Supreme Court No. 101279-9

SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,
Respondent,

v.

ALEJANDRO MARTINEZ,
Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This case involves two brothers in their late teens sexually assaulting one or both of their stepbrothers, who were around 5 and 6 years-old in 1995 in a trailer when their respective parents were not at home. The assaults came to light two years later when the younger boy drew a graphic depiction of a sex act which came to the attention of the school. The school principal called the police. The police investigated, obtained a short confession from Alejandro, but did not arrest him. Within days, both brothers disappeared. Alejandro S. Martinez, as he was known by various people in the 1990s, was found almost 21 years later in Connecticut under the name of Alex Ocampo with a different date of birth. Eduardo was also found in Connecticut and admitted that he and Alejandro fled Washington State to avoid arrest.

By the time of trial, the boys were now men, ages 30 and 31. Although they had tried to put the rapes behind them and were embarrassed about what happened to them, they described

the rapes perpetrated by their stepbrothers. Alejandro was charged with one count of Rape against one brother and was convicted. Eduardo was charge with one count of Rape against both brothers and was convicted.

II. RESPONSE TO ISSUES PRESENTED FOR REVIEW

1. Defendant's first issue: "*Is this Court's review necessary to determine whether the defense has a constitutional right to inquire into prospective jurors' potential racial and ethnic biases during voir dire where, as here, the court of appeals agreed there was a rational concern about juror bias against the defendant a Mexican immigrant accused of rape?"*

This is not a correct statement. The trial court allowed the defendants to probe whether potential jurors had racial and ethnic biases during voir dire. The defendants asked the trial court for permission to ask potential jurors about their attitudes toward *illegal* immigrants. The trial court properly did not allow testimony about whether the victims or defendants

immigrated, legally or illegally, and that subject was properly restricted from voir dire.

2. Defendant's second issue: *"Is this Court's review warranted, where the court of appeals' decision sanctions the prosecution's use of an alleged alias to argue consciousness of guilt, based on nothing more than the defendant's use of his given name, consistent with Latinx naming conventions?"*

Alejandro went from being known as Alejandro S. Martinez with a date of birth of January 25, 1979, to being known as Alex Campos, with a date of birth of March 21, 1978, after he fled from Washington to avoid the charges. And, whether the defendant admits it or not, there is abundant evidence that he fled to avoid being arrested. He abruptly left Washington after learning of the investigation and his brother / co-defendant admitted he fled to avoid the consequences of the investigation.

3. Defendant's third issue: *"Is this Court's review warranted, where no court has previously determined whether defendants—here, brothers—may be joined for trial based on separate rapes that occurred at different times?"* The rapes were ***not*** committed at different times. They all occurred in the same residence when the parents were not home. The victims were witnesses to each other's rapes.

III. STATEMENT OF THE CASE

The State incorporates the Statements of Fact in the briefs submitted in Eduardo and Alejandro's cases before the Court of Appeals. In addition, the State makes the following comments.

Additional facts regarding barring questions to jury about immigration status:

The State incorporates its Statement of Facts on "Trial Court's order to bring questions regarding immigration to the

venire" in the briefs submitted to the Court of Appeals. In addition, the following facts should be noted.

The State brought a motion in limine seeking to bar "questions pertaining to immigration status of a witness," under ER 413. CP 290. The court granted the motion in trial number 3 because the immigration status of any witness was not an element of the offense and was not otherwise relevant. RP 08/26/2019 at 84. Eduardo had no objection to the motion. RP 08/26/2019 at 84. Alejandro objected because it would limit use of a U-VISA obtained by J.P. The Petition for Review skillfully omits the manner in which the defendants walked back this motion, their make-it-up-on-the-fly approach, and that they wanted to inform the jury the alleged victims were not in the country legally.

