No. 53935-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ROBERT MAYKIS,

Appellant.

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

BRIEF OF APPELLANT

Jessica Wolfe
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

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A. INTRODUCTION

On his way home, Earl Brewster, Jr., urinated against the fence in the parking lot next to his apartment. He did so in full view of Robert Maykis' young daughter, who was looking out of her bedroom window to watch her father as he left the apartment complex. Mr. Maykis saw Mr. Brewster urinating and became upset. Mr. Maykis allegedly called Mr. Brewster several racial slurs, including the n-word, and threw a rock at him over the fence, hitting Mr. Brewster in the knee. Mr. Maykis was charged with malicious harassment and second degree assault, with deadly weapon enhancements based on his use of the rock.

During jury selection, Mr. Maykis was prohibited from asking about jurors' reactions to the n-word. At trial, Mr. Maykis was not permitted to elicit testimony during cross examination that he had apologized to Mr. Brewster, despite the State opening the door to this issue on direct. Mr. Brewster also gave irrelevant testimony regarding his brain surgeries. Finally, the court erroneously denied Mr. Maykis' halftime motion to strike the deadly weapon enhancements.

Mr. Maykis was denied his constitutional rights to an impartial jury as well as to present a complete defense. Additionally, his sentence was improperly enhanced by 18 months due to the deadly weapon enhancements. A new trial is required with the enhancements stricken.

B. ASSIGNMENTS OF ERROR

1. The trial court's restrictions on voir dire denied Mr. Maykis his constitutional right to an impartial jury. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22.

2. The trial court's admission of irrelevant evidence was an abuse of discretion.

3. The trial court's exclusion of relevant evidence denied Mr. Maykis his constitutional right to present a defense. U.S. Const. VI; Const. art. I, § 22.

4. The trial court erred in not striking the deadly weapon enhancements based on the plain meaning of the statute. RCW 9.94A.825.

5. The imposition of the deadly weapon sentencing enhancements violated Mr. Maykis' right to due process of law. U.S. Const. amend. XIV; Const. art. I, § 3.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Defendants have a constitutional right to a fair trial before an impartial jury. The purpose of voir dire is to enable the parties to learn the state of mind of the prospective jurors to ensure defendants are tried by an impartial jury. A trial court abuses its discretion if it limits questions that are needed to ferret out bias or partiality, particularly if those questions

relate to issues of race. Here, the court prevented Mr. Maykis from asking potential jurors questions about their reactions to the n-word. These questions related to the most critical and provocative evidence against Mr. Maykis in a case where he was charged with a crime based on racial animus. Was Mr. Maykis denied his constitutional right to an impartial jury?

2. Evidence must be relevant to be admissible. A court abuses its discretion when it admits irrelevant evidence. Here, Mr. Brewster was permitted to testify about his brain surgeries over defense objection. This evidence was not relevant to any fact of consequence. Further, the evidence made Mr. Brewster a more sympathetic victim and had the potential to mislead the jury regarding import of this information in adjudicating Mr. Maykis' guilt. Did the court abuse its discretion in admitting this evidence, warranting reversal?

3. An accused person's constitutional right to present a defense includes the right to present relevant evidence. After the prosecution offered evidence of "run-ins" Mr. Maykis had with the complaining witness, the court barred Mr. Maykis from eliciting evidence to explain these "run-ins" involved Mr. Maykis apologizing. Was Mr. Maykis denied his constitutional right to present a defense when the court

prevented him from countering the State's evidence and asking questions relevant to the prosecution's claim he acted with racial animus?

4. A defendant's sentence may be enhanced if they were armed with a "deadly weapon" at the time of the commission of the crime. Here, Mr. Maykis' sentence was enhanced by 18 months based on his use of a rock during the commission of the crimes. However, a rock does not meet the statutory definition of a deadly weapon. Did the trial court err in denying Mr. Maykis' request to strike the deadly weapon enhancements?

D. STATEMENT OF THE CASE

1. Mr. Maykis encounters Mr. Brewster peeing in view of his young daughters' window, becomes upset, and throws a rock at Mr. Brewster while yelling racial epithets.

Earl Brewster, Jr. got off the bus at a deli parking lot in Bremerton. RP 449;[1] CP 4. He lived in the condo complex next to this parking lot. RP 451. Shortly after getting off the bus, he felt the need to urinate, and so unbuckled his pants and started to pee between two U-Haul trucks parked in the lot up against a fence. RP 450–51; CP 4; *see also* Ex. 1 (photograph of the U-Haul trucks and fence).

