

05866-2

05866-2

No. 65866-2-I

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

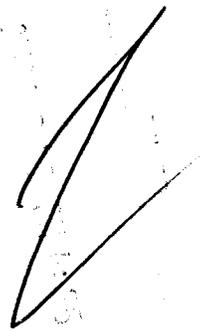
STATE OF WASHINGTON,

Respondent,

v.

JOEL M. KAHORA,

Appellant.

A large, stylized handwritten mark or signature, possibly a checkmark or a signature, located on the right side of the page.

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

APPELLANT'S OPENING BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. **ASSIGNMENTS OF ERROR**..... 1

B. **ISSUE PERTAINING TO ASSIGNMENTS OF ERROR** 1

C. **STATEMENT OF THE CASE** 2

D. **ARGUMENT** 8

THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED MR. KAHORA'S CONSTITUTIONAL RIGHTS TO CONFRONT HIS ACCUSERS AND PRESENT A DEFENSE BY RESTRICTING HIS CROSS-EXAMINATION OF THE COMPLAINING WITNESS ABOUT HER POSSIBLE MOTIVE TO FABRICATE THE ALLEGATIONS..... 8

1. A defendant in a criminal trial has a constitutional right to full and effective cross-examination of the complaining witness 8

2. The trial court abused its discretion and violated Mr. Kahora's constitutional rights by limiting his cross-examination of the complaining witness about her possible motive to fabricate 11

3. The constitutional error in precluding full and effective cross-examination of the complaining witness requires reversal.. 14

E. **CONCLUSION**..... 15

TABLE OF AUTHORITIES

Constitutional Provisions

Const. art. I, § 3.....	9
Const. art. I, § 22.....	9
U.S. Const. amend. VI	9
U.S. Const. amend. XIV	9

Washington Cases

<u>State v. Foster</u> , 135 Wn.2d 441, 957 P.2d 712 (1998).....	9
<u>State v. Hudlow</u> , 99 Wn.2d 1, 659 P.2d 514 (1983)	11
<u>State v. Jones</u> , 168 Wn.2d 713, 230 P.3d 576 (2010).....	9, 11
<u>State v. Peterson</u> , 2 Wn. App. 464, 469 P.2d 980 (1970)	12, 13

United States Supreme Court

<u>Chambers v. Mississippi</u> , 410 U.S. 284, 294, 90 S.Ct. 1038, 35 L.Ed.2d 297 (1973)	9, 10
<u>Chapman [v. California]</u> , 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1976)	14
<u>Davis v. Alaska</u> , 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)	9, 10
<u>Delaware v. Van Arsdall</u> , 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)	10, 14

A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in excluding testimony about M.M.'s contentious relationship with her foster mother, which was relevant to Joel Kahora's defense.

2. The trial court abused its discretion in excluding testimony about M.M.'s knowledge of her track coach's prior conviction for domestic violence, which was relevant to Mr. Kahora's defense.

3. The trial court's decision to exclude the above testimony violated Mr. Kahora's state and federal constitutional right to confront the complaining witness.

4. The trial court's decision to exclude the above evidence violated Mr. Kahora's state and federal constitutional right to defend against the charges.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

In a criminal trial, a defendant has a broad constitutional right to cross-examine a complaining witness in order to reveal the witness's possible bias and motive to fabricate the allegations. A defendant also has a constitutional right to present evidence relevant to his defense. Did the trial court abuse its discretion and violate Joel Kahora's constitutional rights by limiting his ability to

cross-examine the complaining witness about her possible motive to fabricate the allegations?

C. STATEMENT OF THE CASE

The State charged Mr. Kahora with two counts of second degree assault, domestic violence, alleging he intentionally assaulted his teen-aged daughters M.M. and E.M. and thereby recklessly inflicted substantial bodily harm. CP 1-2. The State alleged Mr. Kahora kicked M.M. in the leg, punched her in the back of the head, and twisted her wrist during an argument. CP 4. The State alleged Mr. Kahora hit E.M. on the side of the head during the same argument, causing her eardrum to rupture. CP 4-5.

