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Court of Appeals No. 36019-9-III
Okanogan County Superior Court No. 17-1-00332-6

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

State of Washington,

Plaintiff/Respondent,

v.

Jose Enrique Gonzalez Palomares,

Defendant/Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR OKANOGAN COUNTY

The Honorable Henry Rawson, Judge

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Appellant, Jose Enrique Gonzalez Palomares (“Mr. Gonzalez”), by undersigned counsel, submits to this Court the following reply to the State’s response to his opening brief.

II. ARGUMENT

A. Mr. Gonzalez’s Right to a Speedy Trial was Violated Because the Court’s Hearing on the State’s Pretrial Motion to Admit Evidence did not Commence the Trial.

The State relies on State v. Andrews, 66 Wn. App. 804, 832 P.2d 1373 (1992) in support of the proposition that the trial court’s resolution of the State’s pretrial motion to admit evidence was sufficient to toll Mr. Gonzalez’s speedy trial period and that the health condition of the trial judge’s brother amounted to an unavoidable and unforeseen circumstance within the meaning of CrR 3.3(e)(8). See State’s Response (“Response”) at 7 – 8. However, Andrews is clearly distinguishable from Mr. Gonzalez’s case.

In Andrews, the court held that trial commences for speedy trial purposes when a trial court rules on a motion after the case has been assigned to a trial judge or called for trial. Id. at 810. In that case, the defendants whose cases had already been called for trial sought dismissal after the trial judges in their respective cases had ruled on motions to

exclude trial witnesses from the courtroom. Id. at 806 – 809. The Andrews court held that denial of the motions for dismissal on speedy trial grounds was appropriate based on the general rule that “the hearing and disposition of preliminary motions by the trial judge after a case is assigned or called for trial is considered a customary and practical phase of the trial.” Id. at 810.

Mr. Gonzalez’s case is distinguishable from Andrews because Mr. Gonzalez’s case had not been assigned or called for trial at the time the court ruled on the State’s pretrial motion to admit evidence. Indeed, the State acknowledges in its briefing that the trial court ruled on the State’s motion to admit evidence on November 30, 2017, and Mr. Gonzalez’s trial was not scheduled to commence until December 6, 2017. See Response at 9. In fact, after the hearing on the State’s motion to admit evidence on November 30, 2017, the case was scheduled for a readiness hearing the following Monday. RP 32. Consequently, because Mr. Gonzalez’s case was not assigned or called for trial at the time the court ruled on the State’s pretrial motion to admit evidence on November 30, 2017, the court’s consideration of the motion was not sufficient to commence the trial and thereby toll the speedy trial period.

And while the trial judge’s need to attend to his brother on the morning of December 6, 2017, was certainly understandable in light of his

brother's failing health, the judge's absence was not sufficient to satisfy the requirements of CrR 3.3(8)(e). The State's reliance on the dental emergency cited in Andrews is misplaced. First, in Andrews, it was the judge himself who had a dental emergency. See id. at 812. Second, the court's discussion of the unavoidable and unforeseen circumstances exception under CrR 3.3 is dicta, because the court in that case had already held that Andrews's trial commenced prior to the expiration of the speedy trial period when the court heard the State's motion in limine to exclude witnesses. Id. at 812. Moreover, after the judge's dental emergency Andrew's case was reassigned to a different judge almost immediately and trial began the following judicial day. See id. at 806 – 807.

The State's efforts to dodge the holding of State v. Kenyon, 167 Wn.2d 130, 216 P.3d 1024 (2009), are unpersuasive. That case makes clear that where delay of a defendant's trial results from the unavailability of a judge the delay is not excusable as an unavoidable or unforeseen circumstance because the case can be reassigned to a pro tempore judge or a visiting judge. In Kenyon, the Supreme Court framed the question before it as follows: "We are asked to determine whether the speedy trial rule, CrR 3.3, which allows exclusions for unavoidable or unforeseen circumstances, permits a trial court to continue a criminal trial past the speedy trial deadline because of the unavailability of a judge." Id. at 135.

In that case defendant's trial was continued past the speedy trial expiration date because one judge was on vacation and the other judge was presiding over another trial. See id. at 134. The Supreme Court reversed and ordered dismissal of the charges with prejudice, holding that the unavailability of judges, regardless of the reasons, is effectively court congestion and that without making a record on the availability of pro tempore judges and available court rooms, an extension of the speedy trial period is reversible error. Id. at 138 – 39. The Court explained, “one judge was unavailable because he was presiding over another trial and the other judge was unavailable because he was on vacation. This amounts to court congestion, and the trial court must document available courtrooms and judges.” Id. at 139. Because the trial court in that case failed to make a record documenting the availability of visiting or pro tempore trial judges and available courtrooms, reversal was required.

