Supreme Court No. 97554-0
Court of Appeals No. 77626-6-I

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

JOSE LUIS DIAZ-ACOSTA,

Petitioner.

PETITION FOR DISCRETIONARY REVIEW

RICHARD W. LECHICH
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Jose Luis Diaz-Acosta, the petitioner, asks this Court to grant review of the Court of Appeals' decision terminating review.[1]

B. ISSUE PRESENTED FOR REVIEW

Non-constitutional error is prejudicial if there is a reasonable probability of a different result but for the error. The appellate court does not decide the credibility of witnesses. The Court of Appeals held the trial court erroneously admitted "rebuttal" testimony from a witness the State failed to call in its case-in-chief. Although the testimony was damning as to Mr. Diaz-Acosta's claim of self-defense and was emphasized repeatedly by the prosecution during closing arguments, the Court of Appeals held the error harmless, reasoning that other witnesses had testified contrary to Mr. Diaz-Acosta's testimony on self-defense. Does the decision conflict with precedent where the Court of Appeals improperly reasoned the State's witnesses were more credible than Mr. Diaz-Acosta?

[1] A copy of the unpublished opinion, dated June 10, 2019, and order denying Mr. Diaz-Acosta's motion for reconsideration, dated July 17, 2019, are attached in the Appendix.

C. STATEMENT OF THE CASE

Jose Luis Diaz-Acosta went out to enjoy the nightlife in Bellingham. RP 160, 162.[2] Mr. Diaz-Acosta, an aircraft technician, had recently moved from Arizona. RP 159, 161. He met his friend, Ian Christianson, and they went out to a couple of bars. RP 160, 169. Mr. Diaz-Acosta had developed a friendship with Mr. Christianson after meeting him earlier that summer. RP 172, 195.

After closing time, around 2:00 a.m., Mr. Diaz-Acosta and Mr. Christianson left a bar. RP 170. They met a couple of other people outside the bar and discussed going to one of their houses to hang out. RP 161, 171. They congregated in a nearby parking lot. RP 173.

Mr. Diaz-Acosta, who was a little drunk and realizing he needed to urinate, decided to relieve himself in the parking lot. RP 170, 173. Using a car to shield himself from view, he began to relieve himself on the ground near the car. RP 162-63.

As Mr. Diaz-Acosta was relieving himself, a group of people approached him. RP 163. A man in this group, apparently believing Mr. Diaz-Acosta was urinating on his car, rushed at Mr. Diaz-Acosta and swore at him. RP 163-64. As Mr. Diaz-Acosta later explained to the police

[2] The "RP" citations refer to the trial proceedings in the 10/24/17 and the 10/25/17 volumes.

and to the jury, the man pushed him twice. RP 92-95, 163-64; Ex. 1. The man first pushed him on the shoulder, causing Mr. Diaz-Acosta to bump into the car. RP 164, 173. Mr. Diaz-Acosta quickly zipped his pants up. RP 174. The man was angry and was in his face. RP 174. The man pushed Mr. Diaz-Acosta again, possibly in his chest. RP 175. Fearing for his safety and believing the man would hit him, Mr. Diaz-Acosta punched his assailant in the face. RP 165-66, 168-69. The man fell and unfortunately hit his head on the ground. RP 103-04.

Distressed, Mr. Diaz-Acosta left the scene. RP 167, 176. Mr. Diaz-Acosta wanted to stay out of possible trouble. RP 177. Confronted by police shortly thereafter, Mr. Diaz-Acosta initially denied being in a fight. RP 83-84, 178. He explained that his hand was always swollen and that he had hit a pole out of anger. RP 84, 178. Following his arrest, Mr. Diaz-Acosta cooperated with the investigation and provided a written statement. RP 90-96; Ex. 1. The prosecution charged Mr. Diaz-Acosta with one count of second degree assault. CP 3-4.

The alleged victim was Eric Sorenson. Mr. Sorenson had gone out that night with his friends, Brandon (last name unknown), Tia Howard, and Shaylee Clouser. RP 10-11, 23-24, 130-31. After a night at the bars, the four went to a restaurant. RP 12, 14. After their meal, they returned to the lot where their two vehicles were parked. RP 15. Brandon had drove

Mr. Sorenson while Ms. Howard had drove Ms. Clouser. RP 12-13, 25-26. Brandon was Mr. Sorenson's designated driver. RP 12, 25.

