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SEP 29, 2016
Court of Appeals
Division III
State of Washington

NO. 34057-1-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ARNULFO CISNEROS SANCHEZ, APPELLANT

APPEAL FROM THE SUPERIOR COURT OF GRANT COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

- A. WAS SANCHEZ DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE STATEMENTS COMPLAINED OF ARE NOT HEARSAY AND, EVEN IF THEY WERE, HE CANNOT DEMONSTRATE PREJUDICE? (ASSIGNMENT OF ERROR No. 1)
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II. STATEMENT OF THE CASE¹

The State adopts the facts recited by appellant Arnulfo Cisneros Sanchez, and supplements those facts as follows. RAP 10.3(b).

Maria Navarrete was a divorced mother living in Desert Aire with her three children. RP 57–58. She had not been in an intimate romantic relationship since divorcing her husband four years before the incidents at issue here. RP 58.

Navarrete had known Sanchez over 20 years. RP 59. They were not close friends. *Id.* She was a very close friend of Sanchez' wife. RP 60. Sanchez worked on Navarrete's cars over a several week period ending June 2, 2014. RP 95. Sanchez went to Navarrete's home three times to

¹ The State cites only to the three volume, sequentially paginated verbatim report of proceedings at the August 5–7, 2015 trial, designated RP ____.

work on her pickup truck and her car. RP 60–61. Sanchez also worked on the vehicles at his house. RP 62. Navarrete had arranged for the work through Sanchez' wife. RP 62.

According to Navarrete, her conversations with Sanchez were generally about the work he was doing on her vehicles, with the exception of one time when she spoke with him at his wife's request concerning problems the couple was having with their marriage. RP 62. Both Sanchez and his wife participated in that conversation. RP 64. Navarrete never spoke alone to Sanchez concerning his marital problems and never spoke to him about anything other than her vehicles. *Id.* Sanchez had never been inside Navarrete's house, either alone or with his wife. RP 62.

On June 2, 2014, Navarrete was at the Sanchez residence when Sanchez left for Navarrete's house to work on her truck. RP 64–65. Navarrete remained, visiting with her friend. RP 65. Sanchez was still at Navarrete's house when she arrived home. *Id.* Navarrete went inside. *Id.* Sanchez came to the door and asked for water. *Id.* He drank two glasses of water, standing on the front porch, and eventually left around 5:30. RP 66.

Navarrete went to bed around 8:00. *Id.* The house was hot because her air conditioning was not working so she slept without sheets or blankets, wearing only a tee shirt and underwear. RP 66–67. Her two bedroom windows were open. RP 67.

Navarrete had worked a 12-hour shift that day and was very tired. RP 70. She slept on her stomach. *Id.* Navarrete had been “very asleep” when she woke around 11:30 PM and felt someone kissing her buttock. RP 71. It took her a few seconds to realize what was happening. RP 72. She rolled over and a man jumped on top of her. RP 71. There was no light of any kind in Navarrete’s bedroom while she slept, not even a digital clock face. RP 67. Navarrete could not see anything and did not recognize the man who was assaulting her. RP 74. He held her hands and pinned her body with his. RP 72. She shook her head from side to side, crying and begging: “no, you’re hurting me, let go of me” and, “please stop, you’re hurting me.” RP 73. The man spoke Spanish, telling her: “I love you, I miss you” and, “I desire you.” *Id.* He was kissing her all over. *Id.* He told her not to scream because her children were in the other room. *Id.*

All Navarrete could think about was her children and whether they were safe. *Id.* She could not estimate how long the encounter lasted, but said it felt like “forever.” RP 75. Her assailant was not able to do anything other than kiss her and hold her arms because she was fighting. *Id.* She finally stopped fighting and just went numb. RP 74. The man then let go of one of her arms and she was able to roll away from him. *Id.* The man jumped out the window. *Id.*

Navarrete never locked her bedroom door at night, or even closed it, in case her children needed her. RP 78. After her assailant left, Navarrete found her bedroom door closed and locked and had to unlock it to get out. *Id.*

Navarrete did not immediately call the police. RP 78. She did not go back to bed and was exhausted when she arrived for her 12-hour work shift the next morning. *Id.* Concerned coworkers encouraged her to call the police when she told them what had happened. *Id.* She reported to law enforcement as soon as she got off work. RP 79. Grant County Deputy Sheriff Corey Judkins testified Navarrete described her attacker as approximately six feet tall, slender, with a voice that made her think of her ex-husband. RP 130–32. She later clarified the attacker sounded like her ex-husband but was not built like her ex-husband. RP 135. She said the person was built like Sanchez and also reminded her of Sanchez. RP 132, 135. She could not definitely identify Sanchez as her attacker. RP 135.

