

FILED
Sep 06, 2016
Court of Appeals
Division III
State of Washington

No. 34052-0-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Appellant,

vs.

DANILO SALGUERO-ESCOBAR,

Defendant/Respondent.

Respondent's Brief

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

TABLE OF CONTENTS

A. APPELLANT’S ASSIGNMENTS OF ERROR.....4

B. RESPONDENT’S ISSUES.....4

C. STATEMENT OF THE CASE.....4

D. ARGUMENT.....7

 Since all five factors to obtain a new trial based on newly
discovered evidence were satisfied, the trial court did not abuse its
discretion in ordering a new trial.....7

 1. The evidence was discovered after the trial and could not have
 been discovered before trial by the exercise of due diligence.....9

 2. The evidence is material.....12

 3. The evidence is not merely cumulative or impeaching.....15

 4. The evidence will probably change the result of the trial.....17

E. CONCLUSION.....20

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Moreman v. Butcher</i> , 126 Wn.2d 36, 891 P.2d 725 (1995).....	8
<i>State v. Gassman</i> , 160 Wn. App. 600, 248 P.3d 155 (2011).....	12
<i>State v. Hawkins</i> , 181 Wn.2d 170, 332 P.3d 408 (2014).....	8
<i>State v. Rice</i> , 48 Wn. App. 7, 737 P.2d 726 (1987).....	12
<i>State v. Roche</i> , 114 Wn. App. 424, 59 P.3d 682 (2002).....	16
<i>State v. Savaria</i> , 82 Wn. App. 832, 919 P.2d 1263 (1996), <i>disapproved of on other grounds by State v. C.G.</i> , 150 Wash. 2d 604, 80 P.3d 594 (2003).....	16, 17
<i>State v. Swan</i> , 114 Wn.2d 613, 790 P.2d 610 (1990).....	8
<i>State v. Williams</i> , 96 Wn.2d 215, 634 P.2d 868 (1981).....	8

Court Rules

CrR 7.5 (a).....	7
------------------	---

A. APPELLANT’S ASSIGNMENTS OF ERROR

The trial court erred and abused its discretion in granting defendant’s motion for a new trial pursuant to CrR 7.5. Appellant then lists five sub-assignments of error relating to the trial court’s ruling ordering a new trial based on newly discovered evidence.

B. RESPONDENT’S ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.

Did the trial court not abuse its discretion in ordering a new trial, where all five factors to obtain a new trial based on newly discovered evidence were satisfied?

C. STATEMENT OF THE CASE

Mr. Salguero-Escobar was found guilty of first degree rape and first degree burglary following a jury trial which ended on December 4, 2015. CP 59-60. The complaining witness, Joette Talley, testified Mr. Salguero-Escobar entered her home without permission on September 8, 2015 and raped her. RP¹ 212-14. Talley said she had several brief conversations with Mr. Salguero-Escobar earlier that summer but denied having had any lengthy conversations or involvement with him. RP 203-06. She claimed Mr. Salguero-Escobar was never invited to her house and

¹ “RP” refers to the verbatim report of proceedings of the trial and post-trial motion.

just showed up uninvited, upon which she told him, “You need to fucking leave.” RP 205.

Mr. Salguero-Escobar testified the conversations that summer were more extensive than Talley testified and she had invited him inside her house and given him a tour. RP 331-32, 348, 378, 381. He gave Talley his phone number during one of these visits. RP 382. On or about June 8, 9 or 10, 2015, Talley called him on his cell phone and invited him over to her house. He said he was at her house around seven hours. She showed him her house and the two had consensual sexual intercourse. RP 381-83, 389. Mr. Salguero-Escobar also testified he and Talley had consensual sexual intercourse on September 8, 2015, the date of the alleged rape and burglary. RP 362, 407.

Following the conviction, defense counsel moved for a new trial based on newly discovered evidence. CP 64-68. The following facts are pertinent to that motion.

On November 20, 2015, defense counsel obtained a subpoena *duces tecum* directed to AT&T/Cricket Wireless. The subpoena sought "all documentation pertaining to Cricket Wireless phone number (702) 302-0315 in the name of Danilo Escobar for the period June 1, 2015

through September 9, 2015. CP 69-70, 74-76. The subpoena was faxed to AT&T/Cricket Wireless on November 20, 2015. CP 78.