In the instant case, it is beyond question that the trial judge had a respectable reason for excusing himself from the proceedings. However, the trial judge's reason for being unavailable is irrelevant under Kenyon. In light of his own unavailability, the trial judge was required to make a detailed record of the availability of pro tempore judges, visiting judges and available courtrooms before continuing Mr. Gonzalez's trial past the speedy trial date. See Kenyon, at 139. Because the trial court failed to do so in this

case, Mr. Gonzalez's right to a speedy trial under CrR 3.3 was violated, and dismissal of the charges with prejudice is required.

Nor is the question of whether or not Mr. Gonzalez was prejudiced by the delay relevant to the outcome of this Court's inquiry. It is well established that "[f]ailure to strictly comply with the speedy trial rule requires dismissal, regardless of whether the defendant can show prejudice." State v. Raschka, 124 Wn. App. 103, 112 (2004) (citing State v. Adamski, 111 Wn.2d 574, 582 (1988)).

B. The Record in this Case Does not Support the Trial Court's Finding of Extraordinary and Striking Circumstances Sufficient to Warrant Dismissal of the Jury after Mr. Gonzalez's First Trial.

The State contends that Mr. Gonzalez was not placed in double jeopardy because the trial court gave the jury that was seated for Mr. Gonzalez's first trial enough time to deliberate and had sufficient grounds to sustain a finding of extraordinary and striking circumstances necessary to support a mistrial. See Response at 12 – 13.

Citing the approximately five hours the jurors had for deliberations without considering the other relevant circumstances, the State concludes that the Court "appropriately considered all the relevant factors and properly declared a mistrial." Response at 13. But, while the State is correct in asserting that the trial court need not make an explicit record of the findings

in support of its mistrial ruling, the record in Mr. Gonzalez's case simply does not support the conclusion that the court considered all the relevant factors and possible alternatives before declaring a mistrial.

First, the record affirmatively indicates that no member of the jury, other than the foreman, was provided with an opportunity to weigh in on the question of whether the jury could reach a verdict within a reasonable time. After receiving the jury question, the trial court brought the jury out of the jury room and asked the foreman, on the record, whether he believed that the jury could reach a verdict within a reasonable time. See RP at 132. The trial court received his answer and immediately ordered the jury back into the jury room to sign the verdict form in blank and upon receipt of the signed verdict form declared a mistrial. See RP at 132 – 36.

The trial court did not order the jury to discuss the probability of a verdict when they were ordered back into the jury room or poll the other jurors. See id. The Court provided no clarification about what the significance of signing the blank verdict form was. See id. In essence, the trial court declared a mistrial based on the representation of the jury foreman without any consideration of the positions of other members of the jury. Nor did the Court ask the parties for their positions as to whether a mistrial should be declared or consider alternatives to dismissing the jury, such as releasing the jury for the evening and having the jury reconvene the

following day or permitting some additional time for deliberations the same day. See id. Perhaps most striking is that the trial court did not explain during its colloquy with the foreman what it meant by reasonable time, especially in light of the fact that the colloquy took place after four o'clock in the afternoon, and the foreman could have easily believed that a reasonable time meant by the end of the work day.

The case law is clear that a jury foreman's assertion that a verdict cannot be reached only justifies declaration of a mistrial where that assertion is supported by that of the other jurors. See State v. Jones, 97 Wn.2d 159, 163, 641 P.2d 708 (1982) ("Obviously, if the jury, through its foreman and of its own accord, acknowledges that it is hopelessly deadlocked, there would be a factual basis for discharge *if the other jurors agree with the foreman.*") (emphasis added). A jury's initial request for "instruction about how to proceed if they are deadlocked is not a motion for a mistrial." State v. Burdette 178 Wn. App. 183, 196. 313 P.3d 1235 (2013). Further, a jury's bald assertion that it is deadlocked is not enough to justify a mistrial without consideration of other factors. See id. Rather, the trial court must consider other facts, including the length of the trial, the complexity of the issues and the time the jury has been deliberating. See id. In each case, the decision to declare a mistrial must be weighed against a defendant's "valued right to

have his trial completed by a particular tribunal” as well as the defendant’s constitutional protection against double jeopardy. Jones, 97 Wn. 2d at 162.

