

No. 306593

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

FILED
Sep 13, 2012
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON, Respondent

v.

SYLVESTER C. LOPEZ, Appellant

APPEAL FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY
THE HONORABLE WILLIAM ACEY

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR.....	1
II. STATEMENT OF FACTS.....	1
III. ARGUMENT	
A. The Trial Court Erred When It Denied Mr. Lopez’s Motion For A New Trial Based On Newly Discovered Evidence.	5
1. The Trial Court Erred When It Characterized The Affiant Testimony As Inadmissible Hearsay And Cumulative.	7
2. The Trial Court Erred When It Found The Evidence Was Not Newly Discovered.	11
3. The Newly Discovered Evidence Was Material..	13
4. The Trial Court Erred When It Held The Proffered Evidence Would Not Have Changed The Outcome Of The Trial.....	14
IV. CONCLUSION	16

TABLE OF AUTHORITIES

Washington Cases

<i>Johnston v. Ohls</i> , 76 Wn.2d 398, 457 P.2d 194 (1969).....	9
<i>Matter of Pers. Restraint of Benn</i> , 134 Wn.2d 868, 952 P.2d 116 (1998).....	12
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971) .	6
<i>State v. Bache</i> , 146 Wn. App. 897, 193 P.3d 198 (2008).....	7
<i>State v. Barry</i> , 25 Wn. App. 751, 611 P.2d 1262 (1980)	14
<i>State v. Barry</i> , 25 Wn. App. 751, 611 P.2d 1262 (1980)	11
<i>State v. Briggs</i> , 55 Wn. App. 44, 776 P.2d 1347 (1989).....	6
<i>State v. Epton</i> , 10 Wn.App. 373, 518 P.2d 229 (1974).....	10
<i>State v. Letellier</i> , 16 Wn. App. 695, 558 P.2d 838 (1977)	14
<i>State v. Lopez</i> , 107 Wn. App. 270, 27 P.3d 237 (2001)	1
<i>State v. Lopez</i> , 121 Wn. App. 1015 (2004).....	2
<i>State v. Lopez</i> , 133 Wn.App. 1034 (2006).....	3
<i>State v. Lopez</i> , 147 Wn.2d 515, 55 P.3d 609 (2002).....	2
<i>State v. Macon</i> , 128 Wn.2d 784, 911 P.2d 1004 (1996).....	7
<i>State v. Marks</i> , 71 Wn.2d 295, 427 P.2d 1008 (1967).....	6
<i>State v. Pierce</i> , 155 Wn. App. 701, 230 P.3d 237 (2010).....	10
<i>State v. Quismundo</i> , 164 Wn.2d 499, 192 P.3d 342 (2008)	6
<i>State v. Rohrich</i> , 149 Wn.2d 647, 71 P.3d 638 (2003)	6

<i>State v. Slanaker</i> , 58 Wn. App. 161, 791 P.2d 575 (1990).....	10,11
<i>State v. Strauss</i> , 119 Wn.2d 401, 832 P.2d 78 (1992)	9
<i>State v. Williams</i> , 96 Wn.2d 215, 634 P.2d 868 (1981)	7
<i>State v. Williamson</i> , 100 Wn. App. 248, 996 P.2d 1097 (2000).....	9
<i>State v. Wilson</i> , 32 Wn.2d 593, 231 P.2d 288 (1951), <i>cert.denied</i> , 342 U.S. 855, 343 U.S. 950 (1952).....	11

U.S. Supreme Court Cases

<i>Pennsylvania v. Ritchie</i> , 480 U.S. 39, 57, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).....	13
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Rules

ER 401	13
ER 803(2).....	7

I. ASSIGNMENT OF ERROR

- A. The Trial Court Abused Its Discretion In Denying Mr. Lopez's Motion For A New Trial Based On Newly Discovered Evidence.

Issues Related To Assignment Of Error

- A. Did the trial court err when it characterized the affiant's testimony as inadmissible hearsay and cumulative?
- B. Did the trial court err when it held the proffered evidence would not have changed the outcome of the trial?