Ms. Howard and Ms. Clouser testified that the men were ahead of them as they walked towards their vehicles. RP 15, 27-28. They noticed a group of men around their cars and that they were urinating on Brandon's car. RP 15, 27. Mr. Sorenson and Brandon confronted the group. RP 15, 28. According to Ms. Howard and Ms. Clouser, Mr. Sorenson was punched after he asked what the group was doing. RP 17, 28-29. They did not see Mr. Sorenson push anyone. RP 17, 29. Ms. Howard thought the punch happened quickly, about less than a minute after their arrival. RP 21-22. In contrast, Ms. Clouser thought there was about three to five minutes of interaction between the men before the punch. RP 39.

Bryan Sharick, a bouncer at a bar near the parking lot, testified he heard a commotion. RP 43. He saw there was some kind of argument between two sides in the parking lot. RP 43, 57. The loudness and tone drew his attention. RP 52. After he turned away to yell for assistance from his fellow employees, he heard what he thought sounded like a person being hit with a beer bottle. RP 45, 55. He did not see the punch. RP 45. He thought about five to ten minutes passed between when his attention was first drawn and the sound of the hit. RP 60-61.

Michael and Randon Bilson, father and son, testified they were sitting in a vehicle about 30 to 40 yards away when their attention was drawn to a confrontation between two groups of men. RP 101, 117-18. Michael did not notice any women nearby. RP 107. Both sides were yelling, arguing, and swearing at each other. RP 110-11, 128. Although the Bilsons did not see pushing, they testified there may have been pushing and that they failed to observe it. RP 111, 125-26.

The prosecution did not call Brandon to testify.

Mr. Sorenson himself did not remember the encounter. RP 131. He recalled drinking that night and waiting to eat at the restaurant. RP 130. He remembered waking up at the hospital. RP 32. Due to his fall, he suffered a skull fracture. RP 149, 153-54. Unfortunately, the injury resulted in Mr. Sorenson suffering from issues of sensory loss and memory problems. RP 133-34, 157. Mr. Diaz-Acosta expressed regret at the harm Mr. Sorenson suffered as result of him defending himself. RP 165-66, 176.

Over Mr. Diaz-Acosta's objections, the court permitted the prosecution to call his friend, Mr. Christianson, as a "rebuttal" witness. RP 181, 185-86, 188. Mr. Christianson had not been called by the prosecution in its case-in-chief and was not on the prosecution's witness list. Supp. CP __ (sub. no. 32). Mr. Christianson testified there had been no pushing and

that Mr. Diaz-Acosta's actions were not done in self-defense. RP 193-94, 202. Following the prosecutor's closing argument, where the prosecutor repeatedly emphasized Mr. Christianson's testimony, the jury convicted Mr. Diaz-Acosta of second degree assault. RP 222-23, 227-28; CP 33.

Mr. Diaz-Acosta, who had no known felony history, was sentenced to nine months in jail. 10/31/17RP 3; CP 41. Mr. Diaz-Acosta obtained an appeal bond and a stay of the sentence. 10/31/17RP 12; Supp. CP __ (sub. 65).

The Court of Appeals held that that the trial court erred in permitting the State to call Mr. Christianson as a "rebuttal" witness. Although the State had not argued harmless error and the erroneously admitted testimony was very prejudicial to Mr. Diaz-Acosta's claim of self-defense, the Court of Appeals held the error harmless. Mr. Diaz-Acosta moved for reconsideration, but the Court of Appeals denied his motion without explanation.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

In conflict with precedent, the Court of Appeals reasoned the error in admitting rebuttal testimony from a new witness was harmless because there was other eyewitness testimony contradicting Mr. Diaz-Acosta's testimony that he acted in self-defense.

1. The Court of Appeals properly held that the trial court erred by admitting "rebuttal" testimony from a new witness after the defense rested.