In view of these principles, it is clear that the trial court abused its discretion by failing to consider all the relevant factors and weigh those factors against Mr. Gonzalez’s right to have his case decided by the first jury seated for his trial. The State suggests that the trial court’s acknowledgement that the jury was dealing with a difficult case weighs in favor of declaring a mistrial, but the case law supports the exact opposite conclusion. The more complex the issues, the more time a jury should be given to deliberate. See id. at 165.

Nor was the trial court warranted in accepting the jury’s bald assertion that they were deadlocked. The jury had a total of approximately five hours to deliberate, and presumably the jury took a break for lunch as well as other breaks throughout the day. See id. Thus, at best, the jury had only been deliberating for a few hours before a mistrial was declared after an approximately two-day trial, involving multiple witnesses and complicated credibility determinations.

Moreover, without polling the jury or allowing the jury members to weigh in on the question posed to the foreman, the trial court could not have possibly had sufficient information to make a determination as to whether the jury was genuinely deadlocked.

Finally, it was unreasonable for the trial court to declare a mistrial without allowing the parties an opportunity to present their positions on the issue or considering alternatives.

Because no reasonable judge would have declared a mistrial based upon the facts before the trial court in Mr. Gonzalez's case, the trial court abused its discretion when it declared a mistrial, and Mr. Gonzalez's convictions should therefore be reversed and dismissed with prejudice because Mr. Gonzalez's retrial placed him in double jeopardy.

C. The Photographs of the Text Messages Mr. Gonzalez Sent to his Wife and Testimony About Those Text Messages Should Have been Excluded under RCW 5.60.060(1).

The State contends that the abuse of discretion standard should apply to Mr. Gonzalez's claim that the trial court erroneously admitted photographs of text messages he sent to his wife and erroneously permitted testimony about those text messages over an assertion of spousal privilege. See State' Brief at 13. However, the case law is clear that where an otherwise discretionary ruling pertains to the "application of a court rule or statute to particular facts," it becomes a question of law that is reviewed de novo. State v. Tatum, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994). Courts have held that the de novo standard of review specifically applies to determinations pertaining to privilege. See Lodis v. Corbis Holdings, Inc.,

172 Wn. App. 835, 854, 292 P.3d 779 (2013). Because the trial court's application of RCW 5.60.060 to the facts of Mr. Gonzalez's case was a legal question, his spousal privilege claim should be reviewed de novo.

The State devotes the majority of its argument to explaining why under Washington case law spousal testimonial privilege does not preclude third parties from testifying about statements made to them by a defendant's spouse. See Response at 14 – 15. The State's long-winded discussion of State v. Clark, 26 Wn.2d 160, 168, 173 P.2d 189 (1946) and State v. Winnett, 48 Wn. 93, 92 P. 904 (1907) does nothing more than set up a straw person and knock it down. The issue before this Court is not whether statements made by Mr. Gonzalez's wife to law enforcement were admissible, but rather whether Mr. Gonzalez's own statements, in the form of text messages to his wife, and a law enforcement officer's testimony about the content of those text messages, were admissible over an assertion of spousal communications privilege under RCW 5.60.060(1).

The State reliance on State v. Burden, 120 Wn.2d 371, 841 P.2d 758 (1992), is also misplaced. First, Burden is distinguishable on its facts as the wife in that case was an accomplice in the husband's criminal activity and the statements she made were about her own involvement in the criminal activity not about confidential communications made to her by her husband. See id. at 373. Second, and much more importantly, Burden addresses

spousal testimonial privilege not spousal communications privilege. The Burden court expressly stated that spousal communications privilege was “not at issue in this case.” Id. at 374. Importantly, Burden held that testimony by a third person about statements made to him or her by the defendant’s spouse is only admissible if such testimony is not “excluded under *either the testimonial or the marital communications privileges.*” Id. at 376 (emphasis added). Consequently, because the question before the Court is spousal communications privilege, Burden is not helpful to the State’s case.