First, it was clear that the defendants wanted the jury to know that they were not here legally, and the alleged victims were not either. The initial request was "[I]f I can ask people their opinions on *legal immigration and people being here*

illegally and if they have strong feelings about that." RP[1] at 444. (Emphasis added.) The Court pushed back and asked, "[I]s your question going to be if you have any prejudice against people being here illegally?" RP at 444-45.

Eduardo's attorney answered explicitly: "(I'll) ask something to the effect if people have various opinions about *legal entry and different entries*. And people have very different *opinions about immigration*." RP at 445. (Emphasis added.) The Court continued to push back on injecting immigration status into jury selection and asked, "What does evidence regarding the immigration status have to do with this case?" RP at 446. The attorney responded, "My clients came here and *they came here illegally*." RP at 446. (Emphasis added.)

[1] Unless otherwise indicated, "RP" refers to the verbatim report of proceedings from jury trial on 9/26/2019 to 10/10/2019, prepared by Cheryl Pelletier, RPR, CCR.

Alejandro tried a different tack and claimed there was animosity in the family because of the way they crossed the border, specifically how the alleged victims' father married the defendants' mother. RP at 447-48. That statement was not supported by the evidence in the prior trials. RP at 448.

Alejandro tried a different theory: A person interviewed by Detective Cantu who identified himself as Alejandro may have actually been an illegal immigrant working under an assumed name, who just happened to use Alejandro's actual name. RP at 450. Again, there was no evidence for this. RP at 450.

The court recessed for the day to allow the defendants to frame their arguments. RP at 450. The next day, the best Alejandro could do was: "I don't know how it's going to come out, but it can come out. It could leave the inference to the jury." RP at 457.

The court denied the motion to inquire about the jury venire's attitude toward illegal immigration because under ER

413 it was not an essential fact to prove an element or a defense, but the court did allow the defendants to inquire about any venire members attitudes against those of Hispanic descent or ethnicity. RP at 470.

Additional facts regarding Alejandro's use of an alias.

The State incorporates its Statement of Facts on "Alejandro's use of aliases" in the brief submitted to the Court of Appeals. In addition, the following facts should be noted.

This evidence was admitted as part of the evidence that he fled Prosser, WA after being interviewed by Detective Cantu in 1998. CP 286.

No matter what the naming customs are with Hispanics, the defendant was known as Alejandro S. Martinez in Prosser, WA before he was contacted by Detective Cantu in 1997. RP at 1301. His high school had Alejandro S. Martinez as his name in 1994 with a date of birth of January 25, 1979. RP at 1300-01. The defendant identified himself in October 1998 as Alejandro Martinez to Detective Cantu.

The defendant in this Petition points to several documents as claims that they show he has always used either Martinez or Ocampo as his last name and that he prefers Alex as his first name. However, these documents were produced *after* the defendant fled Washington and assumed another identity. For example, the marriage license was from March 5, 2015. RP at 656. The driver's license in Washington State is in the name of Alex Ocampo, but it was obtained in 2006. RP 06/12/2019 at 28. The Connecticut driver's license in the name of Alex Ocampo Martinez was issued on December 28, 2016. RP 06/12/2019 at 28. Another document from the Metropolitan Transportation Authority lists his name as Alex Ocampo and was dated April 5, 2017. RP 06/12/2019 at 28. He obtained his Mexican passport in 2006. RP at 1305.

The defendant in this Petition cites his birth certificate as verifying his name as Alex Ocampo or Alex Ocampo Martinez.

See PRV at 21. However, no birth certificate was admitted as an exhibit in the case. See Exhibit List.[2]

The naming customs in Hispanic culture do not explain why in Prosser, WA his school had his date of birth as January 25, 1979, but when referring to himself as Alex Ocampo he claimed his date of birth as March 21, 1978. RP at 1279-80, 1303-04.

Additional facts concerning Joinder / Consolidation issue:

The State incorporates the Statement of Facts submitted in the briefing to the Court of Appeals regarding "Facts regarding motion to join and cross-admissibility of J.P. and E.P.'s testimony."

