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December 22, 2015  
Court of Appeals  
Division I  
State of Washington

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WASHINGTON STATE  
SUPREME COURT

Supreme Court No. 92681-6

(Court of Appeals No. 72503-3-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent

v.

BERNARDO BASAVE,

Petitioner.

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PETITION FOR REVIEW

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JAN TRASEN  
Attorney for Petitioner  
WSBA # 41177

WASHINGTON APPELLATE PROJECT  
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A. IDENTITY OF PETITIONER

Bernardo Basave, appellant below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Basave appealed from his Skagit County Superior Court conviction. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUE PRESENTED FOR REVIEW

The Sixth Amendment's guarantee of the right to present a defense and the Fourteenth Amendment guarantee of due process, along with similar guarantees of the Washington Constitution, are violated where a trial court bars a defendant from presenting relevant evidence. Where the trial court restricted cross-examination related to the victim's motive to lie, did the court violate Mr. Basave's rights under the United States and Washington Constitutions, and should review thus be granted pursuant to RAP 13.4(b)(1) and (2)?

D. STATEMENT OF THE CASE

Bernardo Basave and his wife, Ana Laura, are Mexican-American agricultural workers. 8/4/14 RP 8-12.<sup>1</sup> They have lived in Skagit County for many years, and up until shortly before the allegations in this case

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<sup>1</sup> The verbatim report of proceedings is referred to by date. Because many of the individuals named in the proceedings are related by marriage, first names are used; due to the nature of the allegations, only the initials of the alleged victim are used.

occurred, they shared a home with Ana Laura's brother, Gerardo S. and his wife, S.O.S. The two families shared a residence which was owned by their employer at 7679 Worline Road in the town of Bow; the Basaves lived downstairs and S.O.S. and her family lived upstairs. Id. at 1-13. The Basave family lived with their two children, and the S. family with their five children. Id. at 9; 8/6/14 RP 127.

A few months before the alleged incident, the farm owner gave the Basave family the lease to the house next door, at 6611 Worline Road. 8/4/14 RP 13-15, 194-95. The Basaves' new house was bigger than the house in which the S. family remained. Id. at 194-95.

Now that the S. family remained alone in the smaller house, Ms. S. allowed her children to take the bedrooms upstairs, and she and her husband took the downstairs bedroom. Id. at 14. This is the bedroom which had formerly belonged to Mr. Basave and Ana Laura. Id. at 14.

On, December 31, 2012, the S. family had a New Year's Eve party in their home. Id. at 17. Approximately 30 family members attended, and a great deal of tequila was consumed by the party-goers. Id. Ms. S. stated that she was intoxicated and that she could not remember leaving the party and returning to her room that night. Id. at 19. She also stated that Mr. Basave was drinking, as was her husband, Gerardo. Id. at 18. Ms. S. later reported that she felt someone pulling on her hair and believed she had

been pressed against the bed, and that the person's hands had been near her stomach. Id. at 19-20. She could not see the person and could not remember anything else. Id. at 20-21.

Ms. S.'s teenaged daughter, Jessica,<sup>2</sup> stated that she remembered seeing her mother acting intoxicated at the party, and that she had taken her downstairs to her bedroom to go to sleep. 8/4/14 RP 168-71. At approximately 3:00 or 4:00 a.m., after the party guests had gone home, Ms. S.'s teenaged son, Agustin, went to check on Ms. S. because he heard a noise in her room, as if something had fallen. Id. 86. He saw his mother crying and saw his uncle, Mr. Basave, standing in her room without any pants. Id. at 86-87.

Agustin and Jessica stayed to assist Ms. S., and Mr. Basave left through the living room, where Mr. S. was still apparently passed out on the living room sofa. Id. at 90-92. Ms. S. rested, then awoke the next day and showered. Id. at 23. She also showered the following day and laundered all of her clothing and bed linens. Id. at 27-29. Ms. S. told Jessica, "she felt like something had happened to her, because when you're a woman, you know when something happens, and that her body was really sore." Id. at 180. She did not tell Jessica she had been raped.

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<sup>2</sup> Ms. S.'s daughter's name is spelled "Yesica" and "Jessica" in the record.