Robert Maykis had just left his apartment in the same complex to make a phone call in his car. RP 577. Mr. Maykis' girlfriend and his two-

[1] All hearings held from March 21, 2019 to the morning of July 30, 2019 are consecutively paginated and cited as "RP." All other hearings are cited by their hearing dates.

year-old daughter were watching him from the window of his daughter's bedroom. RP 574, 577–78. Mr. Maykis' daughter liked watching him leave the apartment from her window so she could say "hi" to him. RP 577–78. Mr. Maykis' girlfriend could see Mr. Brewster peeing on the other side of the fence from the vantage of the bedroom window. RP 577; *see also* Ex. 14 (photograph of perspective from daughter's window); RP 575–76 (girlfriend describing exhibit).

Mr. Maykis saw Mr. Brewster peeing on the other side of the fence and yelled at him. RP 578–79. Exactly what he said to Mr. Brewster was disputed at trial, and none of the three eyewitnesses—Mr. Maykis' girlfriend, Mr. Brewster, and a passerby—gave consistent accounts. *Compare* RP 579 *with* RP 453 *and* 418. Witnesses for the State testified that Mr. Maykis had called Mr. Brewster a "n*****"[2] as well as used other racial epithets. RP 417, 453. Mr. Maykis' girlfriend testified that Mr. Brewster called Mr. Maykis a "white motherfucker" and Mr. Maykis had called Mr. Brewster a "black bastard." RP 579. Mr. Brewster

[2] Witnesses and the parties variously referred to the "n-word" and the actual racial epithet the "n-word" refers to. This brief will refer to the racial epithet as the "n-word" and will use asterisks ("n*****") to indicate when the actual word itself was used at trial.

testified that during the altercation, he told Mr. Maykis to "shut the fuck up" and said, "I live here. What are you, a bum?" RP 463.

Mr. Maykis then picked up a rock and threw it over the fence, hitting Mr. Brewster in the knee. RP 418–19; 468; 579. Mr. Brewster picked up the rock and threw it back at Mr. Maykis because he was "pissed at that point." RP 476; *see also* RP 425. Mr. Brewster later developed a small mark he described as a "bruise" or "scar" where the rock hit his knee. RP 471–73, 491; Ex. 10 (photograph of the injury). He also developed some pain in his knee that was "bothersome." RP 509.

2. Mr. Maykis is charged and convicted of malicious harassment and second degree assault with deadly weapon enhancements after a flawed trial.

Mr. Maykis was charged with malicious harassment and second-degree assault with a special allegation that Mr. Maykis committed both crimes with a "deadly weapon"—the rock. CP 13–14. Mr. Maykis exercised his right to a jury trial. During jury selection, defense counsel sought to ask potential jurors if they had a visceral response to the n-word. RP 295–96. The State objected to this line of questioning. RP 296. Defense counsel explained that given the nature of the charges, he needed

to know if that word would interfere with the jury's ability to be "fair and impartial in this case." RP 297.

The court sustained the State's objection, instructing defense counsel he could ask about "the worst words that they can think of." RP 298. Defense counsel further pointed out that the State had already been permitted to ask about deadly weapons and potential biases to cases involving deadly weapons, and argued he should also be permitted to ask about racial slurs. RP 299. The court reiterated that it would sustain the objection. RP 304–305. After witnesses testified that Mr. Maykis had used the n-word, defense counsel brought a motion for a mistrial on the basis he was not permitted to ask questions about the n-word during voir dire. RP 444–45. The motion was denied. RP 445–46.

During the direct examination of Mr. Brewster, he was permitted to explain over defense objections on relevance that he had brain surgery several months before the incident. RP 475–76. He testified his skull was "mainly plastic and things up there" and that the surgeon told him to "[a]void at all costs getting hurt on your head." RP 475.

Mr. Brewster also ambiguously testified that he and Mr. Maykis had "a run-in or two since" at the apartment complex, although he described these "run-ins" as "pleasant at the time." RP 480–81. When defense counsel asked Mr. Brewster about these interactions, the State

objected on the basis of relevancy. RP 492. Outside of the jury's presence, defense counsel conducted a voir dire of Mr. Brewster, who testified that Mr. Maykis had apologized to him in person. RP 500–501. The court sustained the State's objection, ruling the evidence was "collateral" and "doesn't go to a state of mind at the time." RP 504–505.

