6, 950 P.2d 981 (1998).

This Court reviews a trial court's evidentiary rulings for an abuse of discretion. State v. Ortiz, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). Discretion is abused if it is based on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The ruling by the trial court followed the clear language and intent of ER 613(b). Here, Dainard had yet to be interviewed by police or the prosecutor, increasing the unfair surprise to the State. Next, Dewald needed a chance to explain or deny the statement, as the prosecutor believed that there was never a conversation between Dewald and Dainard. Finally, if the conversation did occur, Dewald would save court time by either admitting or clarifying the statement, making Dainard's additional testimony

unnecessary. If he denied it, the jury would be able to examine fully the credibility of each witness on the issue, giving a more just result. Thus, the trial court properly followed the clear language and intent of ER 613(b).

There was no need to bypass the rule "in the interest of justice," as Williams now contends. Dewald was still available to be recalled to provide this foundation. The statement from Dainard was similar to the testimony provided by Weaver and Williams. Additionally, Dewald had already been "impeached," consistent with the foundational requirements of ER 613(b), regarding a statement he gave to police about the events of that night. 2RP 239-41, 264-67.

Williams confuses the rule's purpose in saving time, which relates to avoiding unnecessary extrinsic evidence if the declarant admits he or she made the statement. Instead, Williams argues that the trial court should have avoided the "waste of time" in recalling *Dewald*, and simply admitted the statement. Appellant's Brief at 21-22. He asserts Dewald would deny saying that he

"threw the first punch" anyway; thus, the court should have simply streamlined the impeachment process without him.⁶ Appellant's Brief at 21.

There is nothing in the record to indicate how Dewald would have responded to this alleged statement. This need to clarify the record is exactly why ER 613(b) exists. It is not simply to avoid the "waste of time" that Williams suggests on appeal. Appellant's Brief at 22. The court properly exercised its discretion in not foregoing the rule "in the interests of justice." In fact, to the contrary, justice and the clear language of the rule, required its application.

c. The Trial Court's Application Of ER 613(b) Did Not Violate Williams' Constitutional Right To Present A Defense.

A defendant has a constitutional right to present a defense. Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). In that effort, a defendant has a right to impeach a prosecution witness with bias evidence. State v. Spencer, 111 Wn. App. 401, 408, 45 P.3d 209 (2002). A violation

⁶ Again, the defense proffered impeachment testimony was that Dewald had initially struck Williams with either a hand or elbow to Williams' face, not "thrown the first punch." 1RP 11; 2RP 340.

of a defendant's rights under the confrontation clause is constitutional error. State v. Dickenson, 48 Wn. App. 457, 470, 740 P.2d 312 (1987).

A constitutional error is harmless, however, if the reviewing court is convinced beyond a reasonable doubt that the same result would have resulted in the absence of the error. State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996). Moreover, a defendant may waive certain constitutional rights through his conduct without ever expressly waiving them on the record. State v. Wise, 148 Wn. App. 425, 437, 200 P.3d 266 (2009).

Williams was not denied his right to present a defense because there was no exclusion of evidence by the trial court. The court explained the foundational requirements necessary, consistent with ER 613(b), which required that Dewald be given the opportunity to admit or deny the statement before or after Dainard's statement was offered. Williams opted not to recall Dewald and proceeded without the statement instead. Accordingly, he waived his right to confront the witness on this issue and instead opted to present other similar testimony as a part of his defense.

Even if the court had improperly excluded the statement, the error was harmless beyond a reasonable doubt. Trial counsel had

already impeached Dewald's version of events in detail through an inconsistent statement to police. He addressed these same issues of bias through the substantive, eyewitness testimony from Weaver and Williams, who both testified that Dewald struck Williams in the face with either an open hand or elbow. Dainard's impeachment would be of little effect. It was non-substantive testimony that was similar to other substantive and impeachment evidence already admitted. Even the trial court at sentencing described the strength of the evidence in the case as being "rather overwhelming."⁷ 3RP 45. Thus, it would be harmless, and his claim fails.

3. WILLIAMS' TRIAL COUNSEL WAS NOT INEFFECTIVE.

Williams claims that he had ineffective assistance of counsel because his trial attorney did not properly impeach Dewald. He asserts that his trial counsel should have impeached Dewald with his alleged statement to Dainard that he first struck Williams. 2RP 340; 1RP 11. Specifically, Williams claims that the trial attorney should have laid proper foundation, per ER 613(b), which requires that Dewald first be asked if he made this statement to Dainard

⁷ This harmless analysis will be discussed in greater detail below, § C.3.b., infra.

before any related impeachment testimony by Dainard. Because trial counsel tactically decided not to recall Dewald to lay this foundation and any failure to impeach would not have affected the outcome of the trial, Williams' claim fails.