Rebuttal testimony is admissible "only where new matter has been developed by the evidence of one of the parties and is ordinarily limited to a reply to new points." State v. Lampshire, 74 Wn.2d 888, 894, 447 P.2d 727 (1968). The Court of Appeals properly held that the trial court erred by admitting sham "rebuttal" testimony that the State could have made part of its case-in-chief. Slip op. at 8.

2. Non-constitutional error requires reversal if there is a reasonable probability the jury would have reached a different result absent the error.

For non-constitutional error, the "error is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Smith, 106 Wn.2d 772, 780-81, 725 P.2d 951 (1986) (quoting State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). Put plainly, non-constitutional error is prejudicial if there is a reasonable probability of a different result had the error not occurred. State v. Gunderson, 181 Wn.2d 916, 926, 337

P.3d 1090 (2014). The analysis is not whether the properly admitted evidence is sufficient to find guilt. Id. at 926-27. If "the appellate court is unable to say from the record before it whether the defendant would or would not have been convicted but for the error committed in the trial court, then the error may not be deemed harmless . . ." State v. Mack, 80 Wn.2d 19, 22, 490 P.2d 1303 (1971).

3. The testimony admitted in error was very prejudicial to Mr. Diaz-Acosta's claim of self-defense and was not harmless.

Mr. Diaz-Acosta argued that reversal was required because the admission of his friend's damning testimony was prejudicial. Br. of App. at 13-17. In sum, Mr. Christianson contradicted Mr. Diaz-Acosta's claim that Mr. Sorenson was aggressive and pushed Mr. Diaz-Acosta. RP 193-94. He testified he was "shock[ed]" that his friend had punched Mr. Sorenson and "didn't feel like it was self-defense." RP 194. During closing argument, the prosecutor repeatedly cited Mr. Christianson's testimony to jury, arguing it defeated Mr. Diaz-Acosta's claim of self-defense. RP 222-23, 227-28.

An error in admitting rebuttal testimony is especially important in a case "where the result hinged upon the jury's belief of the testimony of the witnesses." Lampshire, 74 Wn.2d at 894. Absent the court's error, the jury could have found Mr. Diaz-Acosta's testimony credible, or found the

testimony from the other eyewitnesses inadequate to disprove Mr. Diaz-Acosta's claim of self-defense beyond a reasonable doubt. If so, the jury would have returned a not guilty verdict.

4. In holding the error harmless, the Court of Appeals improperly made credibility determinations rather than analyze whether the jury could have reasonably found Mr. Diaz-Acosta's claim of self-defense credible but for the error.

Notwithstanding that the error went to the heart of the case and that the evidence was very prejudicial to Mr. Diaz-Acosta's defense, the Court of Appeals held the error harmless. In doing so, the Court of Appeals found credible the testimony of the other witnesses who testified Mr. Diaz-Acosta hit Mr. Sorenson without provocation. Slip op. at 9-10. This was improper because "[a]n appellate court ordinarily does not make credibility determinations." State v. Maupin, 128 Wn.2d 918, 929-30, 913 P.2d 808 (1996). "Credibility determinations 'cannot be duplicated by a review of the written record, at least in cases where the defendant's exculpating story is not facially unbelievable.'" State v. Holmes, 122 Wn. App. 438, 447, 93 P.3d 212 (2004) (quoting State v. Gutierrez, 50 Wn. App. 583, 591, 749 P.2d 213 (1988)). It was the jury's role to determine witness credibility, not the Court of Appeals. Mr. Diaz-Acosta's claim of self-defense was not facially unbelievable. After all, to receive a self-defense instruction, there must be some evidence to support it.

There is a reasonable probability that the jury could have found Mr. Diaz-Acosta's testimony credible absent the admission of his friend's testimony that he did not act in self-defense. Contrary to the Court of Appeals opinion, the testimony from the other witnesses were not uniformly against Mr. Diaz-Acosta's claim and their views of the incident were not comparable to that of Mr. Christianson, who was right next Mr. Diaz-Acosta. Two of the witnesses, the women in Mr. Sorensons' group, were friends with the Mr. Sorenson and were about 10 to 15 feet away. RP 15-16. One witness, a bouncer, heard a loud argument between the two groups, was about 20 to 30 feet, and did not see the whole incident, including the punch. RP 42-43, 52-57. Two other witnesses were about 30 to 40 yards away, did not see the whole incident and testified there could have been pushing. RP 101, 105, 120, 126. This is hardly evidence that renders the admission of Mr. Christenson's damning testimony harmless.