Prior to trial, Mr. Kahora moved to admit evidence to show the girls' motive and bias in bringing the allegations against their father. 6/23/10RP 15; CP 6-31. Defense counsel explained the family had recently moved to Washington from Massachusetts and both girls had been adamantly against the move. 6/23/10RP 23-30. The defense theory was that the girls felt animosity toward their father and fabricated the allegations in order to get away from him and be able to make their own decisions. Id. Counsel offered two pieces of evidence to support the defense theory. First, counsel explained that when M.M. was placed in foster care after the

alleged assault by her father, she had the same kinds of problems with her foster mother that she had with her parents. 6/23/10RP 28-29. Her foster mother would not let her do everything she wanted to do, ordered her to do chores, and would not buy her everything she wanted. Id. M.M. told the CPS social worker that the foster mother "provides for my needs but she doesn't provide for my wants" and asked to be placed in a different home. Id. As she requested, M.M. was placed in the home of her track coach, with whom she was living at the time of trial. Id. This evidence was relevant to show the lengths M.M. was willing to go to get what she wanted. Id.

Second, counsel offered evidence that M.M. knew her track coach had a prior conviction for a domestic violence offense. 6/23/10RP 29-30. The evidence was relevant to show that, although M.M. stated she was afraid to live with her father as a result of the alleged assault, she was not actually concerned about her safety but instead was determined to get what she wanted. Id. She wanted to live with her track coach because he was helping her to achieve her goal of being a track star. Id.

The trial court denied the defense motion to admit the testimony, finding the relevance of the evidence was outweighed by its potential to prejudice and mislead the jury. 6/23/10RP 37-38.

At the jury trial, Mr. Kahora testified that he and his wife, Annsarah Mboya, and their daughters, 17-year-old M.M. and 16-year-old E.M., are from Kenya. 7/06/10RP 57-58. The family moved to the United States in 2004. 7/06/10RP 57. At first, they lived in Massachusetts. 7/06/10RP 62. Then they moved to Washington in July 2009. 6/29/10RP 57. The family moved to Washington so that Mr. Kahora could be ordained as a minister. 7/06/10RP 64. Another reason for the move was that Mr. Kahora and his wife were concerned about the girls. 7/06/10RP 64. For instance, one day at school another student had called M.M. a "monkey." 7/06/10RP 64. On another occasion, M.M. received a "D" grade in a class. 7/06/10RP 65-66. M.M.'s friends were not well behaved and took drugs. Id. M.M. did not always obey her parents or do her chores. 7/01/10RP 104-05. Sometimes the girls would leave the house without telling their parents and stay out late. 7/01/10RP 19. Mr. Kahora and his wife decided to move the family to Washington in part to remove the girls from the environment they were in. 7/06/10RP 66.

The girls did not want to move to Washington. 6/29/10RP 60; 6/30/10RP 52; 7/06/10RP 68. They did not want to leave their school and friends. 6/29/10RP 59; 6/30/10RP 52. M.M. told her parents she would do anything to avoid having to move. 7/06/10RP 68. She went to court to find out whether she could be emancipated but found out she could not. 6/29/10RP 138; 7/06/10RP 70. The family spoke to a juvenile probation officer supervisor, who told them the girls could not live by themselves until they were 18 years old and therefore must move to Washington with their parents. 7/06/10RP 72. The family spoke with their pastor, who offered to allow the girls to stay with him. 7/06/10RP 39. But Mr. Kahora did not want to leave his daughters in Massachusetts. 7/06/10RP 72. He insisted that the girls move to Washington with their parents. 7/06/10RP 66-68. In Kenya, it is customary for children to obey their elders. 7/06/10RP 60.

M.M. was not happy that she did not have a choice about the move. 6/29/10RP 128, 134, 172. She did not like that her father often made decisions for her, such as which church to attend, whether she could see her friends, and the kinds of activities she could be involved in. 6/29/10RP 128-30. She did not always follow

house rules. 6/29/10RP 130. She was resentful of Mr. Kahora and did not believe he was her biological father. 6/29/10RP 121-22.

Mr. Kahora testified that on October 11, 2009, he and his family went to church as usual and returned home at around 9 p.m. 7/06/10RP 76-77. He went to the kitchen to make tea and asked the girls to come out of their bedroom to clean the kitchen, which was a mess. 7/06/10RP 77-78. E.M. came out first and cleaned a portion of the kitchen. 7/06/10RP 78. Then M.M. came out and began arguing with E.M. 7/06/10RP 78. Mr. Kahora asked what was going on and M.M. said she did not want to clean the kitchen because she was tired. 7/06/10RP 78. He told her she had to do her chores. 7/06/10RP 78. M.M. then ran up behind him, punched him in the back of the neck, and ran to the hallway. 7/06/10RP 133. He moved toward her, but E.M. told him to let M.M. be. 7/06/10RP 79, 143-45. He did not hit either M.M. or E.M. 7/06/10RP 56-57, 79.