The State’s response does nothing to address the precedents holding that a written confidential communication between spouses is inadmissible over an assertion of spousal communications privilege if it is a successful confidential communication. As explained by the Supreme Court in State v. Fiddler, 57 Wn.2d 815, 820, 360 P.2d 155 (1961), a confidential letter sent from one spouse to another is protected by the spousal communications privilege. In order for a writing to be protected under the communications privilege: 1) “the communication must have been intended to be confidential by the sender” and 2) “there must have been a successful confidential communication.” State v. Grove, 65 Wn.2d 525, 527 (1965). In Mr. Gonzalez’s case, there is no dispute that the communication was intended to be confidential and was, in fact successful, i.e. it was received

by Mr. Gonzalez's wife without being intercepted by any third party. Thus, under these precedents, spousal communications privilege prevents admission of the text messages between Mr. Gonzalez and his wife over an assertion of privilege.

State v. Thorne, 43 Wn.2d 47 (1953), is inapposite because in that case the conversation between the spouses was overheard by a third party as it occurred and was therefore found not to be confidential. Further, cases holding spousal communications privilege to have been waived in the context of writings are also distinguishable as in those cases, no successful communication occurred. See Fiddler, 57 Wn.2d at 820 (no successful confidential communication where wife could not read and husband expected that letter to wife would be read to her by third party); Grove, 65 Wn.2d at 527 (no successful confidential communication where all outgoing mail was screened by prison and the defendant was aware of this fact).

Quite notably, the State's response fails to adequately address the question of whether a non-communicating spouse's unilateral disclosure of a confidential communication waives spousal communications privilege, which is what the trial court in this case ultimately concluded. See RP at 29. Perhaps this is unsurprising, as the answer to that question is not helpful to the State's case. As discussed at length in Mr. Gonzalez's opening brief,

while this may well be an issue of first impression in Washington state, cases from other jurisdictions have consistently held that where the non-communicating spouse unilaterally discloses a confidential communication against the communicating spouse's interest the privileged communication is inadmissible against the communicating spouse in court. See Commonwealth v. Fisher, 221 Pa. 538, 70 A. 865 (1908) (confidential letters voluntarily delivered to prosecutor by wife could not be admitted against husband); McCoy v. Justice, 199 N. C. 637, 155 S. E. 452 (1930) (confidential letters delivered to plaintiff by wife inadmissible against husband). Unsurprisingly, in an age where many marital communications are made through various electronic means this reasoning has been extended to text message communications. See Sewell v. State, 180 A.3d 670 (2018) (photographs of text messages from non-communicating spouse's phone inadmissible in criminal prosecution of communicating spouse).

In the instant case, the text messages in question constituted successful confidential communications between Mr. Gonzalez and his wife. Mr. Gonzalez intended the messages to be confidential and they successfully reached his wife without being intercepted by a third party. See Grove, 65 Wn.2d at 527. Because the communications were neither overheard by a third party nor intercepted by a third party, they maintained their status as confidential communications and Mr. Gonzalez's wife, as the

non-communicating spouse could not waive the spousal communications privilege by unilaterally disclosing the text messages to law enforcement. See Sewell, 180 A.3d at 681; Fisher, 70 A. at 867.

The State's argument about the applicability of RCW 5.60.060 to written communications may be persuasive were this Court writing on a blank slate. But Washington courts have already definitively construed the confidential communications privilege to the contrary: it applies to both oral statements and writings. See Fiddler, 57 Wn.2d at 820 ("Inasmuch as the letters were not successful confidential communications by the appellant to his wife, nor were they intended to be confidential to her, they did not come within the privilege afforded by the statute, RCW 5.60.060."); State v. Robbins, 35 Wn.2d 389, 393, 213 P.2d 310 (1950) ("The term 'communication' within the meaning of the privileged communication rule as to husband and wife should be given a liberal construction and is not confined to mere audible communications."). Other confidential communications privileges, listed in RCW 5.60.060, which only expressly prohibit a witness from being examined about a confidential communication have similarly been construed to prohibit the admission of confidential writings. See e.g., Victor v. Fanning Starkey Co., 4 Wn. App. 920, 921 – 22, 486 P.2d 323 (1971) (trial court correctly excluded from evidence a letter sent by attorney to his client because the confidential

communications privilege applies to an instrument or document that contains the privileged communication).