In reasoning the error was harmless, the Court of Appeals asserted Mr. Christianson "significantly undercut his own credibility by admitting he could not hear or directly see Diz Acosta and Sorenson interact before the punch." Slip op. at 9 (citing RP 200-02). The Court of Appeals neglects to mention that this testimony came during cross-examination by defense counsel. RP 200-02. Notwithstanding that that defense counsel did

his job by impeaching the witness, the jury may not have found that impeachment compelling.

In Lampshire, this Court emphasized an error in the admission of rebuttal testimony can be particularly harmful if the case turns on the credibility of witnesses and the testimony impacts the jury's evaluation of the witnesses. Lampshire, 74 Wn.2d at 894. The Court of Appeals dismissed this Court's opinion in Lampshire because there were additional errors present in that case and Mr. Diaz-Acosta alleged "only one prejudicial error." Slip op. at 8-9. But it is not the number of errors that is critical. Rather, it is the effect of an error that matters. See State v. Barry, 183 Wn.2d 297, 303, 352 P.3d 161 (2015) (The appellate court "measure[s] the admissible evidence of the defendant's guilt *against the prejudice, if any, caused by the inadmissible evidence*.") (emphasis added) (citing State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). Here, the prejudice caused by the error was significant because it undercut Mr. Diaz-Acosta's claim of self-defense. It gave the jurors a reason to find credible the testimony from the two women in Mr. Sorenson's group that Mr. Sorenson had not pushed Mr. Diaz-Acosta and had punched him without provocation.

5. The Court of Appeals improperly reasoned the error was harmless because even though the testimony was improperly admitted, it was "otherwise unobjectionable."

The Court of Appeals further reasoned the error was harmless because Mr. Diaz-Acosta "does not explain how otherwise unobjectionable testimony becomes prejudicial in a brief two-day trial because it was presented in rebuttal rather than a few hours earlier during the State's case in chief." Slip op. at 9 (emphasis added). This flippant statement shows that the Court of Appeals either misunderstood the harmless error inquiry or was unwilling to apply it. The proper inquiry was whether the improperly admitted evidence prejudiced Mr. Diaz-Acosta. See State v. Burns, 53 Wn. App. 849, 850-51, 770 P.2d 1054 (1989) (error in admitting rebuttal testimony was harmless because "it did not affect the verdict") affirmed on other grounds, 114 Wn.2d 314, 788 P.2d 531 (1990). In other words, if the trial court had sustained Mr. Diaz-Acosta's objection, is there a reasonable probability of a different result? The question is not whether there was prejudice due to the testimony being presented in rebuttal rather than in the prosecution's case-in-chief.

6. Because the decision conflicts with well-established principles, and to bring clarity to the harmless error standard, the Court should grant review.

Review should be granted because the Court of Appeals' decision conflicts with well-established precedent on harmless error analysis and

the principle that judges do not evaluate the credibility of witnesses. RAP 13.4(b)(1), (2). In further contravention of precedent, the court reasons the error is harmless because Mr. Christianson's testimony was not "otherwise unobjectionable." Slip op. at 9. Review is warranted. See State v. Romero-Ochoa, 193 Wn.2d 341, 344, 440 P.3d 994 (2019) (granting petition for review on solely harmless error issue and reversing Court of Appeals' unpublished opinion, which had held error prejudicial).

Review should also be granted to provide much needed guidance on how harmless error analysis should be performed. Until a better framework is established, review for harmless error will continue to be "an arbitrary exercise of judicial authority." State v. Coristine, 177 Wn.2d 370, 387, 300 P.3d 400 (2013) (Gonzalez, J., dissenting) (quoting Dennis J. Sweeney, An Analysis of Harmless Error in Washington: A Principled Process, 31 Gonz. L. Rev. 277, 323 (1996)). Appellate courts frequently evaluate whether an error is prejudicial or harmless. Therefore, to provide clarity, review is warranted as the issue is one of substantial public interest. RAP 13.4(b)(4).