During defense counsel's cross examination of witnesses, the prosecutor made facial expressions that were derisive. CP 29. These facial expressions included rolling his eyes and "smiling at questions." CP 29. One juror submitted a note to the court indicating they found the prosecutor's behavior "very distracting." CP 29. The prosecutor also urged the court to sanction Mr. Maykis' girlfriend by placing her in jail for one day for testifying that she "wouldn't be here if [Mr. Maykis] deserved the punishment that he's looking at," which the prosecutor argued was a violation of a motion in limine. RP 615–16, 633–37. However, the prosecutor appeared to backpedal his request when the court informed him that a defense attorney would need to be appointed before any sanction was imposed. RP 637–39.

After the State rested its case, defense counsel made a halftime motion, challenging the deadly weapon enhancements. RP 513–17. Defense counsel argued that a rock was not a deadly weapon within the meaning of the statutory enhancement. RP 513–17. The court denied the

motion, concluding that the "plain meaning" of the statute could include a rock. RP 651. However, the court noted it was a close issue that "warrants clarification" from the Court of Appeals. RP 651.

The jury convicted Mr. Maykis on all counts, including the deadly weapon enhancements. CP 65–67. At sentencing, defense counsel made a motion to set aside the special findings as to the enhancements, which was denied. RP 8/19/2019 at 6–7. Mr. Maykis' cousin, who described himself as "black and Jewish," made a statement at sentencing, explaining to the court Mr. Maykis was actually part Black, but was "passing" as white and was "not a hate filled man." RP 8/19/19 at 23. Mr. Maykis, who had no other felony criminal history, received 30 months—the highest standard range sentence possible—including 18 months for the deadly weapon enhancements. RP 68–70.

E. ARGUMENT

1. The restrictions on voir dire denied Mr. Maykis his constitutional right to an impartial jury.

People accused of a crime have a constitutional right to a fair trial before an impartial jury. *State v. Davis*, 141 Wn.2d 798, 824, 10 P.3d 977 (2000); U.S. Const. amend. VI, XIV; Const. art. I, §§ 3, 22. "The failure to accord an accused a fair hearing violates even the minimal standards of due process." *State v. Parnell*, 77 Wn.2d 503, 507, 463 P.2d 134 (1969),

abrogated on other grounds by State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001)). "Not only should there be a fair trial, but there should be no lingering doubt about it." *Id.* at 508; *accord State v. Davis*, 141 Wn.2d 798, 825, 10 P.3d 977 (2000) (quoting *Parnell*).

The purpose of voir dire "is to enable the parties to learn the state of mind of the prospective jurors, so that they can know whether or not any of them may be subject to a challenge for cause." *State v. Laureano*, 101 Wn.2d 745, 758, 682 P.2d 889 (1984), *overruled on other grounds by State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1988); *see also* CrR 6.4(b); RCW 4.44.120. "[T]he defendant should be permitted to examine prospective jurors carefully, and to an extent which will afford him every reasonable protection." *Laureano*, 101 Wn.2d at 758. (citations and quotation marks omitted). The "ultimate test" in reviewing limits placed on voir dire is whether a defendant has been permitted "to ferret out bias and partiality." *Lopez-Stayer ex rel. Stayer v. Pitts*, 122 Wn. App. 45, 51, 93 P.3d 904 (2004). A trial court abuses its discretion if it limits questions that are "reasonably sufficient to test the jury for bias or partiality." *State v. Frederiksen*, 40 Wn. App. 749, 752, 753 700 P.2d 369 (1985).

Voir dire is not intended to "educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to

argue the case, to indoctrinate the jury, or to instruct the jury in matters of law." *Frederiksen*, 40 Wn. App. at 752. However, the attorneys are permitted to ask jurors about their personal experiences and feelings regarding factual aspects of a case that may be controversial or elicit strong emotional responses. *See, e.g.*, *State v. Whitaker*, 133 Wn. App. 199, 227, 135 P.3d 923 (2006) (voir dire concerning jurors' "ability to deal objectively with gruesome autopsy photographs" in murder case); *State v. Strange*, 188 Wn. App. 679, 682, 354 P.3d 917 (2015) (during voir dire for child molestation case, court and counsel questioned prospective jurors about their personal experiences with child molestation); *State v. Phillips,* 6 Wn. App. 2d 651, 658, 431 P.3d 1056 (2018) (in case concerning assault with domestic violence aggravators, potential jurors questioned about their personal experience with domestic violence.)