II. STATEMENT OF FACTS

On January 11, 2000, the State charged Sylvester Lopez with four counts of first-degree assault with a firearm and one count of unlawful possession of a firearm in the first degree, based on events that occurred on September 11, 1999. *State v. Lopez*, 107 Wn. App. 270, 272, 27 P.3d 237 (2001).

At trial, Raul Montes testified that he had been at drinking outside Mr. Lopez's home on September 11, 1999, and got into a physical brawl with a neighbor. CP 26. He stated that when the neighbor went to get a gun, Mr. Montes pulled out his own gun and "shot in the air to scare him." CP 28. Mr. Montes recounted that when he became aware that police were looking for Mr. Lopez as

the perpetrator, he contacted Mr. Lopez's attorney. CP 38. He then signed an affidavit in January 2000, confessing to having shot the gun. CP 39.

After a jury trial, Mr. Lopez was convicted of two counts of first-degree assault, two counts of second-degree assault and one count of unlawful possession of a firearm in May 2000. CP 24-49. On review, this Court reversed the conviction for unlawful possession of a firearm, and vacated the persistent offender sentence, remanding for resentencing. *Lopez*, 107 Wn.App. at 273. The Washington Supreme Court affirmed that decision. *State v. Lopez*, 147 Wn.2d 515, 55 P.3d 609 (2002). After a new sentence of 297 months with credit for time served was imposed in 2003, Mr. Lopez appealed the resentencing. *State v. Lopez*, 121 Wn. App. 1015 (2004). This Court affirmed the resentencing in an unpublished opinion. *Id.*

Mr. Lopez submitted a motion pursuant to CrR 7.8 for relief from judgment, arguing that the evidence had been insufficient to sustain the May 2000 convictions. The motion was denied and Mr. Lopez appealed. This Court affirmed his convictions in an unpublished opinion, holding that a CrR 7.8 motion was not the proper vehicle for an insufficiency of evidence argument, and also

denying his ineffective assistance of appellate counsel claim. *State v. Lopez*, 133 Wn.App. 1034 (2006). Mr. Lopez has also filed several personal restraint petitions, none successful in having his case overturned.

In October 2011, Raquel Pimentel, who neither party had called as a witness at trial, provided an affidavit stating that prior to Mr. Lopez being charged in January 2000, an investigator interviewed her about the shooting incident. Ms. Pimentel averred that she told the investigator that her boyfriend, Raul Montes, confessed to her one day after the incident that he shot the gun, not Mr. Lopez. CP 115-117. According to court documents, a defense investigator was not requested until after February 24, 2000. CP 70.

On November 10, 2011, Mr. Lopez filed a public disclosure request to obtain the documents contained in the prosecuting attorney's file. He specifically requested documents pertaining to any statement given by Ms Pimentel. CP 80. Shortly thereafter, the prosecuting attorney responded that there was no reference to Ms. Pimentel or to any statement made by her with regard to Mr. Lopez's case in their file. CP 82.

In December 2011, Mr. Lopez submitted a CrR 7.8 motion for a new trial, citing the newly discovered evidence contained in Ms. Pimentel's affidavit. CP 108-117. Mr. Lopez also submitted the affidavits of two other individuals: his brother-in-law Solomon Avila, and a juror from the 1999 trial. Mr. Avila's affidavit, dated February 2008, stated that Mr. Montes confessed to him on the afternoon of September 11, 1999, that he had "fought with the Coronas pulled a gun and shot at them, the bullet had kicked up dirt beside them and he wanted to flee before the police arrived." CP 87. The juror's affidavit, dated February 2003, stated that had he been aware of Mr. Avila's encounter with Mr. Montes, he would not have found Mr. Lopez guilty of any crime. CP 91.

At the motion hearing, the court ruled:

"I find that the evidence upon which Mr. Lopez bases his motion isn't new, and it is hearsay and not admissible. Mr. Montes did testify at trial, did testify he was the one that did any shooting complained of, not anybody else, specifically the defendant, Mr. Lopez. The jury obviously, as a trier of fact, did not buy into that recollection of the events by Mr. Montes. The jury found based on the testimony of other eyewitnesses at the scene, based on that testimony, they found beyond a reasonable doubt that the State

had proved its case beyond a reasonable doubt, and Mr. Lopez was the shooter...

