No. 45242-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MARCOS LOZANO,

Appellant.

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

The Honorable Christine Schaller, Judge
Cause No. 09-1-00446-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court erred by admitting one portion of the defendant's out of court statement to a witness but excluding other portions of the statement, and whether the court's ruling violated Lozano's state and federal constitutional rights to present a defense and to cross-examine adverse witnesses.

2. Whether Lozano was denied the effective assistance of counsel because counsel did not propose an instruction regarding the defense of consent.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the case with the following exception.

Lozano includes his version of the facts of the offense, Appellant's Opening Brief at 4, but the testimony of the victim and the eyewitness was very different. Candace Charette[1] testified that she and Lozano had consensual sex while the victim, A. B., slept on a small couch or loveseat near the bed. RP 63-64.[2] A. B. did not appear to rouse at any time. RP 64, 91-92. Charette went to sleep, but when she woke Lozano was no longer in the bed. She could see that Lozano was on top of A. B., "clearly having sex with her." RP 65. A.B. was completely unclothed and appeared to still be asleep. Charette yelled, "Get the f*** off of her," and Lozano

[1] At the time of the offense, Charette's last name was Greco. RP 54.
[2] Unless otherwise noted, references to the Verbatim Report of Proceedings are to the three-volume trial transcript dated July 22 through 25, 2013.

jumped up, pulled up his pants, and got back on the bed. RP 66-67. Charette shook A. B. to wake her; A. B. woke slowly and appeared at first not to comprehend where she was. RP 66. Charette assisted A. B. to dress and the two women left Lozano's house. RP 67.

A. B. testified that shortly after they arrived at Lozano's room, he offered her a beer and she had one sip. She laid down, fully dressed, and went to sleep. She woke to the sound of Charette yelling, "What the f***." She was in a different position than when she had gone to sleep, she was undressed, and Charette was yelling at her to put her clothes on. RP 208-09. Lozano was on top of her, with his penis inside her vagina. RP 208-09. When Charette yelled he jumped off, a blanket was thrown over her, and Lozano went to a nearby trash can, where she saw him remove and discard a condom. RP 208-09, 212. Lozano got back into bed, A. B. put on some of her clothing and gathered up the remainder, and the two women left the house. RP 209, 236-37.

Some time later, A. B. discovered her identification and debit card were missing. RP 213. She received a text message from Lazono telling her that she had left her debit card at his house. RP 215. She tried to make arrangements with him to retrieve it, but

she never got it back. RP 216-217. Lozano testified that he believed he threw the card away. RP 338.

C. ARGUMENT.

1. The court's exclusion of the remainder of the defendant's hearsay statement, where a witness testified to one portion of it, violated neither Lozano'a right to present a defense or to cross-examine adverse witnesses. Even if the trial court's ruling was error, it was harmless.

Lozano challenges a ruling of the trial court excluding a portion of a statement Lozano made to a prosecution witness, Mohammed Young. Young testified during the State's case in chief, principally about his acquaintance with A. B. and conversations he had had with her. RP 166-175. On cross-examination, defense counsel asked Young about a conversation he had had with Lozano, and Young testified that Lozano had told him about "his night," and that nothing Lozano said raised any concerns with Young. RP 177. On redirect, the prosecutor asked Young whether Lozano had told him the two girls were mad at him, and when Young could not recall, the prosecutor furnished him with Exhibit 8, which was a transcript of an interview Young had given to the police. RP 178.

After reviewing Exhibit 8, Young testified that Lozano had told him that one of the girls said, "Oh, my god. Get the hell off of me." RP 178-79. On recross, defense counsel elicited testimony that Young's interview with the police had contained more than that one statement, and invoked ER Rule 106 (although he incorrectly identified it as ER 105), asking to admit the remainder of the statement in the interest of fairness and completeness. The State objected on the grounds that the portion of the statement the defense sought to admit was self-serving hearsay, and the court sustained the objection. RP 181-82.

Lozano assigns error to the court's exclusion of the following portion of his statements, other than the italicized words, as recounted by Young to the police:

> [E]verything, from what he told me, was fine. I mean, she never said no or anything, and apparently the door was open and my two other buddies who live in the house were home. They said they heard like, you know, sexual moans like, they didn't hear anything like stop. And when the girl who was in bed, she woke up and saw them having sex and was like, you know, what, you know, what's going on, what's going on. And then that's when I believe [A. B.] kind of, oh, my friend caught me sleeping with the guy that she just slept with, so that when she's like, *oh, my God, get the hell off me*, what are you doing-kind of thing. That's what I was told. So not like she asked him to stop before, just once she got caught by her friend, she was like, stop, you're, what are you doing, where

> are my clothes. He also told me that, you know, she, you know, he unbuttoned her pants but she took her clothes off.