M.M. testified that on that evening, when she came home from church, she went straight to her bedroom. 6/29/10RP 70. Her father called her out of her room to clean the kitchen counters. 6/29/10RP 71. She was not in a good mood because she was tired. 6/29/10RP 71. She wiped the counter and Mr. Kahora asked

her why she had a bad attitude. 6/29/10RP 71. She said she did not have a bad attitude but was just tired. 6/29/10RP 71. He then grabbed her hand and as she tried to get away, he twisted it. 6/29/10RP 72. Then he grabbed hold of her head and as she pulled away, he got a handful of her scarf. 6/29/10RP 72-76. Then he kicked her in the leg. 6/29/10RP 75.

E.M. testified she heard a commotion and came out of her room and asked what was going on. 6/30/10RP 56. Mr. Kahora turned to her, slapped her left ear and kicked her in the leg. 6/30/10RP 56, 62.

The next day at school, M.M. told a teacher and the school counselor that her father injured her wrist and her neck. 6/24/10RP 15; 6/29/10RP 95-98. E.M. told the counselor her father hit her on the ear. 6/30/10RP 69. The teacher and the counselor notified CPS and the police. 6/24/10RP 11, 16.

The girls received medical attention. 6/29/10RP 99. M.M. had a sprained wrist and a sore neck. 6/29/10RP 187; 6/30/10RP 25. E.M. had a small hole in her eardrum that would probably fully heal. 6/30/10RP 102-03.

M.M. told CPS she did not want to go home. 6/24/10RP 16. The girls were placed in foster care that night. 6/24/10RP 30. They

never returned home and were not living with their parents at the time of trial. The school counselor testified M.M. and E.M. seemed much happier after the incident. 6/24/10RP 20. M.M. seemed happy not to be living with her parents anymore. 6/24/10RP 22. M.M. testified she was living with her track coach, who provided her things that her foster mother would not. 6/29/10RP 104, 157.

The jury found Mr. Kahora not guilty of second degree assault for both counts, but guilty of the lesser included crime of third degree assault.¹ CP 47-50.

D. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED MR. KAHORA'S CONSTITUTIONAL RIGHTS TO CONFRONT HIS ACCUSERS AND PRESENT A DEFENSE BY RESTRICTING HIS CROSS-EXAMINATION OF THE COMPLAINING WITNESS ABOUT HER POSSIBLE MOTIVE TO FABRICATE THE ALLEGATIONS

1. A defendant in a criminal trial has a constitutional right to full and effective cross-examination of the complaining witness. A criminal defendant's right to confront the witnesses against him is

¹ The jury was instructed that in order to find Mr. Kahora guilty of third degree assault, it must find that, "with criminal negligence," he "cause[d] bodily harm accompanied by substantial pain that extend[ed] for a period sufficient to cause considerable suffering." CP 75, 78, 82.

guaranteed by both the United States² and the Washington Constitutions.³ In addition, the right to confront witnesses has long been recognized as essential to due process.⁴ Chambers v. Mississippi, 410 U.S. 284, 294, 90 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Id. A defendant's right to an opportunity to be heard in his defense includes the rights to examine witnesses against him and to offer testimony and is "basic in our system of jurisprudence." State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (citing Chambers, 410 U.S. at 294).

The primary and most important component of the right to confrontation is the right to conduct a meaningful cross-examination of adverse witnesses. State v. Foster, 135 Wn.2d 441, 455-56, 957 P.2d 712 (1998); Davis v. Alaska, 415 U.S. 308, 315-16, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). In Davis, the United States

² The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor."

³ Article I, section 22 of the Washington Constitution guarantees that "[i]n all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face, [and] to have compulsory process to compel the attendance of witnesses in his own behalf."

⁴ The Fourteenth Amendment provides no state shall "deprive any person of life, liberty, or property, without due process of law."

Supreme Court observed that, subject to "the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation . . . , the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." Id. at 316. The Court emphasized that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Id. at 316-17.

In Delaware v. Van Arsdall, the Court reaffirmed that

a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness."

Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (quoting Davis, 415 U.S. at 318).

The right to cross-examine adverse witnesses is not absolute. Chambers, 410 U.S. at 295. Courts may, within their sound discretion, deny cross-examination if the evidence sought is vague, argumentative, or speculative. State v. Darden, 145 Wn.2d 612, 620-21, 41 P.3d 1189 (2002). The confrontation right and associated cross-examination are also limited by general considerations of relevance. Id. at 621.

But although trial courts have discretion to limit the scope of cross-examination, "the more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters." Darden, 145 Wn.2d at 619.

