IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No.65517-5-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
JOHN VERNER GALLAGHER,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: October 24, 2011
	)	
	)	

Cox, J. — John Gallagher appeals his judgment and sentence on one count of second degree assault with a firearm. His failure to object below to a police officer's testimony regarding the ricochet of bullets precludes appellate review of its admission into evidence. The trial court did not abuse its discretion in giving an expert witness instruction to which Gallagher objected. Likewise, the court did not abuse its discretion by denying Gallagher's request for a missing witness instruction and his motion for a continuance. There is no showing of ineffective assistance of counsel. Finally, Gallagher's Statement of Additional Grounds for Review does not support the grant of any relief. We affirm.

John Gallagher and his wife own a home in Concrete, Washington. Tami Lumby and her son lived there for a period of time. When Lumby moved out, she left some personal belongings on the property.

Lumby and her friend, Bobbi Lilly, came to the property to collect Lumby's belongings and return some of the Gallaghers' possessions. The Gallaghers were surprised because Lumby did not tell them she planned to come over.

This encounter escalated to a physical altercation between Gallagher and Lumby in the front yard of the property. Gallagher retreated into the home, retrieved his rifle, and returned to the front yard. He then warned the women to get off his property and fired several warning shots into the ground, near them.

Sometime during these events Lumby called 911. Police responded, investigated the situation, and arrested Gallagher.

The State charged him with two counts of assault in the second degree, each with a firearm enhancement. Count I was based upon Gallagher's conduct toward Lumby, and Count II was based upon his conduct toward Lilly. A jury convicted him on Count II, but was unable to reach a verdict on Count I. The jury also returned its special verdict on Count II that he was armed with a firearm.

Gallagher appeals.

EVIDENTIARY RULINGS

Gallagher argues that the trial court abused its discretion in admitting expert testimony about the ricochet of bullets. But he did not object at trial to the

admission of this evidence. Accordingly, we will not review this claim for the first time on appeal.

Gallagher also argues that the prosecutor violated Criminal Rule (CrR) 4.7 and his constitutional rights by presenting the ricochet bullet testimony without prior disclosure or notice to the defense. Because Gallagher has not shown that either of these claims are matters that may be raised for the first time on appeal, we disagree.

"The appellate court may refuse to review any claim of error which was not raised in the trial court."[1] A narrow exception to this rule is that manifest error affecting a constitutional right may be reviewed for the first time on appeal.[2] In assessing whether there is a manifest constitutional error, the court must first determine whether the alleged error suggests a constitutional issue.[3]

Here, the State called Deputy Brad Holmes as a witness. Deputy Holmes was one of the police officers who responded to the Gallagher residence. On direct examination, there was no testimony regarding how bullets ricochet. But on cross-examination, defense counsel and Deputy Holmes had the following exchange:

> Q. Okay. And so when you indicate a ricochet that's speculation that you have based on your observation of where the impact was?
>
> A. Actually in training we were actually trained to shoot into

[1] RAP 2.5(a).

[2] RAP 2.5(a)(3).

[3] State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

> the ground if necessary as bullets tend to ricochet an inch or so. We were trained to shoot underneath vehicles.
>
> Q. You were trained?
>
> The Reporter: Can you repeat that answer a little slower please?
>
> The Witness: We are trained that ricochet shots that are often just inches off the ground travel a long distance along the ground.
>
> By MS. WILSON:
>
> Q. And, Deputy Holmes, in your experience if you were in a position where you needed to shoot a warning shot is it safer to shoot a warning shot in the air than on the ground?
>
> A. That's a tough call, depending on your surroundings in this situation I'm not sure either one is safer.
>
> Q. Ricochet is that a word Mr. Gallagher said to you?
>
> A. No, it's a word that I use.[4]

Gallagher did not either object to this testimony or move to strike it.

He now argues that the trial court abused its discretion in admitting this testimony. He claims that Deputy Holmes was not qualified to testify as an expert. But Gallagher's failure to object to this testimony during trial precludes review unless he shows that the admission of the testimony was a manifest constitutional error necessitating appellate review.[5]

Gallagher fails to make such a showing in this case. He argues that Deputy Holmes's testimony violated his constitutional due process rights and his

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[4] Report of Proceedings (Mar. 30, 2010) at 48.

