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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 343341

WASHINGTON STATE COURT OF APPEALS
DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

EDUARDO CHAVEZ,

Appellant.

REPLY BRIEF OF APPELLANT

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I. SUMMARY OF REPLY

In its response brief, the State of Washington does not address the actual issue on appeal, whether an alleged rape victim's middle school is her "community" for the purposes of admitting reputation evidence of the alleged victim's character for truthfulness under ER 608(a). The State instead relies on its presumptuous and incorrect position that all middle-schoolers are uninformed, judgmental, rumor-mongers who could not possibly offer admissible evidence under ER 608(a). [Resp., 8] The State does not understand the rule or its purpose, and focuses its brief on evidence that was not, in fact, offered under ER 608(a). Mr. Chavez's conviction should be reversed.

II. REPLY

- a. **The proffered testimony was reputation evidence, not opinion testimony, and the defense established a foundation for its admission under ER 608(a).**

The State focuses its brief on only one aspect of Ms. Breeding's testimony during the defense's offer of proof: the "few kids at the skate park." [Resp., 11] The State's concentration on that testimony is misguided, as it is not the testimony at issue, and ignores Ms. Breeding's actual ER 608(a) testimony. Because that testimony met the foundational requirements of ER 608(a), and because the **only issue at trial** in this case

was the relative credibility of the accuser and the accused, the testimony should have been allowed.

The State wholly mischaracterizes what occurred during Ms. Breeding's testimony. It was clear Ms. Breeding did not believe A.S. when A.S. told her she had been raped. [RP 298] The defense, on cross-examination, asked her why:

Q (By Mr. McCool) Okay. Is the reason that you were having a hard time believing her related to your own experience with her?

A Yes.

Q Okay. And you have gone to school with her off and on since at least second grade down at Ferndale?

A Yes.

Q And then you went to school with her at Central?

A Yes.

Q And then you went to school with her down at Weston?

A Yes.

Q And during that time if you added up all the students in all the grades that you had been with her, you have been around probably at least a hundred different people that had interaction with you and her; isn't that right?

A Yes.

[RP 298, ln. 16 – 299, ln. 5]

The State objected to further inquiry, and an offer of proof was made by the defense outside the presence of the jury. The defense continued:

Q So, Miss Breeding, you have been acquainted with in the school setting -- in the school community you have been acquainted with probably at least hundreds of people that have been acquainted with you and [A.S.]; haven't you?

A Yes.

Q Okay. And are you aware of her reputation in that school community for truthfulness or untruthfulness?

A Yes.

Q And what is that reputation?

A She wasn't doing very good.

Q Wasn't doing very good with the truth?

A Yeah.

...

Q Okay. When is the most recent that you have heard about the reputation for truthfulness?

A I don't know for sure.

Q Well, for example, have you heard about that truthfulness since you went to school in Weston with her?

A Yeah.

Q Okay. And that was just last year; wasn't it?

A Yes.

[RP 300, ln. 16 – 301, ln. 15]

The State was given an opportunity to inquire, and it chose to ask about what it now terms “the idle chatter of skate park youth” [Resp., at 12]. [RP 300-01] Then the State moved on to A.S.’s reputation at school:

Q (By Ms. Mulhern) Okay. Prior to last April, what was Alicia’s reputation as far as you are aware in your school community for truthfulness or did she have one at all?

A She did.

Q She did? And what was it?

A She just lied to teachers and, like, she got kicked out of class and stuff.

...

Q And how do you know what [A.S.’s] reputation is?

A Because I have heard it from people and she told me.

Q [A.S.] told you herself that people think she is a liar?

A Uh-huh.

[RP 304, ln. 18-24; 306, ln. 20-23]

The record shows that A.S.’s reputation in her community and the discussions had at the skate park are two separate, distinct categories of evidence. While the skate park discussions may not be admissible,¹ Ms. Breeding’s knowledge of A.S.’s reputation in the community of Weston Middle School clearly was. That evidence met all of the factors: the

¹ Since the defense did not even offer this testimony (it was solicited by the State), this brief does not address its admissibility.

community is sufficiently large, the community is neutral and general, A.S. is a member of that community known to the other members, and the frequency of contact amongst the community members is significant. State v. Land, 121 Wn. 2d 494, 500, 851 P.2d 678 (1993).

Whatever transpired at the skate park is not the issue in this case. The issue is whether the trial court abused its discretion by failing to admit Ms. Breeding's testimony under ER 608(a). The answer is yes because that testimony was proper under the rule.

The State argues that the reputation evidence itself could not be trusted and should not have been heard by the jury. [Resp., 10-11] Having to admit that A.S. does have a reputation at Weston, the State wants to argue instead that her reputation is unearned or unfair because A.S. had been bullied in the past, tended to hang out with a younger crowd at school, and only lied about things "typical for children of that age." [Resp., 10]

But those arguments go to the weight of the evidence, not its admissibility. The judge, as gatekeeper, should have erred on the side of admitting testimony that was critical to an ultimate issue at trial instead of excluding it on narrowly construed technical grounds, materially prejudicing the defense. The jury, not the judge and not the State, should have decided whether how A.S. got her reputation in the community

mattered to their determination of her credibility at trial. There is no support for the State's contention that the defense needed to prove specific instances of a certain kind of untruthfulness to **admit** the ER 608(a) testimony.

Simply put, A.S. is known at school as a liar. Whether that means she is lying about this alleged rape is a question for the jury. But the judge never allowed the defense to pose it.

The State even claims that ER 608(a) evidence would not be admissible against A.S. in any case because it is "collateral to her credibility as to a rape." [Resp., 14] If ER 608(a) evidence were so limited in its use, the rule would say so. Limiting credibility "to" the crime charged makes no sense when the purpose of the rule, as the State argues, is to elicit testimony about the witness's truthfulness **in general**. The State relies on State v. Griswold, 98 Wn. App. 817, 991 P.2d 657 (2000), to support this assertion. But that case does not even apply here because it involved evidence admitted under ER 608(b) to impeach a witness's veracity. Id. at 830.

b. The policy of protecting alleged rape victims does not outweigh the policies underlying the Rules of Evidence and the constitutional right to face one's accuser.

The State's final argument is that ER 608(a) evidence should not be admitted in cases like this because it is "harmful to the child rape

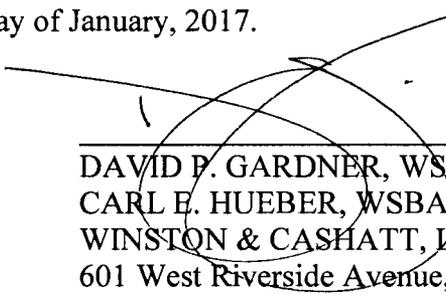
victim to brand her as having a character or reputation for deceit.” [Resp., 17]

This claim ignores the fact that the alleged victim in this case earned her reputation; she was not branded with it. But, more importantly, it ignores the rights of the accused. The accused has a right to tell the jury that the alleged victim’s testimony may not be credible because she is known in her community as an untruthful person. ER 608(a) exists for that very purpose. The State admits that, in this “he said-she said rape case, the credibility of [the defendant] or [the accuser] is dispositive of the case.” [Resp., 16] There is no policy justification for excluding evidence that is dispositive of the case.

III. CONCLUSION

Mr. Chavez’s conviction should be reversed and a new trial ordered.

DATED this 3rd day of January, 2017.



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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington as follows: That on January 3, 2017, I served the foregoing document on all counsel and on appellant by causing a true and correct copy of said document to be delivered to them at the addresses shown below in the manners indicated:

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DATED at Spokane, Washington, on January 3, 2017.

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