If proffered testimony is relevant to the defense, the State has the burden to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. Jones, 168 Wn.2d at 720 (citing Darden, 145 Wn.2d at 622). The State's interest in excluding prejudicial evidence must be balanced against the defendant's need for the evidence; relevant evidence can be withheld only if the State's interest outweighs the defendant's need. Jones, 168 Wn.2d at 720. For evidence of high probative value, "no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." Id. (quoting State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)).

2. The trial court abused its discretion and violated Mr. Kahora's constitutional rights by limiting his cross-examination of the complaining witness about her possible motive to fabricate. Mr. Kahora sought to admit evidence and cross-examine M.M. about

her contentious relationship with her foster mother and her knowledge of her track coach's prior domestic violence conviction. 6/23/10RP 15, 23-30; CP 6-31. M.M. had asked to be removed from her foster mother's home because the foster mother would not allow her to do what she wanted and merely "provides for my needs but she doesn't provide for my wants." 6/23/10RP 28-29. Instead, M.M. asked to be placed with her track coach, despite her knowledge of his criminal history, because he was helping her to achieve her ambitions and goals. 6/23/10RP 29-30. The defense theory was that M.M. fabricated the allegations so that she could move out of her parents' home. She did not want to live with her father because he did not allow her to make her own decisions. The proffered evidence was relevant to the defense because it tended to show the lengths M.M. was willing to go in order to be able to do what she wanted to do.

In State v. Peterson, 2 Wn. App. 464, 465, 469 P.2d 980 (1970), a prosecution for indecent liberties, the defense theory was that the allegations were a fabrication initiated by the older sister of the complaining witness, who did not like the defendant and wanted him removed from their home. The defendant tried to establish this theory upon cross-examination of the girls' mother but was

prevented by the trial court. Id. at 465-66. In reversing the conviction, this Court explained, "[i]t is fundamental that a defendant charged with commission of a crime should be given great latitude in the cross-examination of prosecution witnesses to show motive or credibility." Id. at 466. The Court observed that the questions put to the witness on cross-examination attempted to elicit testimony to establish an inference that the complaining witness initiated the prosecution for reasons which would tend to establish the defendant's innocence. Id. at 467. Thus, "[f]ailure to permit the defendant to pursue this valid theory constituted error which seriously jeopardized his defense." Id.

Here, as in Peterson, the trial court's decision to restrict Mr. Kahora's ability to cross-examine the complaining witness violated his constitutional rights to present a defense and confront his accusers. As stated, the evidence was relevant to show the witness's bias and motive to fabricate the allegations. It supported the defense theory that she fabricated the allegations for reasons tending to establish Mr. Kahora's innocence. Because M.M. was "essential" to the prosecution's case, Mr. Kahora should have been given wide latitude to explore her motive, bias and credibility. See

Darden, 145 Wn.2d at 619. The evidence was not so prejudicial as to disrupt the fairness of the fact-finding process. See Jones, 23

3. The constitutional error in precluding full and effective cross-examination of the complaining witness requires reversal.

"[T]he constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to Chapman [v. California], 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1976)] harmless-error analysis." Van Arsdall, 475 U.S. at 684.

The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Id.

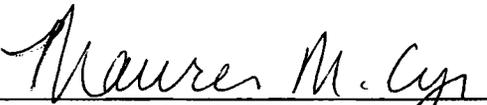
Applying the Van Arsdall factors here, the constitutional error was not harmless beyond a reasonable doubt. M.M. was the State's principal witness and her testimony was central to the State's case. The proffered testimony was not merely cumulative.

The jury heard no other evidence of M.M.'s relationship with her foster mother or her knowledge of the track coach's criminal conviction. M.M. was the only person, other than Mr. Kahora, who was present in the room at the time of his alleged assault against her and, therefore, no other eyewitness corroborated her account. Only M.M. corroborated E.M.'s account of Mr. Kahora's assault against her. Because the error in precluding Mr. Kahora from fully and fairly cross-examining her was not harmless, the convictions must be reversed.

E. CONCLUSION

The trial court violated Mr. Kahora's constitutional rights to confront his accusers and present a defense by precluding him from fully and fairly cross-examining the complaining witness about her possible bias and motive to fabricate the allegations. The convictions must therefore be reversed.

Respectfully submitted this 15th day of April 2011.


MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 65866-2-I
)	
JOEL M. KAHORA,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, JOSEPH ALVARADO, STATE THAT ON THE 15TH DAY OF APRIL, 2011, I CAUSED THE ORIGINAL **APPELLANT'S OPENING BRIEF** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] JOEL M. KAHORA 17305 Ambaum Blvd Burien WA 98148	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF APRIL, 2011.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710