[5] RAP 2.5(a).

right to a fair trial because the State presented it without prior disclosure or notice to him. But he cites no legal authority in support of this argument. Therefore, we need not address this issue any further.[6] Accordingly, Gallagher has not shown that the testimony's admission presents a manifest error affecting a constitutional right and he cannot raise it for the first time on appeal.[7]

At oral argument for this case, Gallagher argued that this testimony was a central theme of the State's closing argument and was highly prejudicial to him. Our review of closing argument does not substantiate his characterization that the State unduly emphasized this testimony. In any event, there was no objection to this portion of the State's argument during closing.

Gallagher argues that the State violated CrR 4.7 because it "never provided any notice it was going to be offering opinion testimony, nor was the subject matter even disclosed in police reports."[8] CrR 4.7(a)(1)(iv) requires the prosecutor to disclose any reports or expert's statements made in connection with the particular case if within the prosecutor's possession or control. But here, the prosecutor did not solicit Deputy Holmes's challenged testimony. Therefore, even if we assume, without deciding, that the violation of CrR 4.7

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[6] See State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (declining review of constitutional issues unsupported by reasoned argument and citation to legal authority).

[7] See State v. Kronich, 160 Wn.2d 893, 899, 161 P.3d 982 (2007), abrogated on other grounds by State v. Jasper, 158 Wn. App. 518, 245 P.3d 228 (2010).

[8] Appellant's Opening Brief at 23.

presents a constitutional issue, the State did not violate that criminal rule.

JURY INSTRUCTIONS

Gallagher argues that the trial court abused its discretion by giving an expert witness jury instruction and refusing to provide a missing witness instruction. We disagree.

Expert Witness Instruction

Jury instructions are sufficient if they permit each party to argue their theory of the case, do not mislead the jury, and when read as a whole, properly inform the jury of the applicable law.[9] No more is required.[10]

Here, the trial court provided an expert witness jury instruction. Defense counsel timely objected.

On appeal, Gallagher's only challenge to this instruction is that it was an abuse of discretion "because there was no indication in the omnibus application of expert testimony and the defense was not given notice."[11] He does not claim that the instruction misled the jury, failed to properly inform the jury of the applicable law, or prohibited him from arguing his theory of the case. Because a

[9] Cox v. Spangler, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000).

[10] Leeper v. Dep't of Labor & Indus., 123 Wn.2d 803, 809, 872 P.2d 507 (1994).

[11] Appellant's Opening Brief at 20.

jury instruction is only improper for one of those reasons,[12] Gallagher fails in his burden to show that the trial court abused its discretion.

We note, as we previously discussed in this opinion, that the expert testimony Gallagher now challenges for the first time on appeal was solicited by his own trial attorney. It is difficult to see why we should fault the State for not giving notice of testimony elicited at trial that it did not anticipate before trial.

Missing Witness Instruction

The trial court also refused to give Gallagher's proposed missing witness instruction. This was not an abuse of discretion.

A trial court's decision whether to give a particular instruction to the jury is a matter that this court reviews for abuse of discretion.[13] Refusal to give a particular instruction is an abuse of discretion only if the decision was "manifestly unreasonable, or [the court's] discretion was exercised on untenable grounds, or for untenable reasons."[14] If a party's theory of the case can be argued under the instructions given as a whole, then a trial court's refusal to give a requested instruction is not reversible error.[15]

If a party fails, without explanation, to call a witness whose testimony would be favorable and that it would naturally call, the opposing party may apply

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[12] See Leeper, 123 Wn.2d at 809.

[13] Stiley v. Block, 130 Wn.2d 486, 498, 925 P.2d 194 (1996).

[14] Boeing Co. v. Harker-Lott, 93 Wn. App. 181, 186, 968 P.2d 14 (1998).