Beyond questions on the charges involved, in many instances voir dire on specific controversial *facts* involved in a case may be appropriate in order "to ferret out bias and partiality." *See Lopez-Stayer*, 122 Wn. App. at 51. For example, this Court recently held that it was not improper in an attempted child rape case involving a Craigslist sting operation for the prosecutor to specifically question jurors about their views on both sting operations and the "sex for sale" sections of Craigslist. *State v. Racus*, 7

Wn. App. 287, 433 P.3d 830 (Jan. 23, 2019) (unpublished portion).[3] In considering the propriety of the questions themselves, this Court held:

> these questions did not argue the prosecutor's case, nor were they designed in any way to prejudice the jury prior to hearing the evidence in the case. Rather, these questions were meant to discover any basis to challenge a potential juror for cause and to permit the exercise of preemptory challenges.

Id. In a factually similar case where the prosecutor asked the jurors questions about Craigslist and the content of the "Casual Encounters" section, this Court concluded the questions were proper because "[a]lthough these questions related to facts that would be presented at trial, the prosecutor's questions did not educate the jury about the *particular* facts at issue. The prosecutor did not use voir dire to inform the jury of the nature of the Craigslist ad [the defendant] responded to and did not suggest that the jury should be prejudiced against [the defendant] because of his use of Craigslist." *State v. Jacobson*, 2018 WL 2215888 at *13, 3 Wn. App. 2d 1058 (May 15, 2018) (unpublished).

Here, Mr. Maykis was charged with malicious harassment on the basis that he caused physical injury to Mr. Brewster because of his race, color, ancestry, or national origin. CP 13 (second amended information), 49 ("to convict" jury instruction). Specifically, the State alleged that Mr.

[3] Mr. Maykis cites *Racus* and other unpublished opinions pursuant to GR 14.1.

Maykis had used racial slurs, including the n-word. RP 763–74 (State's closing argument). When, as here, "the case carries racial overtones," specific voir dire questions are required due to the "real possibility of prejudice." *Frederiksen*, 40 Wn. App. at 752 (citing *United States v. Jones*, 722 F.2d 528, 529 (9th Cir. 1983)). Because Mr. Maykis' purported use of racial epithets went to the heart of this case, he was entitled to question the jurors regarding their reaction to the n-word in order to avoid the possibility of prejudice. *See id.*

The n-word is "the most noxious racial epithet in the contemporary American lexicon." *Monteiro v. Tempe Union High School Dist.*, 158 F.3d 1022, 1034 (9th Cir. 1998). It "stands alone [in] its power to tear at one's insides" and is "the nuclear bomb of racial epithets." Gregory S. Parks & Shayne E. Jones, *N*****: A Critical Race Realist Analysis of the N-Word Within Hate Crimes Law*, 98 J. Crim. & Criminology 1305, 1317 (2008). Recognizing the power of the slur, the prosecutor promised in his closing argument he was "not going to say the word," and also noted that his key eyewitness had "started crying" when she testified that Mr. Maykis had used the n-word. RP 729–30. Then, in the rebuttal portion of his closing argument, the prosecutor argued Mr. Maykis had called Mr. Brewster a "fucking n*****," employing the actual slur itself for dramatic effect right before the jury recessed to deliberate. RP 764.

The particular word Mr. Maykis was accused of using was extremely inflammatory and could have caused an emotional response in potential jury members. By forbidding the defense from asking questions during voir dire about jurors' reactions to the n-word, the court prevented Mr. Maykis from testing the jury for "bias or partiality." *Frederiksen*, 40 Wn. App. at 752. This was an abuse of discretion. *Id.* at 752–53.

Further, this abuse of discretion prejudiced Mr. Maykis. When a court limits voir dire in a manner that does not permit specific questions related to race, there is "a real possibility of prejudice." *Frederiksen*, 40 Wn. App. at 753; *accord State v. Brady*, 116 Wn. App. 143, 148, 64 P.3d 1258 (2003). "[T]he Constitution at times *demands* that defendants be permitted to ask questions about racial bias during *voir dire*." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868, 197 L. Ed. 2d 107 (2017) (emphasis added). In *Brady*, for example, the court unexpectedly limited the period of time set aside for voir dire. *Brady*, 116 Wn. App. at 147. This Court noted that this limitation prevented the defense from asking questions related to racial bias in a case where three of four defendants were Black, and that this prejudiced the defendants as a result. *Id.* at 148–49. Similarly here, Mr. Maykis' defense counsel was prohibited from asking questions related to the most critical and provocative evidence against Mr. Maykis in a case where he had been charged with a crime

based on racial animus. As in *Brady*, the only remedy is to reverse the conviction and remand for a new trial in which the defense is permitted to ask questions during voir dire related to the n-word. *See id.* at 144.