Three days later, Ms. S. reported to the police that she believed “someone had done something to me” after the New Year’s Eve party. Id. at 23 (description of incident at trial), 51-52. Ms. S. did not tell the police on January 3<sup>rd</sup> that she thought she had been raped. Id. 52. In addition, Ms. S. lied to the police about the whereabouts of her husband, Geraldo S., stating they were separated and had not had sexual relations for over a month. 8/4/14 RP 25, 49, 63-66. She even told the police that her husband lived abroad. 8/4/14 RP 25, 49, 63-66. Ms. S. insisted that her children lie to the police about their father’s whereabouts, as well as to the prosecutor’s and defense counsel’s offices on her behalf. Id. at 165-67, 186-88, 194-95.<sup>3</sup> Once Ms. S. finally revealed her husband’s location, he was asked to provide a DNA sample. Id. at 154.

A few days after the party, Ms. S. went to a local hospital at the suggestion of the police, and was examined by a Sexual Assault Nurse Examiner (SANE). 8/4/14 RP 51-52, 110. At both appointments, Ms. S. was accompanied by her daughter, Jessica, who interpreted for her at times. Id. at 50, 55. The State also provided an interpreter for Ms. S. to use at defense interviews. Id. at 51.

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<sup>3</sup> Ms. S. later revealed that her husband had a warrant for his arrest, stemming from several arrests for DUI and other matters. 8/4/14 RP 63. After Ms. S. revealed the truth about Mr. S.’s whereabouts, he was arrested and Ms. S. posted his bail. Id.



In Ms. S.'s examination and interview with the SANE nurse, no injuries were noted. Id. at 124-25. At this appointment, Ms. S. told the nurse there had been vaginal penetration, although Ms. S. had not told the police about this. Id. at 52.

A small amount of DNA was recovered from the sexual assault kit, which was sent to the Washington State Crime Lab. 8/4/14 RP 155; 8/6/14 RP 37-38. Only one spermatozoon was recovered from the kit. 8/6/14 RP 39. This one spermatozoon was recovered from the perineal sample; none were recovered from the vaginal sample or from any other samples taken, including the clothing. Id. at 38-39. The DNA extracted from the single spermatozoon revealed a mixed-DNA profile. Id. at 44. This indicated at least two individual contributors, male and female, with a possible trace contributor present. Id.

The State's expert testified at trial that the female component matched the DNA profile obtained from Ms. S., while the male component matched that of Mr. S., once his DNA profile was obtained. Id. at 45, 57. The third possible trace contributor, according to the State's expert, was consistent with the known profiles of Ms. S., Mr. S., and Mr. Basave. Id. at 58. The State's expert calculated that it was 14,000 times more likely that the mixed DNA profile occurred as a result of these three individuals,

than had it occurred from only Ms. S., Mr. S., and a third unrelated individual selected at random from the United States population. Id.

Mr. Basave was charged with rape in the second and third degrees. CP 1-2.

Following trial, the jury found Mr. Basave guilty as charged; however, the trial court vacated the third degree rape conviction as violative of double jeopardy provisions. CP 47-60.

Mr. Basave appealed, arguing his Sixth Amendment right to confront and cross-examine adverse witnesses had been violated. On November 23, 2015, the Court of Appeals affirmed his conviction.

He seeks review in this Court. RAP 13.4(b)(1), (2).

#### E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT, AND WITH OTHER DECISIONS OF THE COURT OF APPEALS. RAP 13.4(b)(1), (2).

1. The Sixth Amendment guarantees an individual the right to present a defense.

The Sixth Amendment guarantees a defendant the right to present a defense. Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). A defendant must receive the opportunity to present his version of the facts to the jury so that it may decide “where the truth lies.” Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019

(1967); Chambers v. Mississippi, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). “[A]t a minimum . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt.” Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

So long as evidence is minimally relevant,

“. . . the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” The State's interest in excluding prejudicial evidence must also “be balanced against the defendant's need for the information sought,” and relevant information can be withheld only “if the State's interest outweighs the defendant's need.”

Jones, 168 Wn.2d at 720 (quoting State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)).

An accused must be permitted to conduct reasonable cross-examination on a subject relevant to a witness's motive to lie, even if the subject matter is potentially inflammatory to the jury. Olden v. Kentucky, 488 U.S. 227, 231-32, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988). Such cross-examination is designed to expose a witness's motivation in testifying and thereby “expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the

witness.” Id. at 231 (quoting Davis, 415 U.S. at 316-17); Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

2. The trial court’s exclusion of relevant evidence and the court’s constraints on cross-examination violated Mr. Basave’s Sixth Amendment rights.