AT&T responded to the subpoena by fax on November 22, 2015. The response stated: "AT&T objects to this subpoena because it is unable to determine from the subpoena what records are being sought. Please reissue the subpoena with a precise description of the records requested and refer to the AT&T file number shown above when you resubmit the subpoena." CP 70, 80.

On November 23, 2015 defense counsel obtained a second subpoena *duces tecum* to AT&T/Cricket Wireless. It provided: "All records of calls made and received on Cricket Wireless phone number (702) 302-0315 in the name of Danilo Salguero-Escobar for the period June 1, 2015 through September 9, 2015." CP 70, 82-83. The second subpoena was faxed to AT&T/Cricket Wireless on November 23, 2015. The fax cover sheet was marked urgent, with trial to commence December 1, 2015-"Please expedite!" CP 70, 85.

Telephone calls were placed to AT&T by defense counsel on November 27, November 30, December 1, and December 4, 2015 requesting a response to the Subpoena Duces Tecum. CP 71. The last day of Mr. Salguero-Escobar's trial was December 4, 2015. CP 59, 60, 71.

Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com

AT&T responded by a letter dated December 4, 2015 which was not mailed until December 7, 2015. CP 71, 87-90.

The records supplied by AT&T reflect that the complaining witness, Ms. Talley, made a telephone call to Mr. Salguero on June 8, 2015, at approximately 1:42 p.m. The length of the call was 13 minutes 5 seconds. Talley's telephone number is (509) 775-0248. CP 71, 87, 93-99.

The trial court granted the defense motion and ordered a new trial. CP 127. The State appealed. CP 128-31. Additional facts will be included in the argument that follows.

D. ARGUMENT

Since all five factors to obtain a new trial based on newly discovered evidence were satisfied, the trial court did not abuse its discretion in ordering a new trial.

The issue before the court is whether documentation received from AT &T/Cricket Wireless after trial constitutes "newly discovered evidence" for the purpose of granting Danilo Salguero-Escobar a new trial.

CrR 7.5 (a) provides, in pertinent part:

The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:

(3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial. ...

A trial court's decision regarding a motion for new trial will not be disturbed on appeal, absent an abuse of discretion. *State v. Williams*, 96 Wn.2d 215, 221, 634 P.2d 868 (1981). A court abuses its discretion where the decision was manifestly unreasonable, or based on untenable grounds or reasons. *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). Where the trial court grants a new trial, greater discretion is allowed, and a stronger showing of abuse of that discretion is required to set aside an order granting a new trial. *State v. Hawkins*, 181 Wn.2d 170, 179-180, 332 P.3d 408 (2014).

To obtain a new trial based on newly discovered evidence, a defendant must demonstrate that the evidence: (1) will probably change the result of the trial; (2) was discovered after the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. *State v. Swan*, 114 Wn.2d 613, 641-42, 790 P.2d 610 (1990). The absence of any one of these five factors is grounds to deny a new trial. *Williams*, 96 Wn.2d at 223, 634 P.2d 868.

Here, there is no question that all five factors were satisfied.

1. The evidence was discovered after trial and could not have been discovered before trial by the exercise of due diligence (Factors 2, 3).

The State argues the evidence was not discovered after trial because Mr. Salguero-Escobar testified Talley called him around the 8th of June, and hence he knew of the existence of a telephone call. Appellant's Brief p. 24. However, confirmation of the existence of the telephone call was not discovered until after the trial. Once defense counsel became aware of a possible telephone call, every effort was made to discover it prior to trial. The first subpoena *duces tecum* was obtained within a day or two of defense counsel being informed of the possible existence of the June phone call. RP 554. The evidence confirming the existence of the phone call was not discovered until after trial due to the lack of an expeditious response to two subpoena *duces tecums* issued to AT&T/Cricket Wireless. CP 69-90. The initial subpoena was issued 10 days prior to trial. The second subpoena was issued seven days prior to trial. *Id.*

Telephone calls were placed to AT&T by defense counsel on November 27, November 30, December 1, and December 4, 2015 requesting a response to the Subpoena Duces Tecum. CP 71. The last day

of Mr. Salguero-Escobar's trial was December 4, 2015. CP 59, 60, 71. AT&T responded by a letter dated December 4, 2015 which was not mailed until December 7, 2015. CP 71, 87-90. Clearly, the actual confirmation evidence of the phone call was not "discovered" until after the trial and could not have been discovered before trial by the exercise of due diligence.