The State's vague assertion that the admission of the text messages was harmless error is unpersuasive. Indeed, the State does not cite to any facts or evidence in the record in support of its argument. This, again, is unsurprising because a review of the evidence in Mr. Gonzalez's case makes clear that the admission of the text messages could not have been harmless error. The facts before the court were as follows. The alleged offense had been committed approximately five years before it had been reported. RP 230 – 32. The alleged victim expressed doubts as to whether or not she was actually assaulted by Mr. Gonzalez. RP 235 – 41. There was no physical evidence that the victim had been sexually assaulted by Mr. Gonzalez and there were no witnesses to the sexual assault. The first trial of Mr. Gonzalez resulted in a mistrial. And, perhaps most importantly the prosecutor repeatedly relied on the text messages that Mr. Gonzalez has sent to his wife as an admission and evidence of a guilty conscience. RP 362. The lack of evidence presented during trial against Mr. Gonzalez and the State's heavy reliance on the text messages is sufficient to establish that the erroneous admission of the text messages impacted the outcome of Mr. Gonzalez's within reasonable probabilities. See State v. Ray, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991).

D. There was Insufficient Evidence of Vaginal or Anal Penetration to Convict Mr. Gonzalez.

The State argues that because NRE testified that Mr. Gonzalez put his penis inside of her, there was sufficient evidence of penetration to establish that Mr. Gonzalez engaged in sexual intercourse with NRE within the meaning of RCW 9A.44.010. See Response at 28. However, the State seems to overlook the requirement that only penetration of the *vagina* or *anus*, specifically, constitutes sexual intercourse within the meaning of the statute. See State v. Tili, 139 Wn.2d 107, 119 (1999). Because of this, NRE's statement that Mr. Gonzalez put his penis inside of her standing alone is not sufficient to establish that sexual intercourse occurred within the meaning of RCW 9A.44.010.

In order to convict Mr. Gonzalez, the State had to prove specifically that Mr. Gonzalez penetrated NRE's anus or vagina. The State failed to do so in this case. The only testimony that the State elicited on the issue of penetration was that Mr. Gonzalez put his penis in NRE's vagina or bottom. See RP 231 – 32. Without additional elaboration on what NRE meant by bottom, no reasonable juror could find beyond a reasonable doubt that Mr. Gonzalez had sexual intercourse with NRE even when the evidence is viewed in a light most favorable to the State. See State v. Bencivenga, 137 Wn.2d 703, 706 (1999) (quoting State v. Green, 94 Wn.2d 216, 221 (1980).

The State unsuccessfully attempts to distinguish State v. A.M., 163 Wn. App. 414, 420, 260 P.3d 229 (2013), by asserting that in that case there was no testimony of anal penetration. But instead of distinguishing A.M., that fact actually highlights the similarity between A.M. and Mr. Gonzalez's case. Like in A.M., there was no testimony in Mr. Gonzalez's case about anal penetration. At best NRE's testimony indicated that Mr. Gonzalez penetrated her "bottom" but as A.M. establishes penetration of the buttocks is not the equivalent of anal penetration. See id. at 421. Much like NRE, the alleged victim in A.M. testified that the defendant put his penis "in my . . . butt," but this was not enough to establish that anal penetration had occurred and support a conviction for rape of a child. See id. at 417. Notably, NRE testified in Mr. Gonzalez's case that she simply did not know where Mr. Gonzalez put his penis insider her. RP 231. Here, because no reasonable juror could find beyond a reasonable doubt based on NRE's testimony that penetration of her vagina or anus occurred, the evidence was insufficient to sustain a conviction for rape of a child in the first degree and Mr. Gonzalez's conviction should therefore be reversed. See Bencivenga, 137 Wn.2d at 706.

**E. The Trial Court Committed Error when it Denied
Mr. Gonzalez's Motion for a New Trial.**

The State contends that the trial court correctly denied Mr. Gonzalez's motion for a new trial under CrR 7.5 because the new evidence proffered by Mr. Gonzalez was not sufficient to warrant a new trial. See Response at 30 – 35. As discussed in Mr. Gonzalez's opening brief, in determining whether new evidence requires a new trial, courts consider the following factors: (1) whether the evidence would likely change the outcome of the trial (2) whether the evidence was discovered since trial; (3) whether the evidence could not have been discovered before the trial by the exercise of due diligence; (4) whether the evidence is material to the issue and admissible; and (5) whether the newly discovered evidence is not merely cumulative or impeaching. See State v. Adams, 181 Wn. 222, 43 P.2d 1(1935); State v. Gibson, 75 Wn.2d 174, 449 P.2d 692 (1969).

