

NO. 71653-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ALEXIS SANCHEZ-BALBUENA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MONICA BENTON

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Did the court abuse its discretion in allowing Ashley Hamilton to testify to rebut the defendants' claimed alibis?

B. STATEMENT OF THE CASE

Alexis Sanchez-Balbuena and his codefendant, Pablo Delacruz-Perez, were both convicted by jury trial of assault in the second degree and acquitted on the charge of robbery in the first degree. CP 69-70. The facts presented at trial established that the victim, Matthew Koesema, was assaulted by a group of at least two individuals while he was in the courtyard of the Central Park East apartment complex at around 11:30 p.m. 2/13/14 RP 49. After police responded, Koesema immediately identified Sanchez-Balbuena, a person with whom he was familiar from the neighborhood, as being one of the individuals that assaulted him. 2/13/14 RP 182, 191. He identified Pablo Delacruz-Perez as another of the involved individuals from a montage the next day. 2/13/14 RP 182. At trial, each of the defendants presented alibi defenses. 2/18/14 RP 77; 1/19/14 RP 14. In support of his alibi, Sanchez-Balbuena's wife testified that he had been with her at their home on the evening of the assault from 8:00 p.m. onward.

2/18/14 RP 78. Likewise, Delacruz-Perez's mother testified that Delacruz-Perez was at her house when she returned home at 10:00 p.m. and that he did not leave the house until the next morning. 2/19/14 RP 15.¹

After the defense rested, the State called Ashley Hamilton as a rebuttal witness. Sanchez-Balbuena objected to her testimony. Finding that her testimony was relevant, the court permitted her to testify. 2/19/14 RP 37. She testified that she had seen the defendants together near the apartment complex where the assault occurred earlier on the day of the assault. 2/19/14 RP 42. When pressed for details on the time that she saw them, she provided testimony about what she had done in the time between seeing the defendants and talking to police. *Id.* at 44-47. When asked directly if she could estimate what time she saw the defendants, she stated that she did not actually know. *Id.* at 49. On cross-examination, she stated that she could only remember that it was light outside. *Id.* at 50. The State then called Bellevue Police Detective Moriarty to the stand. He testified that he spoke to her on the night of the assault and that she had told him that she had seen the defendants an

¹ To rebut this claim, the State presented cell phone evidence that placed Delacruz-Perez in the Crossroads area between 10:00 p.m. and 12:00 a.m. on the night of the assault.

hour prior to the assault and had walked back to the apartment complex with them. *Id.* at 55.

C. ARGUMENT

The defendant contends that the court erred in permitting the State to call Ashley Hamilton as a witness to rebut the defendants' claimed alibis and that such an error requires reversal. The claim should be rejected. The State did not call Hamilton for the primary purpose of impeaching her, and therefore the court did not abuse its discretion. Furthermore, even if the court did err, any error was harmless because the defendant cannot demonstrate that, within reasonable probabilities, the error material affected the outcome of the trial.

1. THE COURT DID NOT ABUSE ITS DISCRETION BY PERMITTING HAMILTON TO TESTIFY.

The decision to admit evidence lies within the sound discretion of the trial court and should not be overturned on appeal absent a manifest abuse of discretion. State v. Bourgeois, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997). ER 607 permits impeachment of a witness by any party, including the party who called the witness. However, the State "may not call a witness for

the primary purpose of eliciting testimony in order to impeach the witness with testimony that would otherwise be inadmissible.” State v. Barber, 38 Wn. App. 758, 770-71, 689 P.2d 1099 (1984). Although the Barber court did not articulate any guidelines for determining the State’s primary purpose, in State v. Lavaris, the Washington Supreme Court framed the analysis as a determination of whether the State’s impeachment “was employed as a mere subterfuge to place before the jury evidence not otherwise admissible.” 106 Wn.2d 340, 346, 721 P.2d 515 (1986). In that case, the Court found no error in the admission of the witness’s out-of-court statements since his testimony on direct examination provided important circumstantial evidence of the events leading up to the crime. Specifically, the Court found that the witness’s testimony was both relevant to the issues before the jury and corroborated the testimony of the State’s primary witness. *Id.*

In the present case, similar to Lavaris, Hamilton’s testimony was relevant to the issues before the jury and corroborated the primary witness’s testimony. As specifically articulated, the State’s purpose in calling Hamilton was to rebut the defendants’ claimed alibis. 2/19/14 RP 29. Because Koesema testified that the defendants assaulted him together, and both defendants presented

alibi defenses, identity was the primary issue in the case. Due to the fact that Hamilton told Detective Moriarty on the night of the assault that she had walked with Sanchez-Balbuena and Delacruz-Perez back to the apartments about an hour before the assault, she was a logical witness for the State to call to rebut the defendants' alibis.