Mr. Basave attempted to establish during cross-examination of the State’s witnesses that Ms. S. had two motives to lie about being raped: 1) in order to move into the Basave family’s larger home, which she already had; and 2) to increase her chances of gaining U.S. citizenship by applying as a domestic violence sexual assault victim. It was undisputed that Ms. S. and her family gained a new and larger house after reporting these allegations, which resulted in the arrest of Mr. Basave. However, Mr. Basave’s ability to inquire about this before the jury was impermissibly limited by the trial court. 8/4/14 RP 194-95. After sustaining the State’s objection, an unrecorded bench conference was held. Id. The record contains no judicial findings pertaining to the court’s exclusion of this testimony.

Next, Mr. Basave attempted to show the victim’s motive to fabricate, in order to increase her chances of gaining citizenship. Mr.

Basave's cross-examination of Ms. S.'s teenaged son was similarly shut down by the trial court. 8/4/14 RP 101.<sup>4</sup>

3. Because the trial court unconstitutionally limited Mr. Basave's Sixth Amendment right to present a defense, the Court of Appeals decision requires review.

The trial court rejected, without explanation or findings, the notion that under ER 401 and 402, Mr. Basave was permitted to offer evidence tending to show Ms. S. had a motive to lie. The trial court was required to apply the standard set forth in Jones -- specifically, that the evidence regarding the two houses and the immigration status was admissible, unless it was "so prejudicial as to disrupt the fairness of the fact-finding process at trial" and that this prejudice outweighed Mr. Basave's need for the evidence. See Jones, 168 Wn.2d at 720.

The State did not meet that burden. The State made no showing of prejudice at all, much less a showing that admission of this relevant evidence would upset the fairness of the proceeding. The trial court's erroneous ruling deprived Mr. Basave of his right under the Sixth Amendment and Article 1, section 22 to present a defense and his right of confrontation.

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<sup>4</sup> The single question that the son was permitted to answer revealed he had answered affirmatively during a defense interview, concerning his mother's motivations regarding citizenship. 8/4/14 RP 101.

Although the Court of Appeals applied the abuse of discretion standard of review, the error is constitutional. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (A constitutional error requires reversal unless the State can establish beyond a reasonable doubt the error “did not contribute to the verdict obtained”); United States v. Neder, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

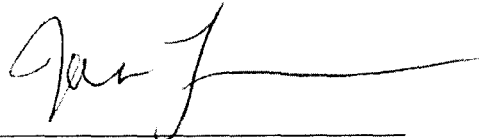
Accordingly, the Court of Appeals decision affirming the conviction is in conflict with decisions of this Court, as well as other decisions of the Court of Appeals. Review should be granted. RAP 13.4(b)(1), (2).

F. CONCLUSION

For the above reasons, the Court of Appeals decision should be reviewed, as it is in conflict with decisions of this Court, and with other decisions of the Court of Appeals. RAP 13.4(b)(1), (2).

DATED this 22<sup>nd</sup> day of December, 2015.

Respectfully submitted,



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JAN TRASEN (WSBA 41177)  
Washington Appellate Project  
Attorneys for Petitioner

## APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 72503-3-1
Respondent,	)	
	)	DIVISION ONE
v.	)	
BERNARDO OCAMPO BASAVE,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: November 23, 2015

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2015 NOV 23 AM 9:11  
CLERK OF COURT  
JENNIFER L. HARRIS

BECKER, J. —The Sixth Amendment guarantees criminal defendants the right to confront and cross-examine adverse witnesses. The right, however, is not without limit. A trial court has discretion to prohibit questioning that seeks to elicit irrelevant testimony. Here, the rape victim’s living arrangements and her immigration status were not shown to be relevant to prove she had a motive to lie about the rape.

Appellant Bernardo Ocampo Basave was charged with raping his sister-in-law at a party at her house on New Year’s Eve. According to trial testimony, the victim’s son walked into his mother’s bedroom late that night after hearing a noise like someone falling. He saw Basave standing there without pants. His mother was lying face down, bent over the end of her bed, crying. She had a top on but was not wearing pants. She reported the incident to the police. The State



obtained laboratory evidence tending to prove sexual intercourse between Basave and the victim.