"The problem with harmless error arises when we as appellate judges conflate the harmlessness inquiry with our own assessment of a defendant's guilt." Harry T. Edwards, To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?, 70 N.Y.U.L. Rev.

1167, 1170 (1995). Respectfully, Ms. Diaz-Acosta submits the Court of Appeals conflated its own assessment of Mr. Diaz-Acosta's guilt with the harmless error inquiry. It did so by finding particular testimony from witnesses called by the State credible and Mr. Diaz-Acosta's testimony not credible. If the right to a jury trial means anything, it means that the credibility of witnesses are decided by jurors, not judges. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge"); Rose v. Clark, 478 U.S. 570, 593, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986) (Blackmun, J., dissenting) ("The Constitution does not allow an appellate court to arrogate to itself a function that the defendant, under the Sixth Amendment, can demand be performed by a jury"); State v. Robinson, 24 Wn.2d 909, 917, 167 P.2d 986 (1946) (legal rights "cannot be impartially preserved if the appellate courts make of themselves a second jury and then pass upon the facts").

Thus, the non-constitutional error standard implicates a defendant's due process right to a fair trial. Evidentiary rules are designed to ensure a fair trial and to comply with due process, but violations of those rules are not reviewed under the constitutional error standard. The harmless error standard to be applied by appellate courts in reviewing

errors in criminal cases is a significant issue of constitutional law that this Court should review. RAP 13.4(b)(3).

To the extent the Court disagrees that the criteria for review is met, the Court should summarily grant review and reverse. See RAP 1.2 (appellate court has discretion to waive rules in the interest of justice). While this Court is arguably not in the business of error correction, the error in this case was obviously prejudicial to Mr. Diaz-Acosta. A reasonable jury could have reached a different result absent the error.

E. CONCLUSION

For the foregoing reasons, Mr. Diaz-Acosta asks this Court to grant review.

DATED this 15th day of August, 2019.

Respectfully submitted,

/s Richard W. Lechich
Richard W. Lechich – WSBA #43296
Washington Appellate Project - #91052
Attorney for Petitioner

Appendix

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

STATE OF WASHINGTON, Respondent, v. JOSE LUIS DIAZ ACOSTA, DOB: 01/24/1990 Appellant.	No. 77626-6-I UNPUBLISHED OPINION FILED: June 10, 2019

VERELLEN, J. — Rebuttal testimony must address new material raised by the defendant's case in chief and cannot be needlessly cumulative. During Jose Luis Diaz Acosta's trial for second degree assault, the State called a rebuttal witness even though the defense's case raised no new matters, and the witness's testimony merely echoed testimony from the State's case in chief. Allowing the rebuttal witness was harmless error because of the overwhelming evidence against Diaz Acosta.

We must remand, however, because two legal financial obligations must be stricken in light of Diaz Acosta's indigence.

Therefore, we affirm in part, reverse in part, and remand.

FACTS

Diaz Acosta and Ian Christianson drank at a nightclub on a summer night in Bellingham.[1] They left around closing time and hung out in the club's parking lot.[2] Having been drinking since nine or ten o'clock that night, Diaz Acosta needed to relieve himself.[3] He went between parked cars to shield himself from view.[4] As Diaz Acosta sought relief, Eric Sorenson and his friends returned to their cars from a night out.[5] Sorenson, believing someone was urinating on his car, approached Diaz Acosta.[6] Within a few minutes, Diaz Acosta punched Sorenson and knocked him to the pavement.[7] Sorenson suffered a basilar skull fracture, a brain bleed, and potentially permanent sensory impairments.[8]

At trial, Diaz Acosta advanced a theory of self-defense.[9] The State presented four witnesses during its case in chief who all testified Sorenson did not push or hit Diaz Acosta.[10] Only Diaz Acosta testified in his defense, and he said Sorenson pushed him and behaved aggressively.[11]

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[1] RP (Oct. 25, 2017) at 160-61.

[2] RP (Oct. 24, 2017) at 43, 51-52.

[3] RP (Oct. 25, 2017) at 162.

[4] RP (Oct. 25, 2017) at 162-63.

[5] RP (Oct. 24, 2017) at 15.

