No. 97245-1
Court of Appeals No. 77795-5-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

OSCAR URBINA,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4, Petitioner, Oscar Urbina asks this Court to accept review of the decision of the Court of Appeals in *State v. Urbina*, 77795-5-I.

B. OPINION BELOW

The Court of Appeals concluded that Mr. Urbina's constitutional right to present his own version of events was not violated when defense counsel unilaterally, and over Mr. Urbina' personal objection, determined what testimony to elicit from Mr. Urbina

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

The state and federal constitutions guarantee a criminal defendant the right to testify; the "right to present his own version of events in his own words." This fundamental right is personal to the defendant and cannot be abrogated by defense counsel or the court. Here, after defense counsel completed directed examination of Mr. Urbina, Mr. Urbina insisted he had more to add and that it was necessary so he could prove his innocence. The trial court accepted defense counsel's view that while Mr. Urbina could choose to testify, defense counsel could control the substance of that testimony by

deciding what questions to ask. Did the trial court deprive Mr. Urbina of his right to testify?

D. STATEMENT OF THE CASE

Based on the results of DNA testing in 2016, the State charged Mr. Urbina with second degree rape alleged to have occurred in 2014. CP 3, 42. In court, M.B.C., the victim of the rape, identified Mr. Urbina as the person who had assaulted her. RP 387.

Mr. Urbina insisted he was innocent. RP 669. Mr. Urbina adamantly denied ever having seen or met M.B.C.. RP 668.

After defense counsel completed his direct examination of Mr. Urbina and the State its cross, Mr. Urbina insisted he wished to testify further. RP 684. Mr. Urbina explained, through an interpreter, "it is an injustice because I have three pieces of additional evidence that I wanted to present . . . how am I going to prove my innocence if I was only given a little bit of time." RP 684.

In response, defense counsel stated he did not intend to question Mr. Urbina any further saying "I'm making the decision on what evidence I'm choosing to put on the stand. . . . There are other issue Mr. Urbina has raised with me, but, at this point, I am going to rest." RP 685. Defense counsel went further, expressing his belief that "[o]nce

Mr. Urbina . . . stated he wants to testify, then it becomes my duty to present his case as I feel best." *Id*. The deputy prosecutor added "it is counsel's strategic decision as to what questions to ask and not ask." RP 686.

The court accepted defense counsel's position and did not permit Mr. Urbina to testify further.

The jury convicted Mr. Urbina as charged. CP 43.

E. ARGUMENT

The trial court deprived Mr. Urbina of his right to testify in violation of the Sixth Amendment and Article I, section 22.

The opinion of the Court of Appeals presents a significant constitutional question and is contrary to decisions of this Court and the United States Supreme Court. This Court should grant review under RAP 13.4.

1. *Both the state and federal constitutions guarantee Mr. Urbina the right to present his own version of events to the jury in his own words*.

The right to defend against a criminal charge "is personal" and "a defendant's choice in exercising that right must be honored out of that respect for the individual which is the lifeblood of the law." *McCoy*

v. Louisiana, __ U.S. __, 138 S. Ct. 1500, 1507 (2018) (Internal quotations and citations omitted.).

> [I]n *Faretta v. California*, [422 U.S. 806, 819, n. 15, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)] the Court recognized that the Sixth Amendment grants to the accused *personally* the right to make his defense. It is the accused, not counsel, who must be informed of the nature and cause of the accusation, who must be confronted with the witnesses against him, and who must be accorded 'compulsory process for obtaining witnesses in his favor. (Emphasis added.)

Rock v. Arkansas, 483 U.S. 44, 52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) (Italics in original, internal quotations omitted).

> Even more fundamental to a personal defense than the right of self-representation, which was found to be "necessarily implied by the structure of the Amendment," is an accused's right to present his own version of events in his own words.

Id. (citing *Faretta* 422 U.S. at 819).

What the Supreme Court found implicit in the federal constitution is explicit in the Washington Constitution. Article I, section 22 expressly guarantees a person the right "to testify in his own behalf."

This right is fundamental, and cannot be abrogated by defense counsel or by the court. *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999) (citing *State v. Thomas*, 128 Wash.2d 553, 558, 910 P.2d 475 (1996)). A defendant's choice to accept representation by

counsel "is not all or nothing." *McCoy,* 138 at 1508. The person does not "surrender control entirely to counsel." *Id*. While counsel provides "assistance" over matters such as when to make evidentiary objections, some decisions "are reserved for the client." *Id.*

2. The trial court and defense counsel prevented Mr. Urbina from relaying in his own words his version of events to the jury.