Appellant's Opening Brief at 6, Exhibt 8 at 3.

This statement contains double hearsay. Not only is it Young recounting what Lozano told him, but apparently what Lozano told him that the "other buddies" told Lozano. There is no question that these statements, other than the one admitted, were hearsay, and Lozano does not argue that they were not. Hearsay is an out of court statement offered to prove the truth of the matter asserted. ER 801(c). A statement made by a party opponent which is offered against that party is not hearsay. ER 801(d)(2). The only statement by Lozano included in this account by Young that would not be hearsay is the one statement that was admitted.

a. Right to present a defense and confront adverse witnesses.

Lozano argues on appeal that the trial court's exclusion of the remainder of this statement violated his Sixth Amendment and Wash. Const. art. I, § 22, right to present a defense by conducting meaningful cross-examination of adverse witnesses. Here the adverse witness was Lozano himself—it was his own statements he wanted to get into evidence. He presumably wanted the jury to

consider the statements for the truth of the matter asserted; they had no relevance otherwise. He could, and did, testify, as discussed below, and got the substance of the hearsay statements before the jury in an admissible form.

Lozano cites to State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002), a case in which the Supreme Court held that the State's interest in keeping secret the location of a drug enforcement surveillance post did not outweigh the defendant's right to challenge the accuracy and truthfulness of a key State witness. Id. at 615. The Darden court found that because the defendant did not know where the witness against him was located, and could not cross-examine on this point, he could not challenge the ability of the witness to observe the drug transaction at issue, and he was "effectively denied . . . the only means available to contest the charge against him." Id. at 620-21.

That fact pattern is significantly different from the fact pattern at issue here, and the reasoning of the court is not necessarily on point. Lozano is objecting to the court's refusal to allow his own out of court statements to be admitted, statements that would have permitted him to get his version of the facts before the jury without

being cross-examined. He was in no way denied the only means available to defend against the charge.

The State does not dispute that both the state and federal constitutions guarantee a defendant the right to present his own version of the facts so that the jury may decide which to believe. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). But that right is not absolute, in that it does not give the defendant the right to introduce evidence that is irrelevant or otherwise inadmissible. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). Here, it was his own statements that Lozano wanted to get in through cross-examination of Young. They were inadmissible hearsay.

Lozano's defense was that A. B. initiated the sexual activity and either was not incapacitated or he reasonably believed that she was not. RP 335-37. Excluding the self-serving statements he made to Young did not deny him the ability to present a defense. He had the right, which he exercised, to testify in his own behalf and he offered the same account on the witness stand. RP 334-37. One of Lozano's former housemates, Tony Salazar, testified that he heard nothing unusual during the night. RP 133. Defense counsel could have asked, but did not, about any moaning Salazar may

have heard. RP 133; Exhibit 8 at 3. In any event, it is unclear what relevance "sexual moans like" would have, since there was no dispute that Lozano had consensual sex with Charette, and nothing in his statement to Young concerned who he said the housemates heard moaning. RP 63-64, 90-91; Exhibit 8 at 3.

An appellate court reviews the trial court's interpretation of the rules of evidence de novo and the application of the rules for abuse of discretion. State v. Sanchez-Guillen, 135 Wn. App. 636, 642, 145 P.3d 406 (2006). The admissibility of evidence lies within the sound discretion of the trial court and will not be disturbed unless no reasonable person would adopt the trial court's view. State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001). "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986). Nonconstitutional error is harmless if "within reasonable probabilities," the outcome of the trial would not have been materially affected absent the error. State v. Anderson, 112 Wn. App. 828, 837, 51 P.3d 179 (2002).

Even if the trial court had erred, which the State does not concede, in excluding the balance of Lozano's statements made to Young and related by Young to the police, it was harmless. Lozano testified and got his version of the events before the jury. It apparently did not find his account credible, and it would not have been any more credible coming through Young than it was coming directly from Lozano on the witness stand. His defense failed on the facts of the case, not the absence of his statements repeated by Young. Because Lozano was not prevented from offering a defense, even if this was error it did not rise to the constitutional level and should be reviewed under the nonconstitutional error standard. Anderson, 112 Wn. App. at 837. The outcome would have been the same even if Young had been permitted to repeat Lozano's statements to the jury.

b. ER 106 Rule of completeness.

Lozano claims that the court should have admitted the balance of his statements to Young under ER 106, the rule of completeness. That rule says:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought

> in fairness to be considered contemporaneously with it.

As before, the admissibility of evidence rests within the sound discretion of the trial court. Atsbeha, 142 Wn.2d at 913-14.