Law enforcement gathered evidence at Navarrete's house, including fingerprints, her sheets and blankets, and the underwear she wore the night of the assault. RP 80. She told the officer there was "some stuff" on the underwear. *Id.* At trial, Sanchez stipulated the DNA found on Navarrete's underwear was his. RP 138.

Sanchez had a different story. According to Sanchez, Navarrete had slipped into sexy shorts and an open blouse before bringing him water to drink. RP 216. She touched him provocatively and asked if he were coming back over to her house. RP 216. He could not believe what he was seeing. RP 217. He still had to finish working on her porch light and debated whether he should return. RP 216–17. In an agony of indecision, Sanchez left his home and went to a park, where he pondered his choices for a “good long time” before returning to Navarrete’s house sometime after 10:00 PM. RP 217–18. He knocked on her window to ask if she wanted to talk. RP 218. She did not answer. RP 218. Not knowing what else to do, Sanchez looked into Navarrete’s bedroom and saw her moving around on the bed. *Id.* Thinking she wanted him, he climbed in through her bedroom window. RP 219. He hugged her and she hugged him back, squeezing him and caressing him as she lay on her bed. *Id.* She was in her underwear. RP 220. He said he took his clothes off and they had sex, then he climbed back out the bedroom window. *Id.* He waited to put his clothes on until after he got outside. RP 221.

Navarrete was home alone seven weeks later, on July 20, 2014. RP 82–83. Somewhere around 10:00 or 11:00 AM, Sanchez drove into her driveway. RP 83. As soon as she saw him, Navarrete started shaking, and “it was like everything came back. It was him.” *Id.* Sanchez was walking

back and forth in her yard and pulling weeds. RP 84. He looked into her bedroom windows. RP 87. As Sanchez walked by her bedroom, Navarrete dropped to the floor, crawled to her bedroom window, and called 911. RP 83–84.

Sergeant Darrik Gregg of the Grant County Sheriff's Office responded to Navarrete's 911 call. RP 146. Navarrete told Gregg she was now sure Sanchez was the person who had previously broken into her house and assaulted her. RP 87. At trial, Gregg testified that when he responded to the 911 call, Navarrete was upset and had started telling him about a prior rape. RP 148. He told the jury he stopped her when he realized it had already been reported. RP 148. He was not involved in the prior report. *Id.*

Seven months later, on February 13, 2015 at around 5:15 AM, Navarrete saw a very bright light, like a flare, shining through her bedroom window. RP 89. There were no outside lights at her house but she did see a car drive away. RP 90. It had a very loud muffler. *Id.* It made the same sound as the car that drove away the night she was attacked. *Id.* She called 911 but nobody responded. *Id.*

Navarrete filled out paperwork to purchase a gun, then bought a good flashlight and put it next to her nightstand. RP 91. Around 5:15 the next morning, she heard noises outside her bedroom window. RP 91–92.

Very slowly and quietly, she opened the curtain and shone her flashlight out the window, directly into Sanchez' face. RP 92. Navarrete screamed as loud as she could, hit the window, and told Sanchez to get out. *Id.* Deputy Raymond E. Appling, Jr., responded. RP 124. He testified Navarrete positively identified Sanchez as the man outside her window. RP 126.

III. ARGUMENT

A. SANCHEZ WAS NOT DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE STATEMENTS COMPLAINED OF ARE NOT HEARSAY AND, EVEN IF THEY WERE, HE CANNOT DEMONSTRATE PREJUDICE.

1. *Navarrete's three statements, recounted by the officers at trial, were statements of identification made by a testifying witness and thus not hearsay.*

Sanchez complains his able trial attorney deprived him of effective assistance of counsel when she failed to object to "hearsay" from the three law enforcement officers who testified concerning Navarrete's increasingly certain identification of Sanchez as the man who assaulted her and peered into her bedroom windows. A statement of identification of a person made after the declarant perceived the person is not hearsay if the declarant testifies at trial and is subject to cross-examination. Evidence Rule (ER) 801(d)(iii).² Navarrete testified at trial and was cross-examined.

² ER 801 -(d) Statements which are not hearsay. A statement is not hearsay if -(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross- examination concerning the statement, and the statement is -(iii) one of identification of a person made after perceiving the person. ER 801(d)(iii).

None of the statements complained of are hearsay. Counsel was wise not to prejudice her client with objections certain to be overruled.

2. *Sanchez was not denied effective assistance when counsel's failure to object to statements repeating Navarrete's identification of Sanchez could not have affected the trial outcome because Sanchez' theory of the case was baffling and internally inconsistent.*

Regardless of whether the statements were hearsay to which competent counsel should have objected, Sanchez was not denied effective assistance of counsel. Whether a defendant has been denied effective assistance of counsel is assessed by the two-pronged analysis set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). The first prong is whether counsel's representation "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Assuming, arguendo, counsel's failure to object constituted deficient performance, whether Sanchez is entitled to relief depends upon whether he can satisfy Strickland's second prong, prejudice. *Strickland*, 466 U.S. at 691. Prejudice is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Here, sustained objections to each of the three statements complained of would have made not one whit of difference in the jury's determination.