Rock makes clear the right to testify is not simply the right to take the witness stand but the person's right to tell their own version of events in their own words. Thus, the right is not honored by simply calling the defendant as a witness and asking them questions. Instead this "fundamental" and "personal" right is honored only when the person is permitted to decide what they wish the jury to hear from them; not some or even most of their version of events. Mr. Urbina was not permitted to offer his version of events in his own words.

Mr. Urbina unambiguously stated he wished to testify beyond that elicited by defense counsel's direct examination. RP 684. Mr. Urbina asked the court how could he prove his innocence if he could not continue his testimony. *Id*. Defense counsel and the prosecutor insisted that while Mr. Urbina had the right to choose to testify, it was for defense counsel to determine what Mr. Urbina would testify to.

RP 685-86. Those positions cannot be squared with *Rock*'s recognition that Mr. Urbina, not defense counsel, has the right to offer his version of events in his words to jury.

As this Court made clear in *Robinson* and the United States Supreme Court made clear in *McCoy*, the right to testify is personal to the defendant, that is, it is not decision counsel's decision. *Robinson*, 138 Wn.2d at 758; *McCoy,* 138 at 1508. Thus, it is irrelevant and nonsensical to ask whether defense counsel's decision to limit Mr. Urbina's testimony was a reasoned tactical choice by counsel, as it is simply was not counsel's choice to make. Nonetheless, that is precisely the inquiry the Court of Appeals engaged in. Opinion at 4-6.

Nothing in *Rock* permits defense counsel to censor or limit Mr. Urbina's version of events. The Sixth Amendment and Article I, section 22 empower Mr. Urbina, not defense counsel, to determine what he wishes the jury to hear from him. If defense counsel is afforded the power to control the content of the testimony the jury does not hear Mr. Urbina's versions of events. Rather, the jury hears only that portion of Mr. Urbina's version of events that defense counsel wishes to elicit. Mr. Urbina is stripped of the ability to personally decide what he wishes the

jury to hear from him. Mr. Urbina is stripped of the right to "offer his own version of events in his own words."

By accepting defense counsel's position, and refusing to permit Mr. Urbina to testify further, the trial court deprived him of his right to testify.

Just as in *McCoy* and *Faretta*, Mr. Urbina's right to relay his version of events through his testimony is a fundamental right personal to him. *Robinson*, 138 Wn. 2d at 758. As in those cases, his choice to exercise that right in manner contrary to the wishes of counsel likely increases the chances of an unfavorable outcome. As in those cases, "[v]iolation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural.'" *McCoy*, 138 S. Ct. at 1511. This Court must reverse Mr. Urbina's conviction.

F. CONCLUSION

Mr. Urbina was denied the ability to control his defense and to his right to tell his version of events to the jury in his own. The opinion of the Court of Appeals presents a significant constitutional question and is contrary to decisions of this Court and the United States Supreme Court. This Court should grant review under RAP 13.4.

Respectfully submitted this 22nd day of May 2019.

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Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. OSCAR LUIS URBINA, Appellant.	No. 77795-5-I UNPUBLISHED OPINION FILED: April 22, 2019

VERELLEN, J. — If a defendant decides to testify, his counsel may not coerce the defendant to forgo testifying. But after a defendant testifies, defense counsel can make a legitimate tactical decision not to recall the defendant to "speak to the jury" after cross-examination. Oscar Luis Urbina appeals his conviction for second degree rape. He contends defense counsel denied his right to testify in his own defense because his attorney did not recall him to the stand to give additional testimony. Because Urbina testified in his own defense and defense counsel made the reasonable tactical decision not to recall him, no error occurred.

Therefore, we affirm.

FACTS

M.B. was raped on April 14, 2014. After going to Harborview Medical Center, a sexual assault nurse examiner took photos of her injuries and obtained a

sample of the perpetrator's DNA.[1] The police submitted the sample to a database, but it did not match any existing profile. No arrests were made, and the investigation stalled for almost two years.