2. The State was permitted to elicit irrelevant evidence that Mr. Brewster had brain surgery before the incident, prejudicing Mr. Maykis.

Evidence must be relevant to be admissible. ER 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Accordingly, there must be a "logical relation between evidence and the fact to be established." *State v. Whalon*, 1 Wn. App. 785, 791, 464 P2d 730 (1970). "When error is assigned to the trial court's admission of evidence on the basis that the evidence is irrelevant, the appellate court reviews for an abuse of discretion." *State v. Sherburn*, 5 Wn. App. 103, 105, 485 P.2d 624 (1971). A court abuses its discretion when its ruling is based on an error of law. *Lopez-Stayer*, 122 Wn. App. at 51. Reversal is warranted when the erroneously admitted evidence is prejudicial to the defendant. *See State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). Erroneously admitted evidence is prejudicial if, "within reasonable probabilities, the outcome of the trial would have been materially affected

had the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

Here, the State elicited testimony from Mr. Brewster that he had brain surgery shortly before the incident. RP 475. Defense objected on relevancy grounds, but the objection was sustained. RP 475. Mr. Brewster then testified:

> A few months before—well, several months before the incident, I just had a reconstructive surgery. It's mainly plastic and things up there. Because I had a massive seizure some years back and I just got around to reconstructing it. *And the surgeon said don't fall again or don't let anything hit it. This thing is not settled. Avoid at all costs getting hurt on your head. And then this guy launches a rock.* So my instinct was to just move back.

RP 475 (emphasis added).

Evidence that Mr. Brewster had recently had brain surgery was not relevant to prove any element of any of the crimes charged. *See* CP 13–14. A deadly weapon in the context of second degree assault as well as in the context of the sentencing enhancement merely contemplates the inherent qualities of the weapon itself and the manner in which it is used, not the susceptibility of the victim. *See* RCW 9A.04.110(6); RCW 9.94A.825. Further, Mr. Brewster did not sustain any injury to his head; he was only hit by the rock in his knee. RP 468. Because the evidence was not relevant, it was not admissible, and the court abused its discretion

in permitting the jury to consider it. ER 401; *Sherburn*, 5 Wn. App. at 105.

Further, the admission of this evidence was highly prejudicial to Mr. Maykis. *See Thomas*, 150 Wn.2d at 871. Not only did this testimony make Mr. Brewster a more sympathetic victim, it also had the potential to mislead the jury regarding the elements of the second degree assault as well as the deadly weapon enhancements.

The jury was instructed that an assault in the second degree could be committed with a "deadly weapon," which was defined to include a "weapon, device, instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." CP 54. Similarly, the jury was instructed that a deadly weapon for the purposes of a sentencing enhancement was an "implement or instrument that has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death." CP 58. In its closing argument, the State specifically referenced the brain surgeries, stating, "remember [Mr. Brewster] had plastic over his skull because he's had three brain surgeries. That head is below the fence line only a couple feet away. So could that man throwing that rock as hard as he could, a couple feet away, a few feet at most between the two of them,

could that rock have killed Earl Brewster?" RP 739–40. Because Mr. Brewster testified that the rock had been aimed at his head and that his brain surgeries made him more susceptible to injury, and because the State referenced these facts in its closing argument, the jury was likely swayed by this inadmissible evidence in its conclusion that the rock was a deadly weapon for the purposes of second degree assault and the sentencing enhancements.

The testimony regarding Mr. Brewster's brain surgeries was irrelevant as a matter of law, and the court's decision to admit it was an abuse of discretion that prejudiced Mr. Maykis. A new trial is required.

3. Mr. Maykis was prevented from eliciting testimony about his apology to Mr. Brewster, thus denying him his right to present evidence in his defense.

