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

STATE OF WASHINGTON)	
)	COA No. 704 ⁹³⁻¹ 30 -I-1
RESPONDENT,)	
)	APPELLANT'S
vs.)	STATEMENT OF
)	ADDITIONAL GROUNDS
FABIAN GARZA,)	FOR REVIEW
)	
APPELLANT.)	
_____)	

I, Fabian Garza, appellant, want to present the following additional grounds for review of matters which have not been adequately addressed by my appellate counsel:

1. THE TRIAL COURT ERRED BY ALLOWING PREJUDICIAL AND CUMULATIVE USE OF MARLO GARZA'S INITIAL STATEMENT.

At trial, the State wanted to rely on the first statement that Marlo Garza made to the police. In that initial statement, Marlo claimed that he has seen Fabian Garza sitting with the victim. Marlo soon recanted the

initial statement. At trial, Marlo testified that he had not seen what he initially said he had seen.

The State wanted to rely on the statement that Marlo originally gave to law enforcement, and to ask the jury to disregard his trial testimony. In their effort to do this, the State was permitted to read and/or present Marlo's initial statement to the jury numerous times, during the testimony of both Marlo and the Detective. My attorney objected to this many times, but the objections were overruled. This cumulative use of Marlo's initial statement, which was recanted at trial, was prejudicial. The prejudicial, cumulative use of Marlo Garza's initial statement prevented me from having a fair trial.

The State was permitted to make repeated use of Marlo's recanted statement, and to read that statement to the jury multiple times. This cumulative use of the statement was prejudicial and deprived me of my Constitutional right to a fair trial. My conviction should be reversed, and the case should be remanded for a new trial.

2. THE TRIAL COURT ERRED BY ALLOWING MY WIFE TO TESTIFY AGAINST ME.

The trial court allowed my wife, Jami Garza to testify against me.

This violates the spousal privilege contained in RCW 5.60.060. This statute states that

(1) A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to a criminal action or proceeding against a spouse or domestic partner if the marriage or the domestic partnership occurred subsequent to the filing of formal charges against the defendant, nor to a criminal action or proceeding for a crime committed by said spouse or domestic partner against any child of whom said spouse or domestic partner is the parent or guardian, nor to a proceeding under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW: PROVIDED, That the spouse or the domestic partner of a person sought to be detained under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW may not be compelled to testify and shall be so informed by the court prior to being called as a witness.

The trial court allowed Jami to testify against me, even though we were married, because the trial court found this crime was committed against a child to whom I was a “parent or guardian.” This was incorrect. The victim in this case was my niece. I am neither her parent nor her guardian.

The trial court erred when it found that the spousal privilege contained in RCW 5.60.060 did not apply. In fact, the State should not have been allowed to use my wife's testimony against me because of the spousal privilege.

3. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT MY CONVICTION BECAUSE THE VICTIM'S VERSION OF THE OFFENSE WAS PHYSICALLY IMPOSSIBLE.

The alleged victim, JC, testified that the assault occurred in her Aunt Jami's bedroom on the same day it was reported to the police. During trial, JC was shown a diagram of the Garza residence, which showed a rough layout of the house and all rooms. JC had no difficulty naming and pointing to all the rooms and areas of the house. She insisted that the assault occurred in her Aunt Jami's room, on the same day that was reported to the police. However, the evidence showed that I was not at the house that day, and in fact, I had no contact with JC at all on the day the crime was committed. The fact that I did not have contact with JC on the day the alleged assault was reported to police was uncontroverted at trial.

Because JC's version of the offense was impossible and could not have happened, the evidence is insufficient to support the jury's verdict of guilty.

4. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT MY CONVICTION BECAUSE THE STATE DID NOT ESTABLISH WHEN AND WHERE THE ALLEGED ASSAULT OCCURRED.

As noted above, the evidence at trial did not establish where in the house the alleged assault occurred. Although JC testified it happened in her Aunt Jami's room on the same day it was reported to the police, this was not possible. It was uncontroverted that Fabian Garza was not at the Garza residence at this time on this day.

The defense witnesses, Ruby Kuhns and Cheryle Moore, both trusted grandparents of JC, as well as Rick Peterson, Mr. Garza's prior attorney, were all told by JC that the initial allegations were false and that she had not been inappropriately touched by Mr. Garza.

Because the competent evidence introduced at trial did not establish when or where the alleged assault occurred, the evidence is insufficient to support my conviction.

5. THE TRIAL COURT ERRED BY NOT ALLOWING MY LAWYER TO SHOW THAT SOME WITNESS WERE BIASED BECAUSE OF THEIR OWN SEXUAL ABUSE.

Two of the State's witnesses, Lindi Moore and Jami Garza, had been victims of sexual abuse as children. The trial court erred by preventing my attorney from asking these witnesses about this.

The fact that the victim's mother and aunt had been victims of sexual abuse when they were children was relevant because it would have showed why they over-reacted to the initial statements by Marlo Garza and JC. Their own histories with childhood sex abuse made them more prone to believe JC's statements, even though they were physically impossible.

This was an important part of my attorney's arguments at trial. When the trial court improperly prevented my attorney from asking the State's witnesses about this, the trial court violated my right to a fair trial where I can call and question witnesses on my behalf. Because this ruling violated my right to a fair trial, my conviction should be reversed and the case remanded for a new trial.

6. CONCLUSION

For the foregoing reasons, my conviction should be reversed and the case should be remanded back to Whatcom Superior Court for a new trial.

DATED this 9th day of May, 2014.



Fabian Garza, Appellant