[15] Van Cleve v. Betts, 16 Wn. App. 748, 756, 559 P.2d 1006 (1977).

the "missing witness" doctrine.[16] This doctrine permits an inference that the uncalled witness's testimony would have been unfavorable.[17] But, the inference is not permitted when (1) the witness is not peculiarly available to the party failing to call the witness; (2) the witness's testimony is unimportant or cumulative; or (3) the circumstances do not establish, as a matter of reasonable probability, that the party would not knowingly fail to call the witness in question unless the witness's testimony would be damaging.[18]

Here, a missing witness instruction was not proper because Lumby was not peculiarly available to the State. The record shows that the prosecutor expected Lumby to testify, made "numerous" phone calls, left "numerous" messages, and served Lumby by certified mail, which was either rejected or not picked up from the post office. The State provided Gallagher with the most recent phone number and address that it had for Lumby and was unaware of any change in that contact information. During trial, the trial court verified, on the record, that the address given to Gallagher was the same as the address where service of the subpoena was attempted. There simply was no basis for the court to give a missing witness instruction to the jury under these circumstances.

Gallagher relies on State v. Davis[19] to argue that, although Lumby was

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[16] State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991) (citing State v. Davis, 73 Wn.2d 271, 276, 438 P.2d 185 (1968) (quoting Wright v. Safeway Stores, Inc., 7 Wn.2d 341, 346, 109 P.2d 542 (1941))).

[17] Id. at 485-86.

[18] Davis, 73 Wn.2d at 276-80; Blair, 117 Wn.2d at 488-90.

[19] 73 Wn.2d 271, 438 P.2d 185 (1968).

subject to subpoena power by both parties, she was not "equally available" to the defense. This argument is not convincing.

In Davis, the State did not call an employee of the law enforcement agency that investigated and gathered all of the relevant evidence in its case against Davis. The supreme court held that the individual "worked so closely and continually with the county prosecutor's office with respect to this and other criminal cases as to indicate a community of interest between the prosecutor and the uncalled witness."[20]

Here, Lumby was not a law enforcement agent who had a professional relationship with the prosecutor. She was the alleged victim of a crime. Likewise, there was no showing that she worked "closely and continually" with the prosecutor. In fact she failed to appear at trial despite the State's expectation that she would testify and its efforts to ensure her presence. In short, Davis is distinguishable and does not require reversal.

DENIAL OF CONTINUANCE

Gallagher argues that the trial court abused its discretion in denying his motion for a continuance during the trial. We again disagree.

The decision to grant or deny a motion for a continuance rests within the trial court's sound discretion.[21] The decision is reviewed under an abuse of

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[20] Davis, 73 Wn.2d at 278.

[21] State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004).

discretion standard.[22] A decision is an abuse of discretion if it is outside the range of acceptable choices given the facts and the applicable legal standard.[23]

Here, during cross examination, Gallagher testified that when he arrived at the jail, he told officers that Lumby and Lilly jumped on his knees, pounded on his neck, gouged his eyes, and kicked him in the groin. He claimed that he suffered from a headache, cuts and bruises on his knees, and scraped elbows.

The prosecutor told the court that it intended to call Deputy Barry Stewart, the officer who booked Gallagher into jail, as a rebuttal witness to Gallagher's alleged injuries. Defense counsel asked the court for more time to interview Deputy Stewart and find a witness to rebut his testimony. The trial court gave defense counsel the opportunity to do both during a break in that day of trial.

Upon returning from the break, defense counsel notified the court that the defense's potential rebuttal witness, a staff member of the public defender, was not available until the next week and asked for a continuance until that time.

The prosecutor then agreed to stipulate that the staff member would testify as follows: "On August 28th, 2009, while in the Skagit County Jail, John Gallagher told [the staff member] he needed photos taken of his injuries."[24]

The State then called Deputy Stewart as a witness. Deputy Stewart testified that Gallagher did not complain of any pain when he arrived at the jail.

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[22] Id.

[23] In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (citing State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)).

[24] Report of Proceedings (April 1, 2010) at 75.

Defense counsel objected and requested a CrR 3.5 hearing on whether Miranda warnings were given to Gallagher before his statements to the deputy.

Defense counsel then moved for a continuance until the next week to interview the public defender staff member and the deputy that strip searched Gallagher upon his arrival to the jail. Counsel also sought to research potential discovery violations and prepare for the CrR 3.5 hearing. The trial court denied the motion, in part, granting a short continuance until the following morning.