The appellant claims that the State knew that Hamilton would testify that she did not know when she saw the defendants and was therefore calling her for the sole purpose of impeaching her. Although it is true that the State had some indication that Hamilton's testimony might differ from what she had previously told police, the State could not be certain that her testimony would change or that her recollection would not be able to be refreshed. *Id.* at 29; see State v. Hancock, 109 Wn.2d 760, 765, 748 P.2d 611 (1988) ("The State was entitled to expect her to testify under oath no differently from the apparently voluntary statement she gave to the detective"). Furthermore, even if she did testify that she could no longer pinpoint the exact time at which she had seen them, the State's position was that Hamilton's testimony that she saw the defendants together on the day of the assault and in close proximity

to the location of the assault had substantial relevance. 2/19/14 RP 37.²

As is clear from the line of questioning, the State first established that Hamilton had seen Sanchez-Balbuena and Delacruz-Perez together in the vicinity of the Central Park East apartment complex on the day of the assault. *Id.* at 42. This fact is relevant rebuttal evidence on its own as it goes to essential elements of the State's case and corroborates Koesema's testimony regarding the date and location of the assault. The State then elicited further testimony regarding the timing of her contact with police as it related to her contact with the defendants. This testimony was independently relevant, substantive evidence on the issue of identity.

When asked directly if she could estimate how long before talking to police she had seen the defendants, Hamilton responded, "I have no idea." *Id.* at 47. However, through her testimony the State established: (1) that Hamilton saw the defendants at a grocery store in Crossroads which is about a five-minute walk from the apartment complex; (2) that after leaving the store Hamilton

² Because neither of the defendants testified, there was no other evidence that the defendants were together that day in the vicinity of the apartment complex where the assault occurred.

walked her friend to the bus stop and then walked back to the gym at the apartment complex; and (3) that she was in the gym for 30-45 minutes prior to leaving and being contacted by police. *Id.* at 44-47. Based on this timeline and the fact that the assault occurred around 11:30 p.m., this was substantive evidence that a reasonable juror could use to infer that Hamilton's contact with the defendants could have occurred sometime after 8:00 p.m.

Given the defendants' alibi defense and the relevance of Hamilton's testimony as substantive evidence on issue of identity, it cannot be said that the State's primary purpose in calling Hamilton was to impeach her. Therefore, the trial court did not abuse its discretion in permitting Hamilton's testimony.

2. EVEN IF THE COURT DID ABUSE ITS DISCRETION, THE COURT'S ERROR WAS NOT PREJUDICIAL AND NOT REVERSIBLE BECAUSE THERE IS NOT A REASONABLE PROBABILITY THAT THE ERROR MATERIALLY AFFECTED THE OUTCOME OF THE TRIAL.

The appellant next claims that the admission of impeachment testimony requires reversal. This argument fails because it cannot be shown that the error, if any, was prejudicial.

Especially in light of the limiting instruction, there is not a reasonable probability that the exclusion of the impeachment testimony would have changed the outcome of the trial.

An error in admitting evidence that does not prejudice the defendant is not grounds for reversal. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Where an error results from a violation of an evidentiary rule, and not a constitutional mandate, the Court applies the rule that the error is not prejudicial and thus not reversible, unless, within reasonable probabilities, the error materially affected the outcome of the trial. State v. Barber, 38 Wn. App 758, 771, 689 P.2d 1099 (1984). In assessing whether the error was harmless, the Court must assess whether the admissible evidence of guilt against the prejudice, if any, caused by the inadmissible testimony. Bourgeois, 133 Wn.2d at 403.

In this case, Hamilton's testimony provided substantive evidence in support of the State's theory of the case and in opposition to the defendants' claimed alibis. The only impeachment evidence solicited, and the only additional testimony provided by

Detective Moriarty on rebuttal was the fact that he spoke to Hamilton on the night of the assault and Hamilton told him that she had seen the defendants an hour before the assault. In recognition of the risk that the jurors might use that evidence for an improper purpose, the court provided a limiting instruction, instructing the jurors that the statements allegedly made by Hamilton to Detective Moriarty were to be used only for the purpose of impeaching her credibility and for no other purpose. CP 51. Because a jury is presumed to follow the court's instructions, any potential prejudice to the defendant was cured by the limiting instruction. See State v. Foster, 135 Wn.2d 441, 472, 957 P.2d 712 (1998). Especially when viewed in conjunction with the other evidence pointing to Sanchez-Balbuena's guilt, particularly Koesema's familiarity with Sanchez-Balbuena and his immediate identification of him as the person who assaulted him; the lack of prejudice caused by the admission of the impeachment testimony does not create a reasonable probability that the outcome of the trial was materially affected.


D. CONCLUSION

This Court should affirm the defendant's conviction and sentence.

DATED this 12 day of February, 2015.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory C. Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ALEXIS SANCHEZ-BALBUENA, Cause No. 71653-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Betty A. Huddleston
Name
Done in Seattle, Washington

2/12/15
Date

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