The State argues lack of due diligence because defense counsel could have requested a continuance once he became aware of the possible existence of the telephone call. Appellant's Brief p. 25-26. First, the State again ignores the fact that defense counsel had no confirmation evidence of the existence of this call at that point in time. He had no documentation other than his client's word, which he felt was insufficient to argue for a continuance. RP 556. At the post trial motion defense counsel further argued:

This is supposition. Mr. Salguero says there's a telephone call on there. I don't know that. I don't have any documentation to support that. And we're up to the date of the trial and I get a discovery or just learn that there's going to be an expert witness at the trial so that was late discovery, which I objected to, which the Court made its ruling and that's on record. So what I had was a choice. Go for a continuance which Mr. Salguero wanted me to do, or not go for a continuance to preclude the state from bolstering up their expert witness in any way You can't make a defendant make a choice that's a Hobson's choice where he gives up one right in order to exercise another right. In this particular case, if I had some kind of sufficient information, even it had been a telephone call back from

AT&T, yeah, we found the records, yeah we found this phone number, it's on the records, I would have moved for a continuance. But I had nothing other than Mr. Salguero's word and I don't go forward without some type of documentation to support what I'm going to argue to the Court.

RP 555-56.

The trial court agreed with defense counsel and rejected the State's argument stating:

. . . I find no fault with the diligence of counsel. If an attorney with the experience and, frankly, reputation of Mr. Morgan tells me that as soon as he found out that he took action, I accept that. And this, I think, is distinguishable from subpoenaing a witness because we would typically not subpoena a witness until we spoke with the witness or we could be subject to sanctions for calling a witness whom we hadn't spoken with. So this is distinguishable. It's an effort to get information. Mr. Morgan is told that such information exists, but he needs to confirm it before it's of any value to him. Should he have asked for a continuance? Perhaps. Is that something that effects some sort of waiver on the part of he or his client? I saw no authority to that effect. The state suggests, very strongly suggests, that it couldn't have been due diligence because there was a choice. A choice to move forward. A reasoned decision. A calculated decision. Perhaps. But, again, I didn't see authority that said that precludes, then, the ability to find due diligence. And I'm unwilling to make that leap, frankly . . .

RP 568-69. The Court further stated:

Was this discovered, was this information, the fact that a phone call was made from a telephone identified as belonging to the complaining witness not disputed by the state to the defendant at a time when he suggested it may have occurred? Was it discovered after trial? Absolutely. The suggestion that it may have occurred was known before trial, but the fact of it occurring - and, again, when I say fact I mean *prima facie* because I agree with the state that be that the foundation necessary for the phone call, perhaps

Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com

some other foundational issues for what's suggested here as other newly discovered evidence, sure. But *prima facie*, making an offer of proof saying that exists, it was discovered after trial. Could not have been discovered before trial by due diligence. Well, again, I haven't had that develop much and Mr. Morgan tells me that as soon as I found out that that could be the case, I took action. I have nothing to dispute that. Nothing to rebut that. So I accept that, that as soon as that was developed, again on this very abbreviated trial timeline, he took action to deal with it.

RP 569.

2. The evidence is material (Factor No. 4).

Evidence is material and, thus, meets the fourth criteria for a new trial if it strongly indicates that the defendant did not commit the crime.

State v. Gassman, 160 Wn. App. 600, 611, 248 P.3d 155 (2011).

“Material evidence” is also included in the definition of relevant evidence:

To be relevant, evidence must meet two requirements: (1) the evidence must have a tendency to prove or disprove a fact (probative value), and (2) that fact must be of consequence in the context of the other facts and the applicable substantive law (materiality). [Citations omitted.] The relevancy of evidence will depend upon the circumstances of each case and the relationship of the facts to the ultimate issue. [Citations omitted.] Relevant evidence encompasses facts that present both direct and circumstantial evidence of any element of a claim or defense. [Citation omitted.] Facts tending to establish a party's theory of the case will generally be found to be relevant. [Citation omitted.]

State v. Rice, 48 Wn. App. 7, 12, 737 P.2d 726 (1987).

The records from AT&T/Cricket Wireless provide both substantive and demonstrative evidence that the complaining witness made a

Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com

telephone call to Mr. Salguero-Escobar on June 8, 2015. It also confirms Mr. Salguero-Escobar's testimony that he went to the complaining witness's home on that date and spent seven hours there. It also tends to confirm his testimony that he had consensual sex with her on that date.

Mr. Salguero-Escobar's defense was that the incident on September 8, 2015, was also consensual intercourse. The fact that consensual intercourse occurred on a prior occasion supports Mr. Salguero-Escobar's credibility. Clearly the evidence is material as well as relevant.