After a short break in the trial day, the prosecutor then conceded that a CrR 3.5 hearing was unnecessary because the State did not know if anyone gave Gallagher Miranda warnings before he talked to Deputy Stewart. The next day, the prosecutor agreed to have the court instruct the jury to disregard Deputy Stewart's testimony, and the court did so. We presume the jury followed the court's instruction.[25]

Gallagher now argues that the trial court abused its discretion because it did not continue the trial to the following week to allow counsel to call the public defender's staff member. Presumably, the substance of the testimony would have been the same as the statement to which the prosecutor stipulated.

It appears that the anticipated testimony was relevant to Gallagher's self-defense claim as corroboration of his statements of the extent of the injuries he allegedly suffered before he retrieved his rifle and fired near the two women. But it is difficult to see how the anticipated testimony would have materially

[25] State v. Brown, 132 Wn.2d 529, 618, 940 P.2d 546 (1997).

affected the outcome of this trial. He testified that he armed himself and fired the gun in response to the fight in his front yard with the two women. The jury did not believe his version of events because it rejected his self-defense claim and convicted him of assault with a firearm. Testimony that he was injured or that he asked for pictures at booking would have added little to his self-defense claim. At best, it would have been cumulative, corroborating the testimony of both himself and his wife.

In sum, we conclude that the court did not abuse its discretion by denying a continuance to the following week of this trial.

INEFFECTIVE ASSISTANCE OF COUNSEL

Gallagher argues that he was denied effective assistance of counsel. We disagree.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced his trial.[26] The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.[27] To show prejudice, the defendant must show that, but for the deficient performance, there is a reasonable probability that the outcome at

[26] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

trial would have been different.[28] If one of the two prongs of the test is absent, the court need not inquire further.[29]

Claims of ineffective assistance of counsel are reviewed de novo.[30]

Here, Gallagher appears to argue that defense counsel was ineffective because she did not adequately prepare for trial. But, he fails to explain why defense counsel's actions were unreasonable or how they prejudiced him. In sum, he fails in his burden to show ineffective assistance of counsel.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Gallagher raises several arguments in his Statement of Additional Grounds for Review. None require reversal.

First, Gallagher argues that his constitutional rights were violated because he cooperated fully with the police and they failed to investigate his injuries or self-defense complaints. The record does not support the claim that the police failed to adequately investigate his claims. Thus, we reject this

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[27] McFarland, 127 Wn.2d at 336.

[28] In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

[29] Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

[30] In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

argument.

Second, Gallagher argues that defense counsel was ineffective because she failed to present records of his requests for medical treatment while in jail. But he fails to explain how this prejudiced him. Therefore, his argument fails.[31]

Third, Gallagher essentially challenges the sufficiency of the evidence and argues that the State failed to present sufficient evidence to disprove his self-defense claim. We disagree.

"When the defendant raises the issue of self-defense, the absence of self-defense becomes another element of the offense that the State must prove beyond a reasonable doubt."[32] Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that the defendant committed the crime.[33] "In determining whether the requisite quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case."[34]

Here, the trial court instructed the jury that the use of force is lawful when a person "reasonably believes that he is about to be injured" and "the force is

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[31] See Strickland, 466 U.S. at 687; McFarland, 127 Wn.2d at 334-35.

[32] State v. L.B., 132 Wn. App. 948, 952, 135 P.3d 508 (2006).

[33] State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993).

[34] State v. Jones, 93 Wn. App. 166, 176, 968 P.2d 888 (1998).

not more than is necessary."[35] Viewing the evidence in the light most favorable to the State, as we must, there was sufficient evidence that Gallagher's use of force was unreasonable and more than was necessary. Gallagher testified that he retreated into his house after the fight, retrieved his rifle and started firing shots at Lumby and Lilly's feet to scare them into leaving. He explained that he did not call the police because he did not know how long it would take a county sheriff to get to his property. Based on Gallagher's own testimony, the jury could have found his use of his rifle was unreasonable. Therefore, the evidence was sufficient to meet the State's burden of proving the absence of self-defense.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Spearman, J.

Becker, J.

[35] Clerk's Papers at 60.