Defendants have a constitutional right under the Sixth Amendment and article I, section 22 to present a defense. *State v. Horn*, 3 Wn. App. 2d 302, 310, 415 P.3d 1225 (2018); U.S. Const. amend. VI; Const. art. I., § 22. This right is "among the minimum essentials of a fair trial." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 296 (1973). Pursuant to this right, defendants may present evidence in support of their defense if it is relevant. *Horn*, 3 Wn. App. at 310. If the court below excluded relevant defense evidence, this Court determines as

a matter of law whether the exclusion violated the defendant's constitutional right to present a defense. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010); *accord State v. Arndt*, 194 Wn.2d 784, 797–98, 453 P.3d 696 (2019).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. The threshold for relevancy is "very low." *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). "Even minimally relevant evidence is admissible." *Id.*

Pursuant to ER 611(b), the scope of cross examination "should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." In criminal cases, defendants are generally given "wide latitude" in cross examination. *State v. Blair*, 3 Wn. App. 2d 343, 355, 415 P.3d 1232 (2018).

Here, Mr. Brewster testified on direct that he had "run-in[s] with Mr. Maykis since the incident. RP 480. Although he described these interactions as "pleasant," his use of the term "run-in" gave the converse impression that the interactions were not positive encounters. *See* Merriam-Webster, "Run-Ins," *available at* https://www.merriam-webster.com/dictionary/run-ins (last accessed May 28, 2020) (defining a

"run-in" as an "altercation" or "quarrel."). On cross, defense counsel sought to elicit more information about these "run-ins." RP 492, 500–501. The State objected on relevancy grounds. RP 492. The defense was permitted to voir dire Mr. Brewster outside the jury's presence, who clarified that he had not had "run-ins" with Mr. Maykis, but rather just "interactions" in which Mr. Maykis apologized for his behavior and did not use any racial slurs. RP 500. However, the court sustained a relevancy objection by the State, prohibiting defense counsel from asking any clarifying questions about the "run-ins" before the jury, including the fact that Mr. Maykis had apologized to Mr. Brewster. RP 504–505.

Here, the State's direct examination of Mr. Brewster would have left the jury with the impression that Mr. Maykis and Mr. Brewster had additional "run-ins" with each other that were negative. RP 480. This testimony "opened the door" for further clarification on cross-examination. ER 611(b). Evidence that these "run-ins" were actually "interactions" during which Mr. Maykis apologized was relevant to rebut the implication that Mr. Maykis had harassed Mr. Brewster after the charged incident. *See State v. Prestegard*, 108 Wn. App. 14, 20, 28 P.3d 817 (2001) (evidence is relevant if it rebuts evidence offered by the State).

Further, this evidence was directly relevant to Mr. Maykis' defense. Because Mr. Maykis was charged with malicious harassment, the

State was required prove he "maliciously and intentionally" caused physical injury to Mr. Maykis "because of" his perception of Mr. Brewster's race, color, ancestry, or national origin. CP 13. Mr. Maykis' entire defense theory on this charge was that he was not motivated by racial animus when he threw the rock, but rather was upset that Mr. Brewster was peeing in view of his daughter's window. *See* RP 757 (defense counsel arguing in closing that "Mr. Maykis wasn't angry that [Mr. Brewster] was black. He was angry that he was peeing.").

"Where intent or malice is an essential element of an offense and the defendant denies having the mental state necessary to form the requisite intent, character evidence may be relevant and admissible to support an inference that the defendant lacks the necessary mental state." *State v. Eakins*, 127 Wn.2d 490, 495, 902 P.2d 1236 (1995); *see also* ER 404(a)(1) ("[e]vidence of a pertinent trait of character offered by an accused" is admissible character evidence). A defendant may prove character by a specific instance of conduct. ER 405(b). It is worth noting that the court denied the State's motion in limine to outright prohibit the introduction of character evidence, noting character evidence "may be admissible when it relates to the nature of the criminal case." RP 27; *see also* RP 23–27. Here, Mr. Maykis sought to elicit testimony that he independently apologized to Mr. Brewster and that they had interactions

with each other in which Mr. Maykis did not use racial slurs or exhibit racist behavior. This evidence made it "less probable" that Mr. Maykis was motivated by racial animus as charged, as it demonstrated he made efforts to make amends with someone of a different race and did not exhibit a pattern of using racist language. *See* ER 401.

A court denies a defendant their constitutional right to present a complete defense it excludes evidence of high probative value. *Jones*, 168 Wn.2d at 721; *accord State v. Cayetano-Jaimes*, 190 Wn. App. 286, 300, 359 P.3d 919 (2015). Here, in addition to evidence that Mr. Maykis' daughter could see Mr. Brewster urinating from her window, Mr. Maykis' additional interactions with Mr. Brewster was the only other evidence to rebut the State's allegations that Mr. Maykis was motivated by racial animus. Accordingly, this evidence was of high probative value, and its exclusion denied Mr. Maykis his right to present a defense. *Jones*, 168 Wn.2d. at 721. Reversal and remand for a new trial is required. *Id.* at 725.