So I find that this new evidence the information contained in the affidavit of Ms. Pimentel, would not change the verdict. So based on that, there are quite a lot of missing elements that you have to show to get a new trial that any one of which, standing alone, would be sufficient to deny a motion for new trial. I find there is certainly four of them here that exist that are fatal weaknesses in Mr. Lopez's motion. So I respectfully – and the evidence is cumulative – not only is it inadmissible and wouldn't change the verdict, but it is cumulative." RP 7-8.

Mr. Lopez appeals the denial of his motion for relief from the judgment and conviction. CP 92, 95.

III. ARGUMENT

A. The Trial Court Abused Its Discretion In Denying Mr. Lopez's Motion For A New Trial Based On Newly Discovered Evidence.

Mr. Lopez contends the evidence, that Mr. Montes confessed to both Ms. Pimentel and Mr. Avila within twenty-four hours of the September 11, 1999 incident, meets the requirements for a new trial based on newly discovered evidence.

A trial court is invested with broad discretion in granting a motion for a new trial, and its determination will not be reversed on appeal absent an abuse of discretion. *State v. Marks*, 71 Wn.2d 295, 302, 427 P.2d 1008 (1967). A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A “discretionary decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *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)) (internal quotation marks omitted). Denial of a new trial is entitled to less deference by a reviewing court than the granting of a new trial. *State v. Briggs*, 55 Wn. App. 44, 60, 776 P.2d 1347 (1989).

A new trial on the ground of newly discovered evidence requires the moving party to demonstrate five elements: (1) the evidence will probably change the result of the trial; (2) the evidence was discovered since the trial; (3) it could not have been discovered before trial by the exercise of due diligence; (4) the evidence is material; and (5) it is not merely cumulative or

impeaching. *State v. Williams*, 96 Wn.2d 215, 223, 634 P.2d 868 (1981). In evaluating the trial court's decision, the reviewing court considers only whether substantial evidence supports the findings of fact and, if so, whether they support the court's conclusions of law and judgment. *State v. Macon*, 128 Wn.2d 784, 799, 911 P.2d 1004 (1996).

1. The Trial Court Erred When It Characterized The Affiant Testimony As Inadmissible Hearsay And Cumulative.

The Washington Rules of Evidence allow for admissibility of out of court statements relating to a startling event that are made while the declarant is under the stress of excitement caused by the event. ER 803(2). Here, in ruling that Ms. Pimentel's statement was inadmissible as hearsay, the court failed to consider whether Mr. Montes' confession was an excited utterance. In determining whether an out of court statement fits within an exception to the rule against hearsay, the court must, as a preliminary matter, consider whether the statement was made while the declarant was still under the influence of the event. *State v. Bache*, 146 Wn. App. 897, 903, 193 P.3d 198 (2008). The question is not whether the statement was spontaneous or even contemporaneous, but rather, whether the declarant was still under the stress of the event. *Id.* at 904.

Here, the court was presented with two affidavits regarding Mr. Montes' confession: one from Ms. Pimentel and one from Mr. Avila. The affidavit from Mr. Avila reported that he spoke with Mr. Montes within minutes of the gun incident. He stated that Mr. Montes was "pacing nervously and chain smoking" and wanted a ride away from the Lopez residence. CP 87. Mr. Montes reported he was upset because "he had fought with the Coronas [the neighbors] pulled a gun and shot at them, the bullet had kicked up dirt beside them and he wanted to flee before the police arrived." CP 87. The description of the encounter indicates a declarant who was clearly under the stress of the event.

Similarly, the affidavit by Ms. Pimentel shows a declarant who was still under the stress of the event:

On September 11, 1999, Raul [Mr. Montes] contacted me by phone. He was in a *frantic stage* and was looking for a ride to Pasco. When I questioned his reasoning for leaving he told me "that there was a situation that turned out bad". It wasn't until the next day that he informed me that there had been a shooting and that he was the one who shot the gun. He claimed that there had been an ongoing feud with a particular neighbor of Sylvester's was the day after the shooting, Raul told me that an argument had escalated and Raul shot a gun to scare the neighbors. He claimed that *he panicked* after he shot the gun and got a ride from Sylvester-'s house. He said he didn't want to go to jail because he had too much at stake. He didn't want to lose custody of his children. We argued about this and he wouldn't turn himself in for fear that he left before the police arrived. CP 115-116. (emphasis added).