The victim initially told police and prosecutors that she was separated from her husband and did not know where he was. This was false. There was a warrant out for his arrest, and the victim was trying to protect him. The jury heard this evidence. Basave sought to impeach the victim's credibility in other ways as well, including through the questions that are at issue in this appeal.

Testimony established that at the time of the alleged rape, Basave and his family lived in a home provided by his employer, while the victim and her larger family lived in a smaller home provided by the same employer. By the time of trial, Basave and his family had moved out of the larger home, and the victim and her family had moved into it.

During cross-examination of the victim's daughter, Basave asked if the home she used to live in was the smaller of the two. She confirmed that it was. Basave then asked if that was why her parents wanted to move into the larger house. The court sustained the State's objection to this question as calling for speculation. Basave asked who was currently living at the smaller house. The court sustained the State's objection to this question as irrelevant.

On appeal, Basave contends that by sustaining the State's objections, the trial court unfairly abridged his Sixth Amendment right to cross-examine witnesses.

The Sixth Amendment guarantees criminal defendants the right to confront and cross-examine adverse witnesses. Davis v. Alaska, 415 U.S. 308, 315-16,

94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). The right, however, is subject to two limitations. First, the evidence sought to be admitted must be relevant. And second, the evidence “must be balanced against the State’s interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process.” State v. Perez, 139 Wn. App. 522, 529, 161 P.3d 461 (2007). This court will not reverse a trial court’s ruling regarding the scope of cross-examination absent an abuse of discretion. State v. McDaniel, 83 Wn. App. 179, 184, 920 P.2d 1218 (1996), review denied, 131 Wn.2d 1011 (1997).

Relevant evidence is that which tends to make “the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. It is the duty of a party offering evidence to make clear to the trial court why the evidence is relevant. ER 103(a)(2).

Basave fails to show relevance. On appeal, Basave explains that if the victim desired to move into the Basave family’s larger home, it would give her a motive to fabricate the accusation of rape. But at trial, he failed to establish that the daughter could do anything more than speculate about her parents’ motives for moving. And the record does not demonstrate that Basave told the trial court the questions were relevant to the victim’s credibility.

During cross-examination of the victim’s son, Basave was prevented from asking questions about the victim’s desire to gain United States citizenship.

Q. [DEFENSE COUNSEL:] Are you aware of any plan for your mom to become a citizen of the United States?

A. No.

Q. Do you think she wanted to be a citizen?

[PROSECUTOR]: Objection. Speculation.

THE COURT: Sustained.

Q. [DEFENSE COUNSEL]: Do you know if she wanted to be a citizen?

[PROSECUTOR]: Objection. Speculation.

[DEFENSE COUNSEL]: I think if he knows, he can say, Your Honor.

[PROSECUTOR]: He would only know based on hearsay.

THE COURT: That objection is sustained.

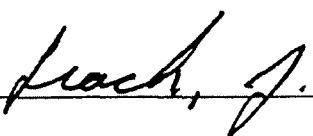
[DEFENSE COUNSEL]: I have nothing further.

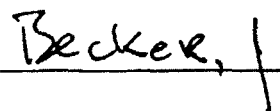
Basave suggests that the victim hoped that reporting the rape allegations would enable her to become an American citizen. But again, he fails to demonstrate that the questions would have produced relevant evidence of a motive to fabricate. The victim's son said he was not aware of any plan for his mother to become a citizen. Anything else he might have said about what she wanted to do would have been speculative or based on hearsay. And again, the record does not demonstrate that Basave told the trial court he was pursuing these questions in order to impeach the victim's credibility.

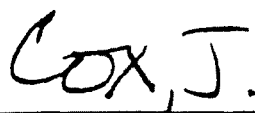
In summary, the limitations imposed by the trial court on the scope of cross-examination did not prevent the introduction of evidence that might have influenced the determination of guilt. We find no abuse of discretion.

Affirmed.

WE CONCUR:

  
\_\_\_\_\_

  
\_\_\_\_\_

  
\_\_\_\_\_

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72503-3-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Erik Pedersen, DPA  
Skagit County Prosecutor's Office
- petitioner
- Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: December 22, 2015

# WASHINGTON APPELLATE PROJECT

**December 22, 2015 - 4:28 PM**

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