The State argues at length that defense counsel unintentionally misstated the time of the phone call on June 8th by adding to, rather than subtracting from, the UTC² time. The State maintains the actual time the telephone call was placed was June 7, 2015 at 10:42 p.m. Appellant's Brief pp 33-34. Therefore, the State argues, it demonstrates the telephone call does not establish what the defendant purported it did, i.e., a call made after the day of the yard sale, and therefore, is not material to and impeaches the defendant's testimony. Appellant's Brief p. 34. The State's analysis of the significance of this time discrepancy is incorrect.

Regardless of whether the State's is correct regarding the time, it has little or no bearing on the materiality of the phone call. First, Mr.

² Coordinated Universal Time. Similar to Greenwich Mean Time (GMT). See CP 93.

Salguero-Escobar could not recall the exact date of the phone call but he thought it was June 8, 9 or 10 and a day or two after the garage sale. RP 378, 381-82, 459. If he could not recall the exact date of the phone call, it is highly possible and logical that he did not recall correctly the time lapse between the garage sale and the phone call.

More importantly, even if the call was placed June 7, 2015 at 10:42 p.m. as the State suggests, *it still occurred after the garage sale*. Ms. Talley testified she held a garage sale on Saturday and Sunday, the 6th and 7th of June, 2015. RP 202. She testified Mr. Salguero-Escobar came to her garage sale first on the June 6th, and then again on June 7th. RP 202. Mr. Salguero-Escobar testified to the same dates. RP 329-34. Since the phone call clearly occurred after the garage sale as Mr. Salguero-Escobar said it did, the State's argument on this issue amounts to much ado about nothing. The most it shows is that Mr. Salguero-Escobar may have been mistaken about the telephone call occurring a day or two after the garage sale, when in fact it may have happened in the evening after the June 7th garage sale. But since Mr. Salguero-Escobar was at the garage sale on two days, June 6th and 7th, the telephone call *did occur* a day after the garage sale in relation to June 6th.

Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com

Either way, it does not lessen the fact that evidence of the telephone call is material. The trial court correctly observed:

Is it material? I don't know how one could say it is not. I recall very distinctly throughout trial that the complainant had indicated there had been no discussions other than that at the garage sale and then, again, I think when she kicked him out of her yard at some point in July, I want to say. And then the evening of the incident alleged. So clearly this is material to, I guess, as corroborative of the defense that was offered by the defendant. That is consent based on a prior relationship.

RP 569.

3. The evidence is not merely cumulative or impeaching (Factor No. 5).

The State argues the proffered telephone record at issue served only two purposes: to attempt to give more weight to the defendant's testimony, and to attempt to impeach the victim's testimony. Appellant's Brief p. 37. The evidence does have the effect of impeaching the complaining witness's testimony that she had never had extended conversations with Mr. Salguero-Escobar and that he had never been in her house. However, it also corroborates Mr. Salguero-Escobar's testimony regarding the length of their conversations and the extent of their relationship.

More importantly, it reinforces his defense of consensual sex and negates the element of forcible compulsion from the rape allegation. *See*

Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com

State v. Roche, 114 Wn. App. 424, 438, 59 P.3d 682 (2002), citing *State v. Savaria*, 82 Wn. App. 832, 838, 919 P.2d 1263 (1996), *disapproved of on other grounds by State v. C.G.*, 150 Wash. 2d 604, 80 P.3d 594 (2003). (“[I]mpeaching evidence can warrant a new trial if it devastates a witness's uncorroborated testimony establishing an element of the offense. In such cases the new evidence is not merely impeaching, but critical.”).

In *Savaria*, telephone records were late in arrival that would have countered the complaining witness's assertion that she had called her father on the night of the offense. The father corroborated his daughter's assertion. The telephone records indicated otherwise. In granting the motion for a new trial based on newly discovered evidence, the Court held:

The telephone records would likely affect the verdict in *Savaria's* trial. A new trial should nevertheless not be granted if the new evidence would only be used to impeach trial testimony. The telephone records would clearly be used to impeach Karelson's, and her father's, testimony. However, other jurisdictions have held that impeaching evidence can warrant a new trial if it devastates a witness's uncorroborated testimony establishing an element of the offense. In such cases the new evidence is not merely impeaching, but critical. We find this authority persuasive. The previous Washington cases which have touched on this issue have done so in the context of new evidence which was not likely to affect the verdict. In this case the evidence of the threat, which formed the basis for at least the harassment charge, came solely from Karelson's testimony and was denied by the defendant. In addition, the claimed phone call was used by Karelson to establish her fear, which is also an element of harassment. Her credibility was crucial.

Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com

Savaria, 82 Wn. App. at 837–38, 919 P.2d 1263.

The present case is indistinguishable from *Savaria*. The essential evidence comes solely from the conflicting testimony of Ms. Talley and Mr. Salguero-Escobar. There was no physical evidence to support the complaining witness's claim of force. As in *Savaria*, the new evidence is not merely impeaching, but critical because it devastates Ms. Talley's uncorroborated testimony establishing an element of the rape offense, i.e. forcible compulsion. Therefore, the evidence is not merely cumulative or impeaching.

4. The evidence will probably change the result of the trial (Factor No. 1).

This case was a classic he said, she said case. It rested upon credibility. The testimony about the actual encounter between Mr. Salguero-Escobar and the complaining witness was not substantially different except regarding the extent of their prior involvement and whether force was used. There was no physical evidence to support the complaining witness's claim of force. Thus, the case rests on Talley's credibility, or lack thereof, as well as Mr. Salguero-Escobar's credibility.

Mr. Salguero-Escobar's defense was consent to a sexual relationship on September 8, 2015. The fact of a prior consensual sexual

Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com

encounter on or about June 8, 2015 impacts the credibility of both Ms. Talley and Mr. Salguero-Escobar. It would impeach the one and support the other. Ms. Talley's testimony was that she barely knew Mr. Salguero-Escobar and that he had never been in her house. On the other hand, Mr. Salguero-Escobar testified that after the telephone call on June 8, 2015, he went to the complaining witness's home and spent approximately seven hours in conversation with her prior to having a consensual sexual encounter.

The evidence of the phone call is indicative of the truth of Mr. Salguero-Escobar's testimony and confirms that he was a guest of the complaining witness on or about June 8, 2015. The records also provide corroboration of Mr. Salguero-Escobar's recollection of and ability to reconstruct the interior of Ms. Talley's home.

The call is also proof of Ms. Talley's lack of candor concerning her relationship with Mr. Salguero-Escobar. Without the evidence confirming the phone call, Mr. Salguero-Escobar's credibility was called into question and the complaining witness could not be impeached on cross-examination concerning the prior consensual sexual encounter. Since the telephone call would swing the balance of credibility in Mr. Salguero-Escobar's favor, it would probably change the result of the trial. As the trial court stated:

Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com

The final factor [number 1] is clearly the most difficult and that is it will probably change the result of the trial. I am, obviously, very reluctant to make any such finding. I have very great confidence in juries and the collective wisdom of juries and how they evaluate cases. But they also must deal with the evidence that they have. And in this, they were denied evidence which would, as I've mentioned in my opinion, be extraordinarily weighty given the circumstances of the entire case. So, again, where we have a case that's based not on additional corroborative evidence but rather on sworn testimony from two sides with diametrically opposed versions and now evidence comes to support the version that was rejected by the jury in a case involving sexual assault and in a case where additional contact other than one limited contact had been denied, I am able to make that finding. Again, looking at this in the interest of justice and not winning or losing, the possibility of a man going to - any person going to prison for twelve years, we tell juries, make that - don't think about punishment except insofar as it makes you careful. And I think the same goes for a Court. That i[t] has to be very careful in evaluating the role of the jury, in evaluating how important that evidence might be in the context of this case. But as I do so, and trying to be as careful as I can, I do believe, and therefore agree with the defense that this evidence, again on a prima facie basis, would probably and will probably affect the result of the trial. As a result, then, I will grant the motion for a new trial.

RP 567-571.

Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com

E. CONCLUSION

For the reasons stated, the judgment of the lower court should be affirmed.

Respectfully submitted, September 5, 2016,

David N. Gasch
WSBA #18270
Attorney for Appellant

PROOF OF SERVICE

I, David N. Gasch, do hereby certify under penalty of perjury that on September 5, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Brief:

Kathryn Burke
kiburke@wapa-sep.wa.gov
Ferry County Prosecutor

SCPAAppeals@spokanecounty.org
Gretchen Eileen Verhoef
Spokane County Prosecutors Office

Danilo E. Salguero-Escobar
c/o Ferry County Jail
PO Box 1099
Republic WA 99166

s/David N. Gasch
WSBA #18270