SUPREME COURT NO. 92775-8

IN THE SUPREME COURT FOR THE
STATE OF WASHINGTON

MIGUEL ANGEL ALBARRAN,

Respondent,

v.

STATE OF WASHINGTON,

Petitioner.

ON APPEAL FROM THE COURT OF APPEALS
STATE OF WASHINGTON

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

U.S. Cases

A. IDENTITY OF RESPONDENT/COUNTER-PETITIONER

The respondent and counter-petitioner in this case is Miguel Albarran, the defendant below.

B. COURT OF APPEALS DECISION

The State of Washington has sought review of the unpublished decision in *State v. Miguel Albarran*, Slip Op. 46162-5-II (filed 12/01/15), *reconsideration denied,* January 8, 2016. In this response, Miguel Albarran asks that if review is granted, this Court also accept review of the Sixth Amendment and exclusion of evidence issues addressed in the court of appeals decision.

C. RESPONSE TO ISSUES PRESENTED FOR REVIEW

1 In *State v. Hughes,*[1] this Court determined that double jeopardy is violated by separate convictions for child rape and rape in the second degree under the incapacity prong. This Court was not called upon to determine whether the general/specific doctrine applied to these two statutes. Nonetheless, the State now argues that review is appropriate under RAP 13.4(b)(1). Where the State has failed to establish that the court of appeals decision is in conflict with *State v. Hughes,* is review inappropriate under RAP 13.4(b)(1)?

[1] *State v. Hughes*, 166 Wn.2d 675, 212 P.3d 558 (2009).

2. The question of whether two statutes violate the general/specific rule is a question of statutory interpretation. Where the State has failed to identify a significant constitutional issue with the court of appeals ruling, has the State failed to meet the criteria for review under RAP 13.4(b)(3)?

3. Where the State offers no argument as to how the court of appeals decision presents an issue of substantial public interest, has the State failed to meet criteria for review under RAP 13.4(b)(4)?

D. ADDITIONAL ISSUES PRESENTED FOR REVIEW

1. The only person who claimed to have witnessed appellant commit this offense was appellant's live-in girlfriend. The defense theory was that the girlfriend was intensely jealous and often became enraged and assaultive as a result of appellant's sexual infidelity. Once she used a GPS tracker to follow appellant to the home of another woman, and then assaulted him in front of the other woman. The court excluded most of this evidence and only allowed general questions about whether the girlfriend was jealous. The defense was not allowed to go into specific acts that would have established the extreme measures employed by the girlfriend. Did the court's ruling violate appellant's Sixth Amendment right to confront a key witness, thereby making review appropriate under RAP 13(b)(1) (3)?

2. T.P. was 13 ½ years old at the time of this incident. She, her mom and Miguel Albarran lived in the same house. The State's key evidence was Miguel's DNA, which was found around T.P.'s vaginal area. In order to explain the presence of the DNA, the defense sought to introduce evidence that appellant and T.P.'s mom regularly used a vibrator during sex, and that T.P. had access to the drawer where the vibrator was stored. The trial court, however, excluded all mention of the vibrator. As a result, the jury was not presented with an alternative to the State's theory. Did the trial court violate defendant's right to present a defense when it excluded this evidence, thereby making review appropriate under RAP 13(b)(1) (3)?

E. FACTS RELATING TO THE ADDITIONAL ISSUES

Denise Domke was the only witness to Miguel's purported actions. The defense theory was that Denise was angry with Miguel as a result of his continued infidelity, and that she made up this story as a means of taking revenge. RP 31, 234. Because the defense theory imputed extreme actions to Denise, the defense had to demonstrate that Denise's jealousy was much greater than in the typical case. Key to the defense was the incident in which Denise, two weeks prior to this incident, used a GPS tracker to locate Miguel at the house of another woman, where she then confronted Miguel and punched him. RP 30-32, 235. The defense also wanted to

cross-examine Denise on other instances of her rage and assaults on Miguel. The defense had a witness ready to testify if Denise denied these facts. RP 30-32, 234-240.

The prosecutor objected to evidence of the assaultive behavior and the tracking device, arguing that neither the assaults nor the tracking was relevant to the issue of bias. The judge granted the State's motion to exclude this evidence. The court said that defense counsel could ask questions about whether Denise was angry over affairs from the previous eight months, but could not bring in specific acts: "As far as specific incidents, this gets into more of the domestic affairs of people that can be outside the scope of what we're concerned with here. So a specific incident as to GPS, a tracking and so on, I would exclude." RP 240. Further, the only assault evidence the court would allow was that Denise hit Miguel after he had purportedly molested T.P.