While a trial court should consider the passage of time between the startling event and the utterance, it is not dispositive. *State v. Strauss*, 119 Wn.2d 401, 416-17, 832 P.2d 78 (1992). Further, as this Court has held, the statement is not required to be completely spontaneous and may be in response to a question. *Id.* (quoting *Johnston v. Ohls*, 76 Wn.2d 398, 405, 457 P.2d 194 (1969)).

Here, even if the court had considered the issue of passage of time between when Mr. Montes said he fired the gun and when he told Ms. Pimentel about it as a bar to admissibility, the fact remains that immediately after the incident he told Mr. Avila the same thing. The Avila affidavit establishes that Mr. Montes was under the stress of the event and still in an excited state immediately after the event, having had no opportunity to reflect or fabricate a story. See *State v. Williamson*, 100 Wn. App. 248, 996 P.2d 1097 (2000). Further, Ms. Pimentel's affidavit significantly supports not only Mr. Avila's account of events, but establishes that the next day Mr. Montes was still frightened. Both affidavits establish that the affiants' testimony would meet the requirements

for an exception to the hearsay rule and the court should have considered them in that light; to not do so was error.

Generally, newly discovered evidence that is merely impeaching or cumulative in effect will not support a motion for a new trial. *State v. Pierce*, 155 Wn. App. 701, 712, 230 P.3d 237 (2010). The rule should become inoperative, however, if such evidence, notwithstanding its cumulative character, possesses sufficient probative value to render probable a different result upon a retrial of the case, it will warrant a new trial. *State v. Slanaker*, 58 Wn. App. 161, 168-69, 791 P.2d 575 (1990).

A witness' prior out of court statements consistent with his in-court testimony are admissible for the purpose of re-establishing that witness' credibility when: (1) his testimony has been assailed; (2) under circumstances inferring recent fabrication of the testimony; (3) when the prior out of court statements were made under circumstances minimizing the risk that the witness foresaw the legal consequences of his statements. *State v. Epton*, 10 Wn.App. 373, 377, 518 P.2d 229 (1974). The record on the cross-examination of Mr. Montes shows the State's theory was that Mr. Montes fabricated a story when he confessed his involvement to Mr. Lopez's attorney. CP 27-47. Evidence that Mr. Montes told the

same facts to others within moments of the incident is of sufficient probative value to render probable a different result on retrial and the cumulative evidence rule inoperative.

Newly discovered evidence, even if similar to other trial evidence is not cumulative where it would probably produce a different trial outcome. *State v. Wilson*, 32 Wn.2d 593, 622-23, 231 P.2d 288 (1951), *cert.denied*, 342 U.S. 855, 343 U.S. 950 (1952). In this case, the testimony of Ms. Pimentel and Mr. Avila should not be considered cumulative or hearsay. As the Washington Supreme Court held, “the rule forbidding a new trial for the purpose of admitting cumulative testimony should never be applied where the newly discovered testimony may be of such cogency and force that it might probably show that an innocent man may probably be caused to suffer for a crime he did not commit.” 158 A.L.R. 1253 (1945); *Slanaker*, 58 Wn. App.at 168-69.

2. The Trial Court Erred When It Found The Evidence Was Not Newly Discovered.

By its very definition, newly discovered evidence must not have been known or obtainable by the defense in the exercise of due diligence before or during trial. *State v. Barry*, 25 Wn. App. 751, 760, 611 P.2d 1262 (1980); *Matter of Pers. Restraint of Benn*,

134 Wn.2d 868, 886, 952 P.2d 116 (1998). Here, Ms. Pimentel's affidavit stated that she spoke to an investigator before Mr. Lopez was charged in January 2000. CP 116. Defense counsel requested an investigator sometime after February 24, 2000, thus, it could not have been a defense investigator who obtained Ms. Pimentel's statement. CP 70. Ms. Pimentel further stated that with the exception of the investigator, she spoke to no one about Mr. Montes' confession to her.