With respect to the first factor, the State argues that the affidavit of Mr. Gonzalez's cousin, YABC, regarding NRE's prior disclosure that a man living in her parents' home sexually assaulted her around the same time Mr. Gonzalez allegedly assaulted her would not change the outcome of trial. Response at 33. The State cites case law holding that where the State has produced "strong and convincing evidence" of guilt and the defendant has produced "little or no evidence of innocence" a new trial should not be

granted based on an affidavit of a co-defendant or accomplice. See State v. Peele, 67 Wn.2d 724, 732 (1966). But, the evidence of guilt against Mr. Gonzalez was not strong and convincing. The primary evidence of guilt was NRE's testimony. Mr. Gonzalez unequivocally denied the allegations, and there was also evidence tending to show that NRE was unsure at some point as to whether Mr. Gonzalez sexually assaulted her. EX D12, D13, D14; RP 235 – 41. Further, NRE failed to disclose to defense investigators and over the course of two trials that she had previously made allegations of sexual assault against someone other than Mr. Gonzalez. YABC was a credible witness, not an accomplice or co-defendant, who had no reason to fabricate. See Adams, 181 Wn.2d at 230 – 31.

In short, Mr. Gonzalez's trial hinged on the jury believing NRE's otherwise uncorroborated account of the sexual assault that Mr. Gonzalez allegedly committed against her. In light of this fact, evidence that NRE had withheld information, that NRE previously made a potentially false allegation, and that NRE could have been confusing Mr. Gonzalez with someone else was highly significant, and would have unquestionably affected the jury's evaluation of NRE's credibility.

The State does not seem to dispute that YABC disclosed the facts in her declaration after the conclusion of Mr. Gonzalez's trial and that Mr. Gonzalez's new evidence satisfies the second prong of the test for granting

a new trial, but questions whether the evidence satisfies the third prong of the test, arguing that it could have been discovered earlier by the exercise of due diligence. Curiously, the State does not make any factual arguments about how the new evidence presented by Mr. Gonzalez could have been discovered earlier. Presumably, the information disclosed by YABC was only known to YABC, NRE, and NRE's parents. CP 266. Neither NRE nor her parents disclosed NRE's prior report of sexual assault to the defense or the State during the investigation of the case, and the information was not disclosed during their testimony at trial. YABC had moved to California by the time that charges were brought against Mr. Gonzalez, and without knowledge of NRE's previous report of sexual assault to YABC there was no reason for the defense to interview YABC prior to trial or call her as a witness. In other words, given that both NRE and her parents had withheld information about NRE's prior disclosure from investigators, there was no way that the defense could have known about the sexual assault allegation previously made by NRE or to interview YABC about those allegations.

The State also argues that Mr. Gonzalez's new evidence was not "material" to his case, as required under the fourth prong of the new trial test. See Response at 33. The State's primary contention seems to be that the new evidence would not have changed the outcome of trial because it would not have shifted the balance on the jury's determination of NRE's

credibility. But, as discussed above YABC's testimony could have been fatal to NRE's credibility, by establishing that NRE had withheld information or that NRE had made non-credible allegations in the past. Washington Court have held that evidence that a key witness committed perjury may qualify as a material fact. See State v. Rolax, 84 836, 838, 529 P.2d 1078 (1974), *overruled on other grounds*, Wright v. Morris, 85 Wn.2d 899, 540 P.2d 893 (1975). In the context of Mr. Gonzalez's case, evidence that the complaining witness withheld material information and made a previous accusation that was not even believed by her parents would have certainly impacted the jury's credibility determination.

Finally, the State argues that Mr. Gonzalez's new evidence did not satisfy the fifth requirement of the newly discovered evidence test because it was impeachment evidence. See Response at 34. However, where the primary evidence of a crime is the victim's testimony, impeachment evidence that undermines the victim's credibility is considered critical evidence and is sufficient to warrant a new trial. See State v. Savaria, 82 Wn. App. 832, 837 – 38, 919 P.2d 1263 (1996). The reason for this is that in such cases the impeachment evidence may be so devastating to the witness's credibility that it renders the witness "totally incredible." See United States v. Davis, 960 F.2d 820, 825 (1992). In the instant case, the new evidence offered by Mr. Gonzalez's established that NRE had withheld

information during defense interviews and that her parents did not believe a previous allegation of sexual assault that she made against another individual.

Moreover, in addition to being used for purposes of impeachment, YABC's testimony could be used as evidence that NRE was now misidentifying Mr. Gonzalez as her abuser and had previously identified her abuser as someone else. Thus, YABC's testimony would have been exculpatory in addition to being impeaching.