Defense counsel was allowed to ask Denise questions about specific women with which Miguel had cheated and whether the infidelities made her angry. But because the GPS incident was excluded, Denise was able to downplay her anger. She stated that their relationship for the previous eight months had been going well, despite the fact that the GPS incident occurred two weeks before the rape accusations. RP 245. Denise tes-

tified that "we had patched things up and things were going great." RP 266.

Miguel raised the excluded evidence as a violation of his Sixth Amendment right to confront witnesses with evidence of bias. The court of appeals concluded that because the trial court allowed the defense to ask Denise questions about whether she was jealous, there was no constitutional violation. Instead, the limitation on cross-examination was subject to an abuse of discretion, and employing that standard, there was no error. Slip Op. at 8, 11.

In addition to Denise's testimony, the State relied upon DNA evidence. Lab results showed small amounts of Miguel's DNA on T.P.'s inner thigh, panties, and vagina area. RP 218. The question for the jury was, how did the DNA get there if not by sexual contact from Miquel? To answer that question, the defense sought to introduce evidence of a vibrator that Miguel and Denise used almost every time they had sex. RP 352. The vibrator was located in the top drawer next to their bed. *Id.* The defense theory is that T.P. used her mom's vibrator. Miguel recalled Denise talking about how the vibrator and lubricant were missing one day. RP 352. The defense also posited that the police or Denise could have used the vibrator to obtain a sample of Miguel's DNA. RP 8, 353-354. On cross-examination, the State's expert agreed that DNA could be transferred from

one object to another thing or person. Further, explained the expert, there would be no means of determining how the transfer occurred, but only that it had occurred. RP 227-229.

The judge excluded this evidence. According to the judge, the foundation for the evidence was Denise's statement that the vibrator was missing one day, and because this statement was hearsay, the defense could not lay the necessary foundation. RP 355. Thus, the defense was not allowed to present facts establishing an alternative explanation for the presence of the DNA. The prosecutor relied upon the DNA evidence in closing. *See e.g.*, RP 416, 462.

In his appellate brief, Miguel argued that the trial court denied him his constitutional right to present a defense. The court of appeals agreed with Miguel that the evidence showing T.P.'s potential use of the vibrator was relevant. Slip Op. at 15. Nonetheless, the court concluded that there was no constitutional violation because Miguel attempted to introduce the evidence supporting his defense through inadmissible hearsay. Slip Op. at 16.

E. WHY REVIEW SHOULD NOT BE ACCEPTED

1. The State has failed to establish the criteria for review under RAP 13.4(b)

The court of appeals decision on the general/specific issue speaks

well for itself, and needs little reinforcement in this answer. As such, respondent will limit himself to just a few comments on how the State fails to satisfy the requirements of RAP 13.4(b).

The State argues that review is appropriate under RAP 13.4(b)(1), because the decision is in conflict with this Court's decision in *State v. Hughes,* 166 Wn.2d 675, 212 P.3d 558 (2009). The State believes that *Albarran* conflicts with *Hughes* because *Hughes* remanded for a determination as to which conviction should be dismissed.

There is no conflict here. In *Hughes*, the appellant did not raise a general/specific claim. The parties did not even address the issue of which conviction must be dismissed. *See Hughes*, 166 Wn.2d at fn. 13 ("In their briefing, the parties did not give us any guidance about which conviction to vacate.") Further, as the court of appeals explained, although *Hughes* may not have specifically addressed the issue, the reasoning in that case supports the conclusion that the general/specific doctrine applies.

The State argues that under *Hughes,* "rape of a child is a status offense, whereas rape in the second degree is based on a physiological inability (whether transitory or chronic) to consent-irrespective of status." *Petition* at 10. In other words, claims the State, they cannot be concurrent offenses because one is based on status and the other is not. But this argument is contrary to *Hughes*, where the Court stated the opposite: "both

statutes require proof of nonconsent because of the victim's status." 166 Wn.2d at 683. *See also Hughes, at 683* ("both statutes protect individuals who are unable to consent by reason of their status.").

In some cases a victim may be unable to consent because alcohol has reduced her ability to fully understand and appreciate what she is agreeing to. *See State v. Al-Hamdani*, 109 Wn. App. 599, 610, 36 P.3d 1103, 1108 (2001). In other cases, it is the lack of age and maturity that makes a person incapable of appreciating the nature and consequences of the sex act. *See State v. Clements,* 78 Wn. App. 458, 467, 898 P.2d 324 (1995) (courts presume minors lack capacity to consent to sexual relations because they are too immature to rationally or legally consent.). As the *Hughes* Court recognized, in either event, the inability to consent is at the heart of the crime. *Hughes*, 166 Wn.2d at 683.