In early March of 2016, Urbina raped A.R., and the police obtained a sample of his DNA after arresting him. After submitting Urbina's DNA to a database, it matched the sample taken from M.B.[2] The police investigated Urbina for the attack on M.B. They confirmed Urbina's license plate matched that of M.B.'s attacker, save for one number, and his car also matched her attacker's. The police took a new DNA sample from Urbina, which also matched M.B.'s rapist. Urbina was charged with the second degree rape of M.B.

During trial, only Urbina testified in his defense. After he testified to his innocence, defense counsel had no more questions for him, and the court told Urbina he could leave the witness stand. Urbina asked to speak directly to the jury. The court told Urbina to consult with his attorney about his prospective testimony and stopped him from speaking further. Outside the presence of the jury and after speaking with his client, defense counsel told the court he was not going to recall Urbina for additional testimony.

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[1] Deoxyribonucleic acid.

[2] The DNA database conducts an automatic daily search comparing new samples to existing profiles and notifies users of any matches.

The jury found Urbina guilty of second degree rape. The court sentenced him to 211 months incarceration running consecutively to his sentence for raping A.R.[3]

Urbina appeals.

ANALYSIS

Both the United States and Washington constitutions provide a criminal defendant the exclusive right to decide to testify in his own defense.[4] A defendant also has the "[a]utonomy to decide that the objective of the defense is to assert innocence."[5] Accordingly in Washington, "a defendant's right to testify is violated if 'the final decision that he would not testify was made against his will.'"[6] To prove this, a defendant must show by a preponderance of the evidence that his attorney "actually prevented him from testifying," thereby rendering ineffective assistance.[7]

We review claims of ineffective assistance of counsel de novo.[8] To prove he received ineffective assistance, a defendant must show (1) that his counsel's

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[3] Although Urbina attacked A.R. in 2016 after attacking M.B. in 2014, he was convicted and sentenced for the second degree rape of A.R. before the start of his trial for raping M.B.

[4] McCoy v. Louisiana, ___ U.S. ___, 138 S. Ct. 1500, 1508, 200 L. Ed. 2d 821 (2018); Rock v. Arkansas, 483 U.S. 44, 52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); State v. Robinson, 138 Wn.2d 753, 758, 982 P.2d 590 (1999).

[5] McCoy, 138 S. Ct. at 1508.

[6] Robinson, 138 Wn.2d at 763 (quoting United States v. Teague, 908 F.2d 752, 759 (11th Cir. 1990), vacated by 932 F.2d 899 (11th Cir. 1991), rev'd on reh'g on other grounds by en banc, 953 F.2d 1525 (11th Cir. 1992)).

[7] Id. at 764.

[8] State v. Lopez, 190 Wn.2d 104, 117, 410 P.3d 1117 (2018).

performance was deficient and (2) caused him prejudice.[9] In this context, a defense counsel provided ineffective assistance if she actually prevented the defendant from testifying.[10]

Here, Urbina testified. He directly asserted his innocence. He denied having sex with M.B., he denied ever having seen M.B. before the trial, and he alleged M.B. lied when she testified about him raping her. Urbina offered an alibi, explaining that he was in a late night church service with his wife when the attack occurred. But at the end of direct examination, Urbina said he had additional testimony.

> Q. Is your assertion here today that [M.B.] is fabricating or making [it] up when she said that you assaulted her?
>
> A. Of course. Of course. Because I have never seen the gal ever. I don't—I don't know what to add because under the—due to the advice of my lawyer, I have been asked not to talk, and so I'm not sure what else I can say. I'm following the steps as instructed by my lawyer, that I shouldn't talk, but I wanted to talk. I almost did, but I have respect [for] authority just like I respect the Bible.[11]

When defense counsel declined to redirect following cross-examination, Urbina asked to "say something . . . that is important for my defense."[12] The court told Urbina to step down from the witness stand to speak with his attorney. After speaking with Urbina, defense counsel declined to recall his client.

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[9] Id. at 109.

[10] Robinson, 138 Wn.2d at 766.

[11] Report of Proceedings (RP) (Nov. 15, 2017) at 672.

[12] Id. at 678.