Sanchez never denied having had sex with Navarrete. His theory of the case was that after Navarrete had come on to him, luring him to a late night rendezvous he was powerless to resist, she had second thoughts and ran to her co-workers and law enforcement with a claim of sexual assault. The theory lacks internal logic. To acquit, the jury would have had to overcome the puzzling question of why Navarrete would have reported assault by an unidentified assailant if she merely wanted to cover her own embarrassment over a lustful indiscretion with the husband of a close friend. Why would she have turned over her underwear with “stuff” on it? Why would she have tentatively identified both her ex-husband and Sanchez? Why would she have panicked and dropped to the floor when a man she had known 20 years returned to her residence seven weeks later? The jury would have also had to resolve what possessed Sanchez to climb naked out the bedroom window and dress in Navarrete’s yard immediately after having sex. Surely, after such a passionate encounter he would have lingered to pull on his pants. Why did he shine a bright light into Navarrete’s bedroom window eight months after their night of passion? And, fleeing discovery after shining the light, why did he come again 24 hours later, the morning Navarrete reversed positions and shone her brand-new flashlight straight into his face?

In light of these baffling, unresolved holes in Sanchez’ defense and

the obvious fact that the jury found Navarrete more credible than he, this Court can only conclude the three “hearsay” statements played absolutely no part in Sanchez’ convictions.

B. THE STATE CONCEDES THE ORDER BANISHING SANCHEZ FROM GRANT COUNTY SHOULD BE VACATED AND THE CASE REMANDED FOR ENTRY OF A NEW ORDER NARROWLY TAILORED TO PROTECT SANCHEZ’ CONSTITUTIONAL RIGHTS WHILE SERVING THE COMPELLING GOVERNMENTAL INTEREST OF PROTECTING THE VICTIM.

“Banishment orders encroach on an individual’s constitutional right to travel, which includes the right to travel within a state.” *State v. Sims*, 152 Wn. App. 526, 531, 216 P.3d 470 (2009) (citing *State v. Schimelpfenig*, 128 Wn.App. 224, 226, 115 P.3d 338 (2005) (citing *Shapiro v. Thompson*, 394 U.S. 618, 630-31, 634, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974)). Courts must narrowly tailor such an order to serve a compelling governmental interest. *Id.* In *Schimelpfenig*, Division Two held a lifetime banishment order prohibiting a convicted murderer from residing in the same county as his victim’s family unconstitutionally impinged upon his right to travel. 128 Wn.App. at 226.

“[T]he interplay of sentencing conditions and fundamental rights is delicate and fact-specific, not lending itself to broad statements and bright

line rules.” *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 377, 229 P.3d 686 (2010). For the scope of such a restriction to be reasonably necessary, there must be no reasonable alternative way to achieve the State’s compelling interest. *State v. Warren*, 165 Wn.2d 17, 34–35, 195 P.3d 940 (2008).

This Court should remand for entry of a narrowly-tailored order, impinging on Sanchez’ constitutional right to travel only so far as is reasonably necessary to protect Navarrete and her family from future harm or harassment. *Schimelpfenig*. 128 Wn. App. at 229.

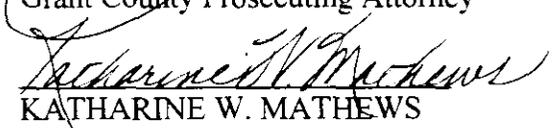
IV. CONCLUSION

This Court should affirm Sanchez’ convictions and remand the matter to Grant County for entry of an order more narrowly tailored to protect Sanchez’ rights as well as the rights of his victim.

DATED this 28th day of September, 2016.

Respectfully submitted,

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IN THE COURT OF APPEALS, DIVISION III
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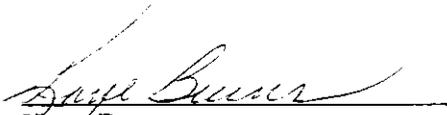
STATE OF WASHINGTON,)
)
 Respondent,) No. 34057-1-III
)
 vs.)
)
ARNULFO CISNEROS SANCHEZ,) DECLARATION OF SERVICE
)
 Appellant.)
_____)

Under penalty of perjury of the laws of the State of Washington,
the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this
matter by e-mail on the following party, receipt confirmed, pursuant to the
parties' agreement:

Christopher Gibson
Nielsen, Broman & Koch, PLLC
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Dated: September 29, 2016.



Kaye Burns