Mr. Lopez made a public records disclosure request in November 2011. In response, the State has indicated it had no statement or reference to Ms. Pimentel in its files. CP 82. Apparently, whichever State investigator Ms. Pimentel spoke with did not make a record of the event.

Because Ms. Pimentel did not discuss the confession with a defense investigator, and the State had no investigative record in its file, it would have been impossible for Mr. Lopez to even know to call Ms. Pimentel as a witness in his defense. Similarly, the statement provided by Mr. Avila was done well after the trial. There was no showing that Mr. Lopez was ever aware of either of the two instances of confession; this is the essence of newly discovered evidence.

3. The Newly Discovered Evidence Was Material.

Evidence is material and relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. The United States Supreme Court has held that evidence is material only if there is a reasonable probability that it would impact the outcome of the trial: reasonable probability is “probably sufficient to undermine confidence in the outcome.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 57, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

To be convicted of the assault charges, the State was required to prove beyond a reasonable doubt that Mr. Lopez fired the weapon. At trial, during Mr. Montes’ testimony, the State focused on discrediting his confession, implying that story was made up some months after the event. CP 36-39. Evidence that he was present at the time of the incident, confessed to someone immediately after the event, confessed again the next day, and then weeks later to an attorney, would have corroborated and substantiated that his testimony was not fabricated.

On review, the critical question is whether the newly discovered evidence undermines the appellate court’s confidence

in the convictions because it would probably have changed the jury's decision.

4. The Trial Court Erred When It Held The Proffered Evidence Would Not Have Changed The Outcome Of The Trial.

A party seeking a new trial based on newly discovered evidence must demonstrate to the court that the newly discovered evidence will probably change the result of the trial. *State v. Letellier*, 16 Wn. App. 695, 703, 558 P.2d 838 (1977). In considering whether the evidence will probably result in a different outcome, a trial court must of necessity pass upon the credibility, significance, and cogency of the proffered evidence. *State v. Barry*, 25 Wn. App. 751, 758, 611 P.2d 1262 (1980).

Here, both affiants were credible sources of information; they gave information about their background and knowledge of the events. Mr. Avila served as a deacon in his church, was bonded, and had a personal policy "not to get involved in my family's legal issues." CP 87-88. He described in detail his interaction with Mr. Montes and the confession. Similarly, Ms. Pimentel, a single mother, served as a volunteer in her community and worked in her family business for over thirty years. CP 115. She also described

in detail not only the confession, but also Mr. Montes' credible reasons for not wanting to come forward. Furthermore, the proffered evidence is undisputedly significant because it directly contradicts the State's theory that Mr. Montes fabricated his story some months after the event.

In making its decision, the court here stated,

“ Mr. Montes did testify at trial, did testify he was the one that did any shooting complained of, not anybody else, specifically the defendant, Mr. Lopez. The jury obviously, as a trier of fact, did not buy into that recollection of the events by Mr. Montes. The jury found based on the testimony of other eyewitnesses at the scene, based on that testimony, they found beyond a reasonable doubt that the State had proved its case beyond a reasonable doubt, and Mr. Lopez was the shooter...

RP 7-8.

The court here did not consider that it also had before it an affidavit of a trial juror. That affidavit clearly stated that had the jury known that Mr. Montes confessed his involvement to others early on, the outcome of the trial would certainly have been different CP 91. In other words, had this newly discovered evidence been produced at the original trial, it would have stood as a sharp

contrast and rebuttal to the testimony of any eye-witness, providing at the very least, a reasonable doubt as to Mr. Lopez's guilt. This Court cannot have confidence in the convictions arising from a trial in which this evidence was not included.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Lopez respectfully asks this court to reverse the superior court's denial of his new trial motion, and grant him a new trial.

Dated this 12th day of September 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Appellant SYLVESTER C. LOPEZ, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Brief of Appellant was sent by first class mail, postage prepaid on September 12, 2012, to Sylvester C. Lopez DOC #630876, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326; and by email per agreement between the parties to Teresa J. Chen, Prosecuting Attorney, :
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