[6] Id. at 27-29.

[7] Id. at 45.

[8] Id. at 132-33; RP (Oct. 25, 2017) at 152-53.

[9] RP (Oct. 24, 2017) at 9.

[10] Id. at 17, 29, 49, 119-20.

[11] RP (Oct. 25, 2017) at 164.

On rebuttal, the State called Christanson over Diaz Acosta's objection.[12] Christianson testified he did not see Sorenson behave aggressively or push Diaz Acosta.[13] The jury found Diaz Acosta guilty of second degree assault.[14]

Diaz Acosta appeals.

ANALYSIS

I. Rebuttal Testimony

Diaz Acosta argues cumulative rebuttal testimony prejudiced his trial.[15] We review a decision to admit rebuttal testimony for abuse of discretion.[16] A court abuses its discretion where its decision is made for untenable reasons, rests on untenable grounds, or is based on an erroneous view of the law.[17]

"'Rebuttal evidence is admitted to enable the plaintiff to answer new matter presented by the defense.'"[18] Although the two may overlap, rebuttal testimony should not be a reiteration of the State's case in chief.[19] Thus, rebuttal testimony

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[12] Id. at 181-82, 185-86.

[13] Id. at 193-94.

[14] Clerk's Papers (CP) at 33.

[15] Appellant's Br. at 12-13.

[16] State v. Copeland, 130 Wn.2d 244, 288, 922 P.2d 1304 (1996).

[17] State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

[18] State v. Swan, 114 Wn.2d 613, 652, 790 P.2d 610 (1990) (quoting State v. White, 74 Wn.2d 386, 394-95, 444 P.2d 661 (1968)).

[19] Id. at 652-53 (quoting White, 74 Wn.2d at 393-95); see State v. Epefanio, 156 Wn. App. 378, 388, 234 P.3d 253 (2010) ("The State . . . is not permitted to call and question a rebuttal witness on anything other than new matters raised by the defense.") (citing White, 74 Wn.2d at 395); see also ER 403 (Courts may exclude "needless presentation of cumulative evidence.").

must "answer new matter raised by the defense"[20] and should not be needlessly cumulative.[21] Because Diaz Acosta was the sole defense witness, the issue is whether his testimony raised any new matters for the State to rebut.

Diaz Acosta's testimony described the evening. He and Christianson drank at the Underground, "just partying," and left around closing time.[22] While Diaz Acosta urinated next to an orange car, Sorenson approached angrily and shoved him.[23] Diaz Acosta steadied himself, and Sorenson shoved him again.[24] Then Sorenson "just rushed me again, just swearing, just pissed off, man, . . . [a]nd just [a] split second, man, unfortunately, [I] just defended myself."[25] Diaz Acosta said he "[a]bsolutely" feared for his safety before punching Sorenson.[26]

The State's case in chief included a truncated version of Diaz Acosta's version of events. The State called the arresting officer to read into the record a statement Diaz-Garcia wrote at the police station after his arrest:

> We were drinking, having a good time, playing pool, drinking[.] [T]ime came to bail out and we got confronted by a drunk individual[,] and he pushed me twice so I defended myself like the constitutional rights explains. He got str[uck] once, and I was told to leave the premises![27]

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[20] White, 74 Wn.2d at 394.

[21] ER 403.

[22] RP (Oct. 25, 2017) at 160-62.

[23] Id. at 163-64.

[24] Id. at 164.

[25] Id.

[26] Id. at 168-69.

[27] RP (Oct. 24, 2017) at 93.

The officer also mentioned Christianson and that he was with Diaz Acosta.[28]

In addition, the State called four eyewitnesses who testified that Sorenson did not push Diaz Acosta. The first two witnesses were friends of Sorenson's and had been out on the town with him that night.[29] They denied Sorenson did anything aggressive before Diaz Acosta punched him.[30] They specifically denied Sorenson pushed or hit Diaz Acosta.[31] The State also called two witnesses unconnected to the victim or the defendant. One was a bouncer guarding the door for a nightclub across the street from the parking lot, and the other was a teenager who had recently completed his shift at a nearby diner.[32] They too testified that Sorenson did not push Diaz Acosta.[33] They also said Diaz Acosta "sucker punched" Sorenson.[34]

During rebuttal, the State asked Christianson four questions about whether anyone pushed, punched, or had any physical contact with Diaz Acosta before the punch.[35] Christianson answered "no" or "nope" to those questions, and he opined, "I didn't feel like it was self-defense or any of that."[36]

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[28] Id. at 94.