Lozano relies heavily on State v. Larry, 108 Wn. App. 894, 34 P.3d 241 (2110), *review denied*, 146 Wn.2d 1022, 52 P.3d 521 (2002). In that case, the court adopted the test from United States v. Haddad, 10 F.3d 1252, 1259 (7th Cir. 1993) to determine whether the additional portions of the statement are necessary to: "1) Explain the admitted evidence, 2) Place the admitted portions in context, 3) Avoid misleading the trier of fact, and 4) Insure fair and impartial understanding of the evidence." Larry, 108 Wn. App. at 910.

In Lozano's case, the statement admitted was "oh, my God, get the hell off me." Exhibit 8 at 3. Nothing about this statement would tend to mislead the jury. Both Charette and A. B. testified and were cross-examined at length. Lozano testified. The context from his perspective and theirs was before the jury. The remainder of his statements would not have clarified or explained "get the hell off me." They would, however, have permitted Lozano to get before the jury the interpretation that he wanted them to adopt.

The trial court excluded the statements on the grounds that self-serving hearsay would not be admissible under any theory. RP 182. "Self-serving hearsay" is just hearsay. State v. Pavlik, 165 Wn. App. 645, 654, 268 P.3d 986 (2011). If it fits within any other exception to the bar against hearsay, the fact that it is self-serving does not insulate it. Id. Whether ER 106 trumps the hearsay exclusion has not been definitively answered, but that exclusion does not generally bar statements offered to prove context. 5 K. Tegland, Wash. Prac. § 106.3 (5th ed. 2007). The trial court should consider whether the statements are relevant, and then whether they are necessary to clarify or explain the admitted statement.

Rule 106 applies only where an opponent seeks to admit other portions of a statement "introduced contemporaneously with the portions offered by the proponent." Id. at § 106.5. There is a common law uncodified rule of completeness that is broader than ER 106 in that it extends to unrecorded statements, and it applies when the opponent seeks to present the remainder of the statement on cross-examination or as part of his own case. Id.; Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 172, 109 S. Ct. 439, 102 L. Ed. 2d 445 (1988). The test that applies, however, is essentially the same "in fairness" standard that applies to

statements offered under ER 106. 5 K. Tegland, Wash. Prac. § 106.5 (5th ed. 2007).

Here Lozano sought to introduce the remainder of his statement to Young, as relayed to the police, during cross-examination of Young. RP 180-82. In that instance it would appear that the common law rule of completeness, rather than ER 106, applies. The court in Beech Aircraft Corp. v. Rainey, while addressing Federal ER 106, noted that the rule "does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case." Beech Aircraft, 488 U. S. 153,172, 109 S. Ct. 439, 102 L. Ed. 2d 445 (1988).

The constitutional right to present evidence does not include the right to present irrelevant evidence. Rehak, 67 Wn. App. at 162. The statements Lozano wanted to introduce contained the "spin" he wanted to put on the evidence, but did not clarify, explain, or put Charette's statement into context. He testified and had the opportunity to present whatever defense he wished. The victim and the eyewitness both testified to the circumstances surrounding the statement, "get the hell off me," as did Lozano. RP 65-66, 208-09, 337. Lozano was not denied the right to present his defense.

For this reason, even if the trial court erred in excluding the remainder of the statement, it was harmless error. Evidentiary error is not of constitutional magnitude. State v. Kelly, 102 Wn.2d 188, 199, 685 P.2d 564 (1984). Therefore, the nonconstitutional error standard should apply—if "within reasonable probabilities," the outcome of the trial would have been materially affected absent the error. Anderson, 112 Wn. App. at 837. Lozano was able to get his version of the facts before the jury, and there is no reason to think that hearing his statement to Young would have cause the jury to acquit.

2. Defense counsel was not ineffective for failing to propose a jury instruction on the defense of consent.

Lozano was charged with one count of second degree rape. There are several alternative means of committing second degree rape, RCW 9A.44.050; the State charged only one, that the victim was incapable of consent by reason of being physically helpless or mentally incapacitated. CP 3; RCW 9A.44.050(b). The jury was instructed on the elements of that offense. Instruction No. 10, CP 112. The jury was also given Instruction No. 9, which reads:

> It is a defense to the charge of rape in the second degree that at the time of the acts the defendant reasonably believed that [A. B.] was not mentally incapacitated or physically helpless.

> The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find the defendant has established this defense, it will be your duty to return a verdict of not guilty as to this charge.

CP 111.

On appeal, Lozano claims ineffective assistance of counsel because his attorney did not propose an instruction defining the defense of actual consent. Appellant's Opening Brief at 16. That instruction is found in the criminal Washington Pattern Jury Instruction 18.25:

> A person is not guilty of rape if the sexual intercourse is consensual. Consent means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse.
>
> The defendant has the burden of proving that the sexual intercourse was consensual by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to this charge.

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 18.25 (3d ed. 2008) (hereinafter "WPIC 18.25").