In addition, as the trial court judge stated, this case was ripe for joinder because there was commonality in the time, place, and victims. RP 05/01/2019 at 75-76.

[2] Clerk subnumbers 112 and 113, designated on 10/27/2022.

At trial, Alejandro objected to the joinder because the defenses were not consistent and that he may be prejudiced by the statement made by Eduardo. RP 05/01/2019 at 79. Apparently, Alejandro referred to the statement by Eduardo after he was arrested in Connecticut that he was paying for some mistakes when he was younger and that he moved to Connecticut after learning of the police investigation. RP at 920.

At trial, Eduardo objected to the joinder because of the unfairness of granting a mistrial in the first trial. RP 05/01/2019 at 81-82. Eduardo's objection was based on unspecified concepts of due process, rather than an argument that the evidence from the alleged victims was not cross-admissible or that combining the cases would not promote judicial economy. RP 05/01/2019 at 81-82. In fact, Eduardo seemed to admit the testimony of the alleged victims would be cross-admissible. RP 05/01/2019 at 82.

Alejandro in his Petition for Review states that the defendants are "accused of separate rapes that occurred at separate times . . ." and "they were committed independently and at different times." PRV at 28-29. However, E.P. and J.P. were witnesses to each other's rapes. E.P. said that J.P. and a younger brother were present when E.P. was assaulted by Eduardo. RP at 1043. J.P. said he was in the trailer when E.P. was taken to the back bedroom and heard him crying. RP at 1112. E.P. was present when J.P. was raped and related one specific episode. RP at 1046. Both J.P. and E.P. testified that these rapes occurred in the same place—a trailer behind the Burger King in Prosser, WA —when their father and stepmother were not at home and were working. RP at 1041-42, 1109, 1112.

IV. ARGUMENT

A. None of the factors in RAP 13.4 (b) for acceptance of review apply on the trial court's limitations into asking potential jurors their attitudes toward illegal immigrants.

Summary of argument: The trial court's discretion regarding conduct of voir dire is reviewed for abuse of discretion. Far from abusing its discretion, the trial court kept irrelevant information—the immigration status of the alleged victims and the defendants—while allowing the defendants to question the venire about attitudes toward Hispanic immigrants.

1. Overview: Standard on review is abuse of discretion and the defendant has misstated the request to the trial court and the effect of the court's order.

First, the standard of review for a challenge to the trial court's decision on voir dire is abuse of discretion. A trial court has discretion to conduct voir dire and is limited only when the record reveals that the court abused its discretion and thus prejudiced the defendant's right to a fair trial by an impartial jury. The defendant must show the trial court abused its discretion and that his right to a fair trial was prejudiced. *State v. Davis*, 141 Wn.2d 798, 825-26, 10 P.3d 977 (2000). So, the issue for the Court of Appeals and this Court is whether the trial

court by limiting inquiry into the immigration status of the alleged victims and the defendants abused its discretion.

Second, the defendant has misstated the issue and the effect of the trial court's ruling. The defendants wanted permission to ask the venire about their attitudes on the immigration *status* of the alleged victims and defendants, not their attitudes toward Mexican immigrants.

If granted, this request would have possibly led potential jurors to conclude the case was less worthy of their full consideration because all involved were in the country illegally. The defendants did not want to ask the venire about possible biases against Mexican immigrants, they wanted to inform the jury that the chief participants came to the U.S. illegally. That would violate ER 413 and introduce evidence to the jury that would be irrelevant if introduced at trial.

2. The Court of Appeals decision is not in conflict with any opinion of the Supreme Court or Court of Appeals, it is not a significant Constitutional question, and

the petition does not involve an issue of substantial public interest.

There is no Conflict with other decisions.

The defendant relies on *State v. Zamora*, 199 Wn.2d 698, 512 P.3d 512 (2022). But *Zamora* supports the trial court's decision not to allow questioning on voir dire into the parties' immigration status.