[29] Id. at 13-14, 24-25.

[30] Id. at 17, 29.

[31] Id.

[32] Id. at 41-42, 117-18.

[33] Id. at 49, 120.

[34] Id. at 102, 122.

[35] RP (Oct. 25, 2017) at 193-94.

[36] Id. at 194.

The State argues Christianson's testimony "addressed a new issue—whether [the] Defendant's testimony of his interaction with Sorenson was accurate."[37] But the record does not support this contention. The State called a police officer to read Diaz Acosta's statement, which is essentially a summary of his self-defense theory. The State preemptively undermined that theory by calling four witnesses who each testified Diaz Acosta struck without provocation. Although Diaz Acosta spoke in detail about his self-defense theory, his testimony merely fleshed out an existing matter. It did not raise a new matter.

Diaz Acosta analogizes this case to State v. Fitzgerald.[38] In Fitzgerald, this court held the trial court abused its discretion by admitting cumulative rebuttal evidence.[39] An adoptive father was accused of two counts of statutory rape against children adopted from the same orphanage.[40] Both orphans testified during the State's case in chief, and both said the father molested and raped them both before their adoption from India and afterwards in Washington.[41] On rebuttal, the State called a third orphan who testified that she saw the father molest and rape the first witness in India.[42] Because the testimony was cumulative with testimony from the State's case in chief about prior bad acts, the court erred by

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[37] Resp't's Br. at 10.

[38] 39 Wn. App. 652, 694 P.2d 1117 (1985).

[39] Id. at 662.

[40] Id. at 654.

[41] Id.

[42] Id. at 660, 662.

admitting rebuttal testimony for this purpose.[43] Similarly here, Christianson's testimony merely recounted the same facts about the same incident testified about during the State's case in chief, albeit from Christianson's perspective.

The State argues on appeal, as it did to the trial court, Christianson's testimony was not cumulative because "he had a unique perspective as to the events as opposed to the witnesses who have already testified."[44]

But Christianson's testimony was needlessly cumulative. He stood four or five feet behind Diaz Acosta during the moments preceding the punch.[45] Diaz Acosta's body obstructed his view of anything Sorenson did, and he did not hear anything the men said to each other.[46] By contrast, a witness who testified during the State's case in chief saw the same events from approximately seven feet away with nothing obstructing her view.[47] She testified about what Sorenson and Diaz Acosta said and did before the punch.[48] Christianson's perspective did not contribute anything new to the jury's understanding and, accordingly, had little probative value. Because it had little probative value and only echoed earlier testimony, it was needlessly cumulative.

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[43] Id. at 662.

[44] RP (Oct. 25, 2017) at 187; Resp't's Br. at 12.

[45] RP (Oct. 25, 2017) at 201.

[46] Id. at 200-02.

[47] RP (Oct. 24, 2017) at 38, 40.

[48] Id. at 35-39.

The State both raised and undermined Diaz Acosta's self-defense theory during its case in chief, and his testimony did not raise a new matter the State had to rebut. Even if it had, Christianson's limited perspective meant his testimony was needlessly cumulative. Accordingly, the court abused its discretion by admitting Christianson's rebuttal testimony.

When considering if the erroneous admission of evidence prejudiced the defendant, we ask "'whether within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'"[49]

Diaz Acosta points to State v. Lampshire[50] to show he suffered prejudice from the erroneous admission of improper rebuttal testimony alone.[51] But Lampshire does not support his proposition. In that case, "the cumulative effect of the cited errors" prejudiced the defendant "where the result hinged upon the jury's belief of the testimony of the witnesses."[52] In addition to admitting cumulative rebuttal testimony, the trial court allowed improper cross-examination questions and improperly commented on a witness's credibility.[53] All three errors undermined the credibility of defense witnesses.