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. In re the Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is

easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70. Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

A defendant must overcome the presumption of effective representation. Strickland, 466 U.S. at 687.

To determine if defense counsel's failure to propose an appropriate jury instruction constitutes ineffective assistance of counsel, appellate courts review whether (1) the defendant was entitled to the instruction; (2) the failure to request the instruction was tactical; and (3) the failure to offer the instruction prejudiced the defendant. State v. Powell, 150 Wn. App. 139, 154-58, 206 P.3d 703 (2009)

Lozano cites to Powell for the proposition that failing to properly present a defense deprives a defendant of a fair trial. Appellant's Opening Brief at 15. In Powell, however, which was a prosecution for second degree rape, defense counsel was found deficient for failing to seek the instruction regarding the defense of reasonably believing the victim capable of giving consent, the

instruction the jury in Lozano's trial was given as Instruction No. 9. CP 111. Powell did not say that counsel was deficient for not seeking an instruction on the defense of consent.

In Lozano's case, counsel quite reasonably did not seek an instruction on the defense of consent. First, it is clear that the defense strategy concentrated on arguing that A. B. was suffering from blackouts and didn't remember what occurred. In closing, counsel argued that position consistently.

> You know, the fact is the evidence shows that she was in a blackout and she did—she is now trying to reconstruct those things in her own image (sic) so she doesn't seem—so it makes sense to her.

RP 425.

> She, [A. B.] doesn't have it right because she was drinking. She was in a blackout.

RP 427.

> [S]he came out of her blackout because she woke up. . . . So the blackout's over, and now she's trying to figure out what the hell she was doing, or what the heck she was doing. Which tells you she didn't know what she was doing because she was in a blackout.

RP 428-29.

> But people drink. They end up having sex. And they end up having sex when they've not been drinking. And that's what happens here. But she doesn't know. She doesn't remember so she's constructing things

> after the fact to fit her notion of how good a friend she is and how good a person she is.

RP 431.

> [P]eople that are in a blackout can do things they normally do. . . . People don't even know they're in a blackout if they were to deal with them, but they're in a blackout. That happens. That's what happened.

RP 433.

> [B]ut then you got the effect of alcohol and how you can do things while you're under the influence. While you've drank alcohol, you can do things and it—you're kind of on autopilot. And I would submit to you that's what was going on in this case. You're like on autopilot.

RP 435.

> So he would not have any idea whatsoever that [A. B.] was highly intoxicated. And it follows that he would have no idea that she was passed out. So if he has no idea that she's highly intoxicated and no idea that she's passed out—but we know she's not passed out. But I'm trying to put you in the frame of mind that a reasonable person would be. Do you think he's going to go rape her? Uh-uh. No. No. Come on. . . . What makes sense is she was in that state where she was either semi awake or awake and things happened. That's what happened in this case.

RP 437.

Arguing that the victim was in a blackout and didn't know what she was doing is inconsistent with the argument that she actually consented.

In addition, the fact that the victim may have "consented" isn't really a defense where the charge alleges that the victim was incapable of giving consent. If the jury found, as it did, that A. B. was incapable of giving consent, then the charge was proved and actual consent is not a defense because the "consent" is not freely given. In State v. Lough, 70 Wn. App. 302, 853 P.2d 920 (1993), *affirmed*, 125 Wn.2d 847, 889 P.2d 487 (1995), the court noted that when the defendant is charged with second degree rape solely on the allegation that the victim was physically and mentally incapacitated, the "she consented" defense is "legally and factually superfluous." Lough, 70 Wn. App. at 329.

The comment to WPIC 18.25 would also discourage a defense attorney from seeking the consent defense instruction where the charge includes the element of incapacity to consent. "With such offenses, the committee believes that it would be constitutional error to instruct regarding the consent defense because the State would be relieved of proving one of the elements of the crime." Comment to WPIC 18.25, 11 Wash. Prac. (3d. ed. 2008).

For all of these reasons, and given the strong presumption that counsel is acting effectively, Lozano does not demonstrate that

his counsel was ineffective. Nor can he show prejudice. If the consent instruction would be superfluous, as discussed in Lough, 70 Wn. App. at 329, the failure to seek it would not be prejudicial. By finding that the victim was incapacitated, the jury necessarily found that she did not consent. A jury instruction about consent would not have changed the outcome of the trial.

D. CONCLUSION.

Lozano was not denied his constitutional rights to confront witnesses or present a defense, and his attorney was not ineffective for failing to seek an instruction on the defense of consent. The State respectfully asks this court to affirm his conviction.

Respectfully submitted this 29th day of April, 2014.

Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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

Dated this 30th day of April, 2014, at Olympia, Washington.

Chong McAfee

THURSTON COUNTY PROSECUTOR

April 30, 2014 - 8:51 AM

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