To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that trial counsel's representation was deficient; and (2) that counsel's deficient representation prejudiced the defendant. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A failure to establish either prong of the test defeats the claim. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, review denied, 115 Wn.2d 1010 (1990).

If a trial attorney's decision can be characterized as legitimate trial strategy or as a tactic, it defeats a claim on ineffective assistance. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Generally, a decision to call or not call specific witnesses is strategic. See State v. Allen, 57 Wn. App. 134, 140-41, 787 P.2d 566 (1990); State v. Sardinia, 42 Wn. App. 533, 539, 713 P.2d 122 (1986).

There is a strong presumption of adequate assistance of counsel. Sardinia, 42 Wn. App. at 542. “The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below.” McFarland, 127 Wn.2d at 335.

“Even deficient performance by counsel ‘does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.’” State v. Crawford, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006) (quoting Strickland, 466 U.S. at 691-93). “A defendant must *affirmatively prove prejudice*, not simply show that ‘the errors had some conceivable effect on the outcome.’” Crawford, 159 Wn.2d at 99 (quoting Strickland, 466 U.S. at 693) (emphasis in original). Williams must show that there is a reasonable probability, but for his counsel’s failure to impeach Dewald, that the result of the proceeding would have been different. Crawford, 159 Wn.2d at 99.

a. There Were Strategic Reasons For Not Recalling The Victim.

Williams argues that his counsel did not engage in trial strategy regarding the impeachment of Dewald. This is not the

case, however. Although defense counsel may have initially had confusion and argued about the foundational requirements of ER 613(b), once the court clarified the rule, counsel made a tactical decision not to recall Dewald for impeachment.

It appears that he did not want to bring this statement to Dewald's attention. Defense counsel omitted any reference to the statement to Dainard during Dewald's testimony. However, counsel did not hesitate laying the ER 613(b) foundation to impeach Dewald with the statement he made to police. Unlike with the statement to Dainard, there was no risk that Dewald would deny the accuracy of that statement to police.

Counsel did not want to give Dewald the opportunity to tell the jury that the conversation did not occur. This was a reasonable tactic, since the prosecutor indicated she did not believe the statement had ever been made.

Accordingly, after the court ruled that counsel would have to recall Dewald in order to have Dainard testify, he instead proceeded by calling Williams to the stand, who testified as an eyewitness to generally the same thing. Williams' relied on his and

Weaver's substantive, eyewitness evidence to contradict Dewald's testimony that he never struck Williams. This avoided any risk of the impeachment backfiring.

Further, after being "impeached" with the statement to police, Dewald clarified how he did not give as detailed of a report to police immediately after the assault, and then testified with even greater details of his beating. 2RP 267, 271. It is reasonable that defense counsel did not want to continue that type of discussion with the victim. Finally, by not recalling Dewald, it limited the victim's injured or sympathetic presence before the jury in his case-in-chief. 2RP 163.

Williams relies on Horton, a case that is inapposite, to support his position that an attorney can be deficient when he or she fails to impeach a witness. State v. Horton, 116 Wn. App. 909, 916, 68 P.3d 1145 (2003). Horton was a rape case where the 13-year old victim testified that she had never had sexual intercourse before the assault. Id. at 913-14. However, she had told a CPS investigator and a second witness, neither of whom were called as impeachment witnesses, that she bragged about prior sexual intercourse with a young boyfriend. Id. at 913. Medical examination indicated evidence of prior sexual activity. Id. at 911.

Per the record and an affidavit after trial, defense counsel, without explanation, failed to lay the proper foundation to impeach. Id. at 916. Thus, it was a "he-said, she-said" case where defense counsel inexplicably failed to impeach the young complaining witness with credible evidence.

Division Two of this Court concluded that the facts in Horton involved a failure to use ER 613(b) in a way that could only be detrimental to the defendant. Id. at 917. The Court also mentioned that the victim in that case had been excused and dismissed from being recalled to testify because neither party "request[ed] in open court that the witness remain in attendance." Id. at 913 n.15 (quoting CrR 6.12(b)).⁸

That is not the case here, where, as discussed above, Williams benefited in not recalling the victim for multiple reasons. In fact, the court in Horton clarified, "We emphasize, though our discussion should already have made it obvious, that failure to

⁸ **When Excused.** A witness subpoenaed to attend in a criminal case is dismissed and excused from further attendance as soon as he or she has given his or her testimony-in-chief and has been cross-examined thereon, *unless either party makes requests in open court that the witness remain in attendance....*"

CrR 6.12(b) (Emphasis added).

comply with ER 613(b) is not *always* deficient performance.