The State argued below that "if Albarran is correct, the portion of RCW 9.94A.537 which allows this aggravator to be applied to Rape in the Second Degree would be rendered meaningless." *COA Response* at 32. The court of appeals rejected that argument, pointing out "there are many ways of committing Rape in the Second Degree, only one of which relates to incapacity." Slip Op. at 20, fn 9.

The State characterizes this ruling as meaning the enhancement "applies only to rape in the second degree when committed by forcible

compulsion." *Petition* at 10. This is a misrepresentation of the court's holding, because the court of appeals did not interpret the enhancement statute, nor did it make a finding that the enhancement only applied to the forcible compulsion prong. Rather, the court simply held that when the victim is a child, the State must charge the defendant under the child rape statute rather than the incapacity prong of rape in the second degree. The discussion regarding the enhancement statute was only in response to the State's claim that this interpretation would render the enhancement statute meaningless, with the court of appeals pointing out that the statue still serves a purpose because of the other five means of committing second degree rape.

The question of whether a conviction violates the general/specific rule is a question of statutory interpretation rather than one of constitutional law. The State sets forth a hypothetical situation in its petition that could produce an inequitable result to a hypothetical defendant, and argues that this creates a substantial issue of constitutional law under RAP 13.4(b)(3). This is much too attenuated a claim to create a constitutional issue.

Finally, the State argues that review is appropriate under RAP 13.4(b)(4) because this unpublished case involves an issue of "substantial public interest that should be determined by the Supreme Court." *Petition*

at 13. The State's main argument is that although the case is unpublished, trial attorneys and trial courts will disregard the law and rely upon the decision. This is ironic. We assume jurors will follow the law as given to them and will ignore stricken evidence or remarks, but somehow attorneys and trial judges will not be able to do so?

The State argues that review is appropriate under this prong because it is "unconscionable" that the State would be precluded from bringing the appropriate charge against a defendant. But the State's outrage does not make the issue one of "substantial public interest." This is not a statute that will impact the public on a regular basis. The decision does not identify prohibited conduct; it does not provide necessary guidance on the public's daily interactions with each other or the government; it does not define the rights of individuals or organizations; it's not even an issue likely to reoccur. The case does not satisfy RAP 13.4 (b)(4). Review should be denied.

F. REVIEW OF ADDITIONAL ISSUES SHOULD BE ACCEPTED

1. Review is appropriate under RAP 13.4(b)(1) and (3), where the trial court prevented the defense from introducing specific acts demonstrating a key witness' motive and bias.

"A trial court's denial of a criminal defendant's right to adequately cross-examine an essential state witness as to relevant matters tending to establish bias or motive will violate the Sixth Amendment right of con-

frontation." Robert H. Aronson, The Law of Evidence in Washington, Sec. 607.042(2) (4th ed. 2005). Accordingly, a defendant "should be given great latitude in the cross-examination of prosecution witnesses to show motive or credibility." *State v. Roberts,* 25 Wn. App. 830, 834, 611 P.2d 1297 (1980).

A defendant is entitled to confront the witnesses against him with bias evidence when the evidence is at least minimally relevant. *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983). "Bias includes that which exists at the time of trial, for the very purpose of impeachment is to provide information that the jury can use, during deliberations, to test the witness' accuracy while the witness was testifying." *State v. Fisher,* 165 Wn.2d 727, 752-753, 202 P.3d 937 (2009); quoting, *State v. Dolan,* 118 Wn. App. 323, 327-328, 73 P.3d 1011 (2003). The defendant is granted more "latitude to expose the bias of a key witness. " *Fisher,* 165 Wn.2d at 752-753, citing, *State v. Darden,* 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). Violations of the state and federal confrontation clauses are reviewed de novo. *State v. Medina*, 112 Wn. App. 40, 48, 48 P.3d 1005 (2002).

The court of appeals in the present case did not review the exclusion of the bias evidence under a de novo standard. Rather, the court employed a "manifest abuse of discretion" test to the court's ruling. *Slip Op.*

at 8. In using this standard, the court of appeals acknowledged, "there is some disagreement in the case law as to what standard of review is to be used." *Slip Op.* at fn 5. Confusion as to the appropriate standard was also acknowledged by the State in their response brief. The State pointed out that while Division Two has employed an abuse of discretion standard, Division One employs a de novo review when evaluating the exclusion of evidence. *COA Response* at 21, citing to *State v. Strizheus*, 163 Wn. App. 820, 829, 262 P.3d 100 (2011). In *Strizheus,* Division One relied upon this Court's decision in *State v. Iniguez*, 167 Wn.2d 273, 217 P.3d 768 (2009) which employed the de novo standard.