4. The deadly weapon enhancement must be stricken because a rock does not fit within the plain meaning of the statute's definition of a "deadly weapon."

The State included special allegations that Mr. Maykis was "armed with a deadly weapon" when committing both malicious harassment and second degree assault. CP 13–14. The "deadly weapon" the State argued

Mr. Maykis was armed with was the rock he threw over the fence at Mr. Brewster. RP 739–40 (closing argument). Pursuant to RCW 9.94A.825, when

> there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime . . . the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

The statute goes on to define a deadly weapon:

> For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, *is likely to produce or may easily and readily produce death.* The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

(emphasis added). Defense counsel challenged the propriety of the special allegations multiple times throughout the trial, including a halftime motion and a motion to set aside the special findings, both of which were denied. RP 651; RP 8/19/2019 at 6–7.

Whether someone is armed with a deadly weapon is a mixed question of law and fact reviewed *de novo. State v. Schelin*, 104 Wn. App. 48, 51, 14 P.3d 893 (2000); *State v. Johnson*, 94 Wn. App. 882, 892, 974 P.2d 855 (1999). Interpretation of a statute is a question of law that

appellate courts review *de novo*. *In re Post Sent. Review of Charles*, 135 Wn.2d 239, 245, 955 P.2d 798 (1998), *superseded by statute on other grounds as stated in State v. McFarland*, 189 Wn.2d 47, 399 P.3d 1106 (2017).

Procedural due process requires that citizens have fair notice of conduct that is prohibited. *State v. Dougall*, 89 Wn.2d 118, 121, 570 P.2d 135 (1977); U.S. Const. amend. XIV; Const. art. I, § 3. "Although impossible standards of specificity are not required, the statutory language must convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice." *Dougall*, 89 Wn.2d at 121. When a defendant's sentence is enhanced based on a statute that did not provide fair notice, this raises "serious due process problems." *State v. Ross*, 20 Wn. App. 448, 453, 580 P.2d 1110 (1978); *accord State v. Shepherd*, 95 Wn. App. 787, 977 P.2d 635 (1999).

In interpreting a statute, courts begin with the plain language, "considering the test of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole." *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013). If more than one interpretation of the plain language is reasonable, courts must turn to statutory construction, including discerning legislative intent. *Id.* at 192–93. If a penal statute is ambiguous, it must

be "strictly construed" in favor of the defendant. *Id.* at 193. "This means [courts] will interpret an ambiguous penal statute adversely to the defendant only if statutory construction 'clearly establishes' that the legislature intended such an interpretation." *Id.*

To discern the plain meaning of an undefined statutory term, this Court may rely on a dictionary definition. *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 881, 357 P.2d 45 (2015). Here, the statute defines a deadly weapon as an "implement" or "instrument," neither of which are statutorily defined. RCW 9.94A.825. The dictionary definition of an implement is "a device used in the performance of a task: tool, utensil." *Merriam Webster*, "Implement," https://www.merriam-webster.com/dictionary/implement (last accessed May 28, 2020). An instrument is similarly defined as a "a mechanical tool or implement." Dictionary.com, "Instrument" (last accessed May 28, 2020). In accordance with these definitions, a deadly weapon is thus a "device," a "mechanical tool," or a "utensil" with the capacity to inflict death and used in a manner that is "likely to produce or may easily and readily produce death." *See* RCW 9.94A.825. Put more simply, "the statute bespeaks instruments on the person which are *designed* to injure or kill." *See Shepherd*, 95 Wn. App. at 792 (quoting and adopting the reasoning of

Ross, 20 Wn. App. at 453) (emphasis omitted and added). A random rock picked up off the ground does not clearly fit within this definition.

Because the meaning of the statute is plain and unambiguous on its face, this Court may end its analysis there. *State v. Larson*, 184 Wn.2d 843, 854, 365 P.3d 740 (2015). However, in the event this Court decides there is any remaining ambiguity in the statutory language, it may turn to legislative intent and other principles of statutory interpretation. *Evans*, 177 Wn.2d at 192–93.