The problem in *Zamora* was that one party in jury selection repeatedly referred to topics of border security, illegal immigration, and crimes committed by undocumented immigrants. That is not far from the request by the defendants herein to ask questions about former President Trump's proposed wall on the southern border and attitudes toward illegal immigrants. The prosecutor in *Zamora* never explained why those questions were appropriate and the defendants in this case, although they were given a day to think about it, could not come with any reason that the immigration status of the victims and defendants were relevant.

The *Zamora* court determined whether the attorney's conduct was a flagrant appeal to jurors' potential racial bias by asking whether an objective observer could view the questions during voir dire as an appeal to the jury panel's potential prejudice, bias, or stereotypes abouts Latinxs. *Id.* at 718. An objective observer is a person who is aware of the history of race and ethnic discrimination in the United States and aware of implicit, institutional, and unconscious biases, in addition to purposeful discrimination. *Id.*

Under this test, an objective observer could view the effort to ask the jury panel about illegal immigrants as an appeal to potential prejudice. An objective observer could see the questions as a ploy subtlety to inform the jury that they should not be concerned about the alleged victims and the defendants. A potential juror might think, "If they are not in the country legally, why am I here. I don't care what happened to illegals 20 years ago."

The *Zamora* court quoted with approval the lower court opinion that "the prosecutor's conduct was improper because the addition of 'border security and illegal immigration as a layer to the question was irrelevant and unnecessarily politicized.'" *Id.* at 714. Whether it is the prosecutor or defense attorney injecting irrelevant and politicized comments in voir dire does not matter.

The defendant also relies on *State v. Frederiksen*, 40 Wn. App. 749, 700 P.2d 369 (1985). The issue in *Frederiksen* was whether the trial court abused its discretion by not allowing inquiry in voir dire about jurors' attitudes toward self-defense. *Id.* at 750. The Court of Appeals is correct that the defendant herein is arguing a constitutional right to an impartial jury while *Frederiksen* is an abuse of discretion case, and on an issue not relating to race or ethnicity.

Further, *Frederiksen* outlined three areas where trial courts may be especially concerned about prejudice. *Id.* at 753. None of those factors apply. The case did not carry racial

overtones. This was not a white victim / Hispanic defendant case. The defendants and alleged victims were all the same ethnicity. The local community did not hold strong feelings (e.g., the insanity defense). There were no other forms of bias and distorting influence.

The case of *U.S. v. Bear Runner*, 502 F.2d 908 (8th Cir. 1974), which the defendant argues is analogous is not on point. PRV at 23. In that case a Native American stood trial for larceny in the same general locality where the highly publicized events involving Native Americans at Wounded Knee had taken place several months before. The Eighth Circuit observed that in the wake of the Wounded Knee incident the feelings of the local citizenry ran high. The trial court conducted the voir dire and only asked general questions.

The defendants had put in the time to come up with some questions to ask a venire about attitudes toward Native Americans. *Bear Runner*, 502 F.2d at 910-11. The Eighth

Circuit ruled that where tensions were high, detailed questions were needed to insure an impartial jury.

In *U.S. v. Hasting,* 739 F.2d 1269 (7th Cir. 1984), a case involving the prosecution of five African American defendants accused of kidnapping white women, the court refused to follow *Bear Runner* because "there is no indication that either they (news reports in media) or other recent events has sparked racial discord among the local citizenry." *Id.* at 1273. In this case, there is nothing in the record showing that there were *any* reports in local media or that the local citizenry was riled up about it.

Not a significant question of Constitutional Law and No Substantial Public Interest

Where the defense attorneys cannot articulate any reason why the jurors may be questioned about their attitudes toward illegal immigrants, where such information would be irrelevant, and where the *Zamora* case specifically advised against such questioning, there is no significant constitutional issue.