Whether it is or is not depends on the particular facts and circumstances of each case.” Horton, 116 Wn. App. at 920 n.35 (emphasis in original).

Importantly, unlike in Horton, Dewald was available to be recalled to testify. Defense counsel had requested that Dewald not be excused from possible later testimony in their case-in-chief. 2RP 275. Dewald was still under the court's subpoena and was not dismissed or excused by the court for this purpose. 2RP 275, 339. It was not too late to accomplish this impeachment effort, and after the court's ruling, defense counsel clearly knew how to do it, if he was so inclined.

Here, unlike Horton's attorney, trial counsel in this case made the strategic decision to avoid the risk of recalling Dewald in what would have been the limited benefit of potential impeachment. He was able to get this evidence in through the testimony of two eyewitnesses. Accordingly, because it was a reasonable, tactical decision to not recall Dewald, Williams does not have a valid claim of ineffective assistance.

- b. There Is No Reasonable Probability That The Outcome Of The Proceedings Would Have Been Different With The Additional Impeachment.

Williams argues that he was prejudiced by his trial attorney's decision not to impeach Dewald. Williams must show that there is a reasonable probability, but for his counsel's failure to impeach Dewald, the result of the proceeding would have been different. Crawford, 159 Wn.2d at 99. This reasonable probability must undermine the confidence in the guilty verdict. Id. Because Williams is unable to prove that the trial would have ended differently with the impeachment, his claim fails.

It is hard to imagine this non-substantive testimony would have influenced the trial any more than the other substantive and impeachment evidence already admitted. The trial court at sentencing summed up the strength of the evidence in this case:

I think the jury was clearly able to find that Mr. Williams was, in fact, the only man fighting. In fact the evidence was rather overwhelming."

3RP 45.

This observation made by the trial court at sentencing was simply an expression of the obvious: that the evidence overwhelmingly showed that Williams committed an unlawful assault.

Trial counsel had already impeached Dewald's version of events in detail through a statement to police. Even if one ignored Dewald's detailed and graphic testimony in this case, Williams and Weaver provided sufficient evidence of Williams' guilt. That is, Dewald accidentally fell into Williams. In doing so, Dewald may have inadvertently struck Williams with an open hand or elbow. By his own admission, Williams overreacted and intentionally grabbed Dewald and took him to ground, grabbing him tightly. Williams had the upper hand, and as Dewald was trying to get away, he swung around. In response, Williams repeatedly punched Dewald in the face, leading to the substantial bodily injury.

Nothing in the proposed statement to Dainard would change the outcome of this case. Williams cannot now prove that it is probable he would not have been convicted otherwise. As the trial court observed, the evidence was indeed overwhelming. As such, his claim of ineffective assistance fails.

4. THE TRIAL COURT PROPERLY SENTENCED WILLIAMS TO A STANDARD RANGE SENTENCE.

Williams claims that the trial court erred in not considering the personal mitigating factors of his “good character,” “personal circumstances,” and “the fact that this crime was an aberration,” in his request for an exceptional sentence below the standard range.⁹ Appellant’s Brief at 31. Specifically, he argues that the trial court, in following the categorical approach of the Sentencing Reform Act (SRA), violated his rights to due process and against cruel and unusual punishment. Because the trial court properly considered only the facts of the case in imposing a standard range sentence, and since Williams’ constitutional claims are invalid, his claim fails.

Generally, a standard range sentence may not be appealed. RCW 9.94A.210(1); State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989). Only if one is challenging the constitutionality of a sentence, and not the length of the sentence, can a standard range sentence be appealed. Herzog, 112 Wn.2d at 423 (quoting State v. Ammons, 105 Wn.2d 175, 183, 713 P.2d 719 (1986)). Therefore,

⁹ At sentencing, Williams raised various personal circumstances and strength of community support as the basis for his exceptional sentence. 3RP 10-13. This included words of support from Dainard who said that Williams is hard worker and valued team leader, but did not mention any issue of self-defense. 3RP 28-29. Williams’ sentencing attorney was not his trial counsel, but is his appellate attorney. 3RP 2.

unless there is a constitutional violation, the issuance of a standard range sentence may not be disturbed on appeal.