The legislative purpose in creating the deadly weapon enhancement was "to recognize that armed crime, including having weapons available to protect contraband, imposes particular risks of danger on society." *State v. Eckenrode*, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007). Because "the intent behind the enhanced punishment was to discourage using or even carrying such weapons," this Court has recognized that this intent will not be served if the statute is applied too broadly to encompass those instruments and implements people cannot be dissuaded from using. *Shepherd*, 95 Wn. App. at 787 (quoting *Ross*, 20 Wn. App. at 454).

At issue in *Shepherd* was whether a motor vehicle qualified as a deadly weapon within the meaning of the sentencing enhancement. *Shepherd*, 95 Wn. App. at 787. *Shepherd* considered and adopted the

reasoning of *Ross*, a case that held a motor vehicle was not a deadly weapon within the meaning of RCW 9.95.040,[4] the statute that sets minimums for certain indeterminate crimes. *See Ross*, 20 Wn. App. at 450; *Shepherd*, 95 Wn. App. at 790–93. The *Shepherd* Court accepted as persuasive *Ross*'s holding that the legislative intent behind the statute would not be served by labeling a motor vehicle a "deadly weapon," because "[p]eople will still use them as before, and there would seem to be no limit on the crimes that could be committed with an automobile." *Shepherd*, 95 Wn. App. at 793 (quoting *Ross*, 20 Wn. App. at 454). Similar here, a rock is an everyday object that has many non-deadly uses. The legislature's intent to dissuade armed crime would not be served by including "rocks" within the gambit of "deadly weapons" warranting a sentencing enhancement. *See id.*

The *Shepherd* Court also adopted the *ejusdem generis* doctrine of statutory interpretation from *Ross* to reach its conclusion that a motor vehicle was not a deadly weapon within the meaning of the statute. *Shepherd*, 95 Wn. App. at 793 (adopting the analysis of *Ross*, 20 Wn. App. at 454); *see also Silverstreak, Inc., v. Wash. State. Dep't of Labor and Indus.*, 159 Wn.2d 868, 882, 154 P.3d 891 (2007) ("The rule of

[4] The definition of a deadly weapon in RCW 9.95.040 and the deadly weapon sentencing enhancements substantially overlap. *See* RCW 9.94A.825

ejusdem generis requires that general terms appearing in a statute in connection with specific terms are to be given meaning and effect only to the extent that the general terms suggest similar items to those designated by the specific terms.") The *Ross* Court determined that a motor vehicle did not fit within a list of items that were "either hand held, or explosive, or those containing poisonous or injurious gas." *Ross*, 95 Wn. App. at 454. Applying that same principle here, the *per se* deadly weapons listed in the statute are all man-made items. *See* RCW 9.94A.825. Additionally, the majority of the items on the list were designed specifically to inflict bodily harm. *See id.* (listing backjack, sling shot, billy, sand club, metal knuckles, dirk, dagger, pistol, revolver, explosives, and poisonous gas as deadly weapons). A rock picked up off the ground does not share these characteristics, and thus, under the *ejusdem generis* principle of statutory construction, the enhancement should not apply.

The deadly weapon enhancement statute refers to "instruments" and "implements," the plain meaning of which do not include rocks. Further, the list of *per se* deadly weapons does not share similar characteristics to rocks. Additionally, the legislature's intent would not be served by enhancing a defendant's sentence because they used a rock in the commission of the crime. Finally, penal statutes must be strictly interpreted against the State and in favor of the accused. *State v.*

Thompson, 38 Wn.2d 774, 779, 232 P.2d 87 (1951). Thus, in the event there is any remaining ambiguity in the statute, this Court should apply the rule of lenity in Mr. Maykis' favor. To do otherwise would violate Mr. Maykis' would "raise serious due process problems." *Ross*, 20 Wn. App. at 453; *accord Shepherd*, 95 Wn. App. at 792.

In sum, a random rock picked up off the ground does not meet the statutory definition of a deadly weapon warranting a sentencing enhancement. Because Mr. Maykis asks that his convictions be reversed and this case remanded for a new trial, the appropriate remedy is to remand with instructions that the deadly weapon enhancements be stricken from the charges.

F. CONCLUSION

For the reasons stated above, this Court should reverse and remand for a new trial, with instructions that the deadly weapon enhancements be stricken from the charges.

DATED this 28th day of May, 2020.

Respectfully submitted,

/s Jessica Wolfe

State Bar Number 52068
Washington Appellate Project (91052)
1511 Third Ave, Suite 610
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2711