> At this point, I, as defense counsel, am not going to recall Mr. Urbina, and we have no further witnesses. The defense would rest for the record. Mr. Urbina disagrees. He wants to speak to the jury. I don't think that is supported. I'm not going to recall him.
>
> . . . .
>
> . . . [A]s his attorney, I'm making the decision on what evidence I'm choosing to put on the stand. We have gone through the court procedure and discussed potentially opening the door to the prior conviction [for raping A.R.]. There are other issues that Mr. Urbina has raised with me, but, at this point, I am going to rest.[13]

Urbina contends his opportunity to testify and profess his innocence does not satisfy his right to testify because his attorney "stripped [him] of the ability to personally decide what he wishes the jury to hear from him."[14]

But "[p]reserving for the defendant the ability to decide whether to maintain his innocence should not displace counsel's or the court's respective trial management roles."[15] It is "a practical necessity" for defense counsel to control trial management because "'[t]he adversary process could not function effectively if every tactical decision required client approval.'"[16] Tactical decisions include which arguments to advance,[17] which witnesses to call,[18] and which questions to

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[13] Id. at 684, 685.

[14] Appellant's Br. at 5-6.

[15] McCoy, 138 S. Ct. at 1509 (citing Gonzalez v. United States, 553 U.S. 242, 249, 128 S. Ct. 1765, 170 L. Ed. 2d 616 (2008)).

[16] Gonzalez, 553 U.S. at 249 (quoting Taylor v. Illinois, 484 U.S. 400, 418, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988)).

[17] Id.

[18] Id.; accord State v. Rafay, 168 Wn. App. 734, 841, 285 P.3d 83 (2012).

ask those witnesses.[19] And, absent coercion, tactical advice from defense counsel about whether to testify "'infringes no right, but simply discharges defense counsel's ethical responsibility to the accused.'"[20]

Urbina testified to his innocence after his attorney called him to the stand. Urbina stated that his counsel advised him against giving certain testimony, and he decided to follow that advice at that time. Urbina may have regretted heeding his counsel's advice soon after doing so, but in absence of coercion, his regrets have no bearing on whether defense counsel provided ineffective assistance. After hearing Urbina's proposed testimony, defense counsel made a reasonable tactical decision not to recall his client given the risk of opening the door to damaging evidence of Urbina's recent conviction for raping A.R.[21] Urbina testified

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[19] See In re Davis, 152 Wn.2d 647, 720, 101 P.3d 1 (2004) ("Courts generally entrust cross-examination techniques, like other matters of trial strategy, to the professional discretion of counsel.").

[20] Robinson, 138 Wn.2d at 763-64 (quoting Lema v. United States, 987 F.2d 48, 52 (1st Cir. 1993)).

[21] During the sentencing hearing, Urbina used the opportunity to discuss what he wanted to say at trial: "In the trial, I wanted to talk, and they did not give me the opportunity to do so. . . . [B]ut I would have liked to say, if I ha[d] the opportunity[,] . . . when I was accused, in March of 2016, March 7th—so, I was accused of rap[ing A.R.]. I hired this woman, and I was detained. For prostitution. She was—and she had accused me of rape. That's all. And the [trial for raping A.R.] was here in April [of 2017], so I know that he want[ed] to combine [the two rape charges into a single trial]. I didn't know where I was going. So we got there, but the detective woman and the detective man were there, who were here during the trial—I'm innocent. . . . In 2015, I have the paper, in October, so I was detained four or five days, and that occasion was . . . I had a problem, but it was not for rape. And then when I had three days being in the jail . . . she [took] the DNA from me. I don't know why. So I asked her why she was doing that because I was already there because of rap[ing A.R.]. So she told me that two numbers of my car license were involved in a [crime] and that's why they were [there]. So they took the DNA." RP (Dec. 8, 2017) at 759-60.

to his alibi defense and fails to show that defense counsel coerced or otherwise actually prevented him from testifying. He fails to establish ineffective assistance of counsel.[22]

Therefore, we affirm.

WE CONCUR:

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at 759-60. Urbina continued in this vein by impugning the investigation into M.B.'s rape, the evidence against him, and M.B.'s credibility.

[22] We note that Urbina also argues the trial court infringed on Urbina's right to testify "[b]y accepting defense counsel's position" and not ordering defense counsel to question Urbina further. Appellant's Br. at 6. Urbina provides no support for this argument's underlying presumption that trial courts should step into defense counsel's shoes in deciding trial tactics.

DECLARATION OF FILING AND MAILING OR DELIVERY

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. 77795-5-I**, 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:

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