The SRA includes limited discretion to exceed or go below the standard range to when the defendant's commission of the crime distinguishes *the crime* from other violations of the same statute, not when the defendant's personal history or characteristics differ from other violators. State v. Alexander, 125 Wn.2d 717, 725, 888 P.2d 1169 (1995) (emphasis added). "A trial court's subjective conclusion that the presumptive range does not adequately address rehabilitative concerns or the personal characteristics of the offender is not a substantial and compelling reason justifying a departure." State v. Murray, 128 Wn. App. 718, 724-25, 116 P.3d 1072 (2005) (citing State v. Allert, 117 Wn.2d 156, 169, 815 P.2d 752 (1991)). "Neither addictions nor other personal circumstances of defendants have been found to support exceptional sentences downward." Murray, 128 Wn. App. at 725 (citing RCW 9.94A.535(1)(e)) (voluntary use of alcohol or drugs is excluded as a mitigating factor); State v. Estrella, 115 Wn.2d 350, 353-54, 798 P.2d 289 (1990) (willingness to obtain treatment and attempts to

gain employment); State v. Hodges, 70 Wn. App. 621, 623, 855 P.2d 291 (1993) (“extraordinary community support” and efforts at self-improvement).

The “fact that criminal conduct is exceptional or aberrant does not distinguish the defendant’s crime from others in that same category.” State v. Fowler, 145 Wn.2d 400, 408, 38 P.3d 335 (2002). To say something is an aberration in normal behavior is not a lawful basis to justify an exceptional sentence. Id.

At the sentencing hearing, the State requested a standard range sentence. 3RP 7. Williams had an offender score of 10. 3RP 6-7. The State referenced that Williams had nearly a dozen felonies by the age of 22 and the severity of the assault left Dewald still suffering from physical injuries. 3RP 7-8. At the time of sentencing, Dewald still experienced blackouts, loss of vision, and dizziness. 3RP 37. The State referenced how, in all of Williams' prior sentencing hearings, including those for theft and firearm felonies, he always received the low-end of the standard range, and he has not stopped breaking the law. 3RP 9-10.

Williams requested an exceptional sentence below the standard sentencing range. 3RP 4-5. His attorney claimed that this assault conviction was an aberration from his "non-violent"

criminal history. 3RP 11. The attorney claimed that the personal characteristics of Williams provided mitigating circumstances, justifying an exceptional sentence below the standard range. 3RP 11-31.

The trial court referenced the "overwhelming" evidence in this case showing that Williams was the only man fighting. 3RP 45. The court concluded that Williams' request for an exceptional sentence below the standard range based on his character references and personal characteristics was not lawfully appropriate. 3RP 46. The court reviewed instead the seriousness of this case. 3RP 47. It then denied the defense request for an exceptional sentence and issued a standard range sentence. CP 288-98.

Since the SRA prohibits consideration of the personal characteristics of the defendant, Williams instead argues that his due process rights have been infringed and he would suffer cruel and unusual punishment under the federal Constitution. He cites various capital cases as an "example" of how the United States Supreme Court requires a review of the defendant's personal character in sentencing, per the Eight Amendment. Appellant's

Brief at 33 (citing Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986); McCleskey v. Kemp, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987)).

The United States Supreme Court has expressly rejected this extension of this doctrine to non-capital cases. Harmelin v. Michigan, 501 U.S. 957, 994-95, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991). For non-capital cases, the Eight Amendment prohibition against cruel and unusual punishment does not require that a trial court consider mitigating factors. Harmelin, 501 U.S. at 994-95. Moreover, discretionary sentencing guidelines are not susceptible to due process vagueness attacks related to notice or arbitrary enforcement. State v. Wilson, 96 Wn. App. 382, 394, 980 P.2d 22 (1999).

There is no lawful basis to Williams' claim that he is due an exceptional sentence for personal mitigating factors. His constitutional rights were not violated. Therefore, his standard range sentence is proper and not appealable.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Williams' conviction and sentence.

DATED this 19th day of November, 2009.

Respectfully submitted,

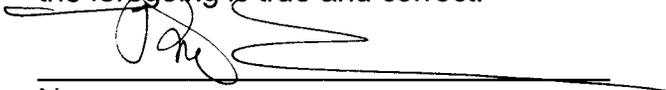
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Sheryl Gordon McCloud, the attorney for the appellant, at 710 Cherry St., Seattle, WA 98104, containing a copy of the Brief of Respondent, in STATE V. ERIK BLAIR WILLIAMS, Cause No. 63639-1, 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

11-19-2009
Date

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