In summary, because YABC's affidavit satisfied all five prongs of the test for granting a new trial the trial court abused its discretion when it denied Mr. Gonzalez's motion for a new trial.

F. The Trial Court Committed Error when it Failed to Exercise its Discretion to Impose a Sentence Below the Standard Sentencing Range in Mr. Gonzalez's Case.

The State does not dispute that the trial court in this case had discretion to impose a sentence below the standard range because Mr. Gonzalez was still a juvenile when the offense was committed nor could it in light of the Supreme Court's decisions in State v. Houston-Sconiers, 188 Wn.2d 1, 392 P.3d 409 (2017) and State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015). The State argues, however, that the trial court recognized

its discretion and exercised it appropriately. The State misconstrues the case law on youth sentencing.

In O'Dell, the Supreme Court held that the trial court failed to meaningfully consider whether the defendant's youth was a mitigating factor for purposes of imposing an exceptional sentence below the standard range where the sentencing court held that it could not rely on the defendant's youth alone to depart from the standard range. See O'Dell, 183 Wn.2d at 696. Notably, the Supreme Court held that in light of the science recognized by federal juvenile sentencing decisions, like Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), a defendant does not need to produce scientific evidence from experts regarding a defendant's reduced culpability as a result of his youth and that lay testimony is sufficient. See id. at 697. In O'Dell, the defendant offered lay testimony to the effect that he was still immature at the age of 18, because among other things he "likes to play video games, and he likes to go hiking, and he likes to play music and tease his sisters." Id. at 697 – 698. The Supreme Court remanded to the trial court for resentencing so that the trial court could meaningfully consider whether the defendant's youth diminished his culpability. Id.

In the instant case, the trial court found that the defense failed to present any evidence about the defendant's "immaturity, impetuosity, or

failure to appreciate the risks or consequences” and therefore refused to exercise its discretion to impose a sentence below the standard range. But, the defendant was not required to produce any scientific evidence of these traits, as recognized in O’Dell. Rather, lay testimony about the defendant’s youthfulness and circumstances at the time of the offense is sufficient to warrant the exercise of sentencing discretion. There was a substantial amount of such evidence before the court at the time of sentencing.

Notably, the testimony at trial established that Mr. Gonzalez was raised by his mother after his father was deported to Mexico. RP 324. Mr. Gonzalez’s mother did not speak English and was forced to raise Mr. Gonzalez and his sisters on her own. RP 324. Mr. Gonzalez’s mother testified during the trial that Mr. Gonzalez was around fifteen years of age at the time of the events in question and that all he did was play soccer all the time. See RP 255, 257. She testified that Mr. Gonzalez lived with her and was enrolled in high school. See id. There was also evidence that Mr. Gonzalez often played video games. RP 201, 327. The sentencing court even recognized that Mr. Gonzalez was a “typical teenager.” RP 436. Perhaps most importantly, there was evidence that Mr. Gonzalez had matured since the time the offense occurred, avoided criminal law violations, and become a productive member of society. RP 215, 246. Yet,

despite this evidence, the sentencing court failed to exercise its discretion to impose a below-range sentence.

In State v. Houston-Sconiers, the state Supreme Court provided a framework for the inquiry a sentencing court must conduct when determining whether the defendant's age at the time of the offenses warrants the imposition of an exceptional sentence. The Supreme Court explained:

“[T]he court must consider mitigating circumstances related to the defendant's youth – including age and its “hallmark features,” such as the juvenile's “immaturity, impetuosity, and failure to appreciate risks and consequences. . . . It must also consider factors like the nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation of the crime, and “the way familial and peer pressures may have affected him [or her].” And it must consider how youth impacted any legal defense, along with any factors suggesting that the child must be successfully rehabilitated.”

Id. at 23. The sentencing court in this case failed to meaningfully consider Mr. Gonzalez's youth. Because there was ample evidence to establish that Mr. Gonzalez's youth diminished his culpability, the trial court abused its discretion by failing to impose a sentence below the standard range.

III. CONCLUSION

For the foregoing reasons, and the reasons previously submitted in this matter the Court should reverse the judgment and the charge against Mr. Gonzalez should be dismissed. In the alternative the case should be remanded for a new trial or a new sentencing.

DATED this 17th day of June, 2019.

Respectfully submitted,

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