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[49] State v. Gunderson, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014) (internal quotation marks omitted) (quoting State v. Gresham, 173 Wn.2d 405, 433, 269 P.3d 207 (2012)).

[50] 74 Wn.2d 888, 447 P.2d 727 (1968).

[51] Appellant's Br. at 17.

[52] Lampshire, 74 Wn.2d at 894.

[53] Id. at 891-94.

Here, Diaz Acosta alleges only one prejudicial error. And he does not explain how otherwise unobjectionable testimony becomes prejudicial in a brief two-day trial because it was presented in rebuttal rather than a few hours earlier during the State's case in chief. Although the prosecutor mentioned Christianson's testimony four times during his closing argument,[54] Christianson significantly undercut his own credibility by admitting he could not hear or directly see Diaz Acosta and Sorenson interact before the punch.[55] Even without self-impeachment, Christianson's testimony was not unduly emphasized or essential for the State's argument:

> [E]very witness, aside from the defendant . . . was there from four distinct vantage points: [Sorenson's friends] behind [Sorenson]; [Christianson] behind the defendant; the bouncer across the street; and the [teenager] elsewhere in the parking lot. Four distinct vantage points, not a single witness indicated that this was anything other than a sucker punch, an assault, not a fight, not a reaction in self-defense, but an assault.
>
> . . . .
>
> As [Christianson] stated, as all the witnesses stated, there is no evidence of self-defense. None. And the defendant's testimony, I submit to you, cannot be found credible in light of all the other witnesses, all of these witnesses who are not connected to one another in any way.[56]

Only Diaz Acosta testified Sorenson pushed him. Four witnesses testified during the State's case in chief that Diaz Acosta punched Sorenson without

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[54] RP (Oct. 25, 2017) at 222, 226-27, 228.

[55] Id. at 200-02.

[56] Id. at 226, 228.

provocation. Two of those four had no connection to either the aggressor or the victim. Each witness's testimony corroborated the others'. It is improbable the outcome of the trial would have changed without the error. Accordingly, error was harmless.

II. Legal Financial Obligations

Diaz Acosta argues the court erred by imposing a $250 jury demand fee and a $200 criminal filing fee without first inquiring about his ability to pay.[57] The State concedes the court erred by imposing the jury demand fee and asks that it be stricken.[58] It does not address the criminal filing fee. But State v. Ramirez[59] states plainly that the criminal filing fee should also be stricken where the fee was imposed prior to the 2018 amendment of RCW 36.18.020(2)(h)[60] and a defendant's appeal was pending after it became effective. This appeal was pending when the law went into effect, and Diaz Acosta is indigent.[61] Under Ramirez, the criminal filing fee must be stricken as well, and the court may strike the fees without a resentencing hearing because it already found Diaz Acosta indigent.[62]

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[57] Appellant's Br. at 17, 21.

[58] Resp't's Br. at 12.

[59] 191 Wn.2d 732, 749, 426 P.3d 714 (2018).

[60] See LAWS OF 2018, ch. 269, § 17.

[61] CP at 69-70.

[62] 191 Wn.2d at 749-50.

Therefore, we affirm in part, reverse in part, and remand so the jury demand fee and criminal filing fee may be stricken.

WE CONCUR:

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

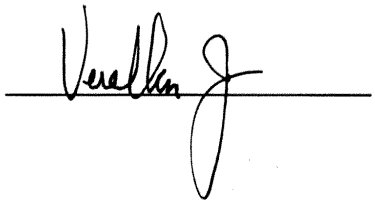
STATE OF WASHINGTON, Respondent, v. JOSE LUIS DIAZ ACOSTA, DOB: 01/24/1990 Appellant.	)	No. 77626-6-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant filed a motion for reconsideration of the opinion filed June 10, 2019. Following consideration of the motion, the panel has determined the motion should be denied.

Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

FOR THE PANEL:



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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. 77626-6-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:

☒ respondent Hilary Thomas, DPA
[Appellate_Division@co.whatcom.wa.us][hthomas@co.whatcom.wa.us]
Whatcom County Prosecutor's Office

☒ respondent Philip Buri – Attorney At Law
[philip@burifunston.com]

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: August 15, 2019

WASHINGTON APPELLATE PROJECT

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