Likewise, there is no substantial public interest in this issue. Defense attorneys should be allowed to carefully craft questions to gauge potential jurors' attitudes toward Mexican immigrants—which the trial allowed. But there is no public interest in allowing questions about the whether an immigrant from Mexico is in the U.S. legally.

B. The factors in RAP 13.4 (b) do not apply regarding the Court of Appeals' decision that the trial court did not abuse its discretion regarding "alias" evidence.

1. Overview: Standard on review.

Decisions involving evidentiary issues lie largely within the sound discretion of the trial court and will not be reversed on appeal absent a showing of abuse of discretion. *State v. Castellanos,* 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

2. None of the factors in RAP 13.4 (b) apply.

The defendant relies on *State v. Slater,* 197 Wn.2d 660, 486 P.3d 873 (2021). But that case is not helpful in this situation. Mr. Slater appeared at multiple court hearings but missed court the day his case was called for trial. He

proactively initiated contact with the court and sought to quash the warrant that had been issued about one month after he failed to appear. *Id.* at 664. The trial court refused to sever a bail jumping count with the underlying No Contact Order Violation. The court in *Slater* reversed the convictions and ordered that the cases be severed.

Here, we have not only both defendants vanishing and moving across the country within days after they learned the police were investigating their stepbrothers report of sexual abuse. In addition, Alejandro changed his name and date of birth.

If Alejandro had been arrested in 1997, had posted bail and had missed one court date in a long line of court dates and then proactively came to court to quash his warrant, *Slater* may apply. But there was sufficient evidence in this case to show that the defendants fled as soon as they learned the police were investigating their stepbrothers' allegations and that as part of trying to conceal his whereabouts, Alejandro changed his name

from Alejandro S. Martinez to Alex Ocampo and changed his date of birth.

The Court of Appeals decision is consistent with all other cases from this Court and other Court of Appeals decisions. *State v. Allen*, 57 Wn. App. 134, 143, 787 P.2d 566 (1990), and *State v. Chase*, 59 Wn. App. 501, 507, 799 P.2d 272 (1990) allowed the admission of false names to prove consciousness of guilt. The defendant attempted to distinguish these two cases because the false name was given directly to the police. But *assumption* of a false name is admissible if there is a reasonable inference of consciousness of guilt of the charged crime. *State v. Freeburg*, 105 Wn. App. 492, 497, 20 P.3d 984 (2001).

There is no significant issue of constitutional law and no substantial public interest in the issue of why Alejandro changed his name and date of birth.

C. The trial court properly joined the defendants for trial; the Court of Appeals decision on this issue was correct and none of the factors in RAP 13.4 (b) apply.

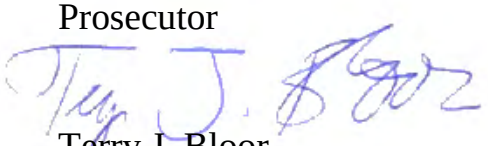
The State incorporates its briefing on this issue to the Court of Appeals. The State called virtually the same witnesses in the first trial involving Eduardo alone, as in the subsequent trials with both defendants. The alleged rapes happened in the same location and the J.P. and E.P. were witnesses to each other's rape. The rapes happened only when the mother of the defendants and the father of J.P. and E.P. were away from the residence. Since both defendants claimed that nothing ever happened with their stepbrothers, the joinder caused them no prejudice.

V. CONCLUSION

Accordingly, the petition for review should be denied. This document contains 3,644 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 28th day of October, 2022.

ANDY K. MILLER
Prosecutor



Terry J. Bloor,
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Mary Swift Nielsen Koch & Grannis, PLLC 2200 6th Avenue, Suite 1250 Seattle, WA 98121	☒ E-mail service by agreement was made to the following parties: swiftm@nwattorney.net

Signed at Kennewick, Washington on October 28, 2022.

Demetra Murphy
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

October 28, 2022 - 2:06 PM

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