The first step in any appellate review is to determine the appropriate standard of review. Without a consensus as to the appropriate standard of review, there will be a lack of consistency in appellate court decisions. Review is necessary to resolve this conflict. RAP 13.4(b)(2). Further, because this Court's most recent decisions have cited to a de novo standard on constitutional challenges, review is appropriate under RAP 13.4(1) as well.

Turning to the court of appeal's ruling on the witness bias issue, the trial court violated Miguel's right to confront witnesses by upholding the State's objection to specific evidence that would have demonstrated the magnitude of Denise's feelings. Specifically, the court erred when it

excluded evidence that Denise had used a GPS tracker to follow Miguel to another woman's house, where she then assaulted him in front of that woman. RP 30-32, 235, 240. The court also excluded evidence that Denise had assaulted Miguel on other occasions when he was unfaithful and she was jealous. *Id.*

State and federal courts recognize that simply allowing the defense to elicit testimony that a witness may be biased does not necessarily satisfy the Sixth Amendment's right to confrontation. *See e.g., Davis v. Alaska*, 415 U.S. 308, 316, 39 L. Ed. 2d 347, 94 S. Ct. 1105, 1110 (1974); *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010). Rather, the defense has the right to present the specific facts that demonstrate the bias. As the court in *State v. Robbins* explained, "It is generally recognized, however, that the inquiry is not strictly limited to the simple question of whether hostility exists, but that, within reasonable limits, the witness may be interrogated as to particular facts tending to show the nature and extent of the hostility." *State v. Robbins*, 35 Wn. 2d 389, 396, 213 P.2d 310, 315 (1950). The true extent of Denise's bias against Miguel could not be established without presenting her extreme behavior, which included tracking and assaulting Miguel. The defense had the right to present facts that would allow the jury to reach its own conclusions regarding Denise's bias and desire for revenge. *See e.g., State v. Pickens*, 27 Wn. App. 97, 100, 615 P.2d 537,

539 (1980) ("the court may violate the confrontation clause if it prevents the defense from placing facts before the jury from which such bias or prejudice may be inferred); *Davis v. Alaska, supra at* 316 (defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.)

It is likely that many jurors have experienced feelings of anger or jealousy, but not to the extent that they would make a false accusation against somebody. It was incumbent upon the defense to show the intensity of Denise's feelings, and simply asking her whether she was jealous about various other women did not allow the jury to infer or understand the extent of that jealousy and rage. On the other hand, using a GPS for tracking movements is an extraordinary measure, as is attacking Miguel in front of another woman. These actions demonstrated the intensity of Denise's feelings against Miguel, making it more understandable why she would make up false allegations against him. The fact that these specific acts occurred within two weeks of when Denise made her allegations to the police, makes this bias evidence even more germane.

Because the exclusion of this crucial bias evidence violated Miguel's Sixth Amendment Right to confrontation, review is appropriate under RAP 13.4(b)(3).

2. Review is appropriate under RAP 13.4(b)(1), (2) and (3), where the trial court excluded an alternative explanation for the presence of DNA.

In addition to the right of cross-examination, a defendant has the right to present evidence in his or her defense. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Besides Denise, the State's main evidence against Miguel were the small amounts of DNA evidence found on T.P.'s inner thigh, panties, and vagina area. RP 218. To demonstrate an alternative source for the DNA, the defense sought to introduce evidence that T.P. had access to a vibrator regularly used by Miguel and Denise. RP 352. The vibrator was also key to the defense theory that either the police or Denise could have used the DNA from that source to wrongfully accuse Miguel. RP 8, 353-354. The State's own expert agreed that DNA could be transferred from one object to another person or thing, and that DNA can last for a long time on an object. RP 227-229. But when the trial court excluded all evidence of the vibrator, the defense lost the ability to meaningfully contest the DNA evidence.

In his offer of proof, Miguel explained that he knew T.P. had used the vibrator because Denise had told him so. The court incorrectly believed this hearsay could not be used to lay an evidentiary foundation and ruled the vibrator inadmissible. Even assuming the court was correct about the hearsay, there was still firsthand testimony that the vibrator was

used regularly by both Miguel and Denise, and that it was easily accessible to T.P. Additionally, the foundation was bolstered by the state's expert who said that DNA can remain on objects for long periods of time, and that DNA can be transferred from an object to a person. While Denise's hearsay statement would have added weight to the vibrator evidence, it was not a necessary part of the foundation.

Similar to the bias evidence, the court of appeals concluded that the appropriate standard of review was an abuse of discretion. Slip Op. at 14. Because of the aforementioned conflict between the divisions on this issue, review is appropriate under RAP 13.4(b)(2).

At trial the State argued that the vibrator evidence was inadmissible because it was not reliable. Specifically, the State argued that because Miguel and Denise used the vibrator together, Denise's DNA would also have been present on the swab if T.P. had used the vibrator. *Id.* Upon closer examination, this argument does not hold water.

As to the lack of Denise's DNA on the swab, this argument goes to the weight of the testimony, not its admissibility. This Court's decision in *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010) is directly on point. *Jones* was a rape case with a consent defense. The defendant claimed that the complaining witness, his niece, had attended a sex party in which she had consensual sex with three men, including the defendant. *Jones*, 168

Wn.2d at 717. The only sperm found on the complaining witness, however, was from the defendant. *Id.* at 724. The trial court excluded the sex party evidence, believing that it was being used to attack the woman's credibility and was therefore barred by the rape shield statute. *Id.* at 717-18.

This Court reversed the conviction in a unanimous decision. The Supreme Court explained that the rape shield statute did not apply in this context. *Id.* at 722. Further, explained the Court, even if the evidence had implicated the rape shield statute, the evidence would still have been admissible. This is because when evidence, if believed, has a high probative value, the Sixth Amendment requires admission of that evidence. *Jones*, 168 Wn.2d at 721, 723; *See*, *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983) (For evidence of high probative value "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const, art. 1, § 22.); *State v. Reed*, 101 Wn. App. 704, 715, 6 P.3d 43 (2000) ("Evidence relevant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest.")

The prosecution in *Jones* argued that the lack of sperm from any of the other men purportedly at this sex party made the proffered evidence unbelievable. This Court disagreed:

> Admittedly, Jones's version of the events is not airtight. He did not call any of the other members of the alleged sex party as witnesses, K.D.'s testimony directly contradicted Jones's account, and only Jones's semen was found on K.D. Nevertheless, a reasonable jury that heard of a consensual sex party may have been inclined to see the sexual encounter in a different light.

Jones, at 724.

An error is not harmless unless the State can prove "beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." *Jones*, 168 Wn.2d at 724. See *State v. Franklin*, 180 Wn.2d 371, 325 P.3d 159 (2014); (constitutional harmless error standard applies where right to confrontation violated by exclusion of other suspect evidence).

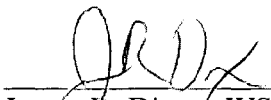
In closing the prosecutor told the jury that the chance the DNA belonged to some other random person in the United States was 1 in 780 quadrillion. The jury did not hear that there was another means by which the DNA could have ended up on T.P., whether through T.P.'s use of the vibrator or by a third party's gathering of DNA from the vibrator. Denied this evidence, defense counsel was left with the shakiest of arguments in closing: "The defendant said, I don't know how my semen and my saliva got on her, but I didn't put it there." RP 439. Exclusion of the vibrator evidence eviscerated Miguel's defense against the DNA evidence. This was a

violation of Miguel's Sixth Amendment, and is in conflict with *State v. Jones, supra.* Review is appropriate under RAP 13.4(d)(1) and (3).

F. CONCLUSION

For the reasons set forth above, Miguel Albarran respectfully requests that this Court deny the State's petition for review. Further, he requests that this Court grant review of the additional issues presented, for the reasons set forth above. As to both additional issues, review is appropriate under RAP 13.4(b)(1), (2) and (4).

Respectfully submitted: March 7, 2016



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CERTIFICATE OF SERVICE

I, Melissa Lu, certify that on March 7, 2016, I caused a true and correct copy of this Brief of Appellant to be served on the following in the manner indicated below:

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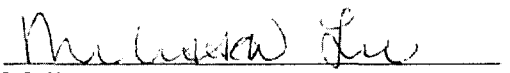
Dated this 7th day of March, 2016 in Seattle, WA



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Cc: James R. Dixon <James@dixoncannon.com>
Subject: State v. Albarran; Supreme Court No. 92775-8

Dear Clerk:

Attached for filing with the Court is Respondent's Answer to Petition for Review regarding State v. Albarran (Supreme Court no. 92775-8). If you have any questions or comments, please let us know.

Thank you.

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