

No. 71653-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ALEXIS SANCHEZ-BALBUENA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

2014 NOV 17 AM 9:08
CLERK OF SUPERIOR COURT
STATE OF WASHINGTON
KING COUNTY

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

B. ISSUE PRESENTED..... 1

C. STATEMENT OF THE CASE..... 1

D. ARGUMENT 3

The trial court erred in permitting the State to call a witness solely for purposes of impeaching her with otherwise inadmissible evidence 3

1. There was no independent relevance of the rebuttal testimony of Ashley Hamilton beyond its use as a conduit to admit otherwise inadmissible evidence 3

2. The improper admission of Ms. Hamilton’s testimony requires reversal 6

E. CONCLUSION..... 8

TABLE OF AUTHORITIES

Washington Supreme Court

State v. Bourgeois, 133 Wn.2d 389, 945 P.2d 1120 (1997) 6
State v. Lavaris, 106 Wn. 2d 340, 721 P.2d 515, 518 (1986) 4
State v. Stenson, 132 Wash.2d 668, 940 P.2d 1239 (1997)..... 4, 6

Washington Court of Appeals

State v. Stubsjoen, 48 Wn. App. 139, 738 P.2d 306 (1987) 4

Court Rules

ER 801 4
ER 802 4

A. ASSIGNMENT OF ERROR

The trial court erred in admitting hearsay testimony.

B. ISSUE PRESENTED

While a party is free to impeach its own witness, it is improper to call a witness solely to introduce otherwise inadmissible evidence under the guise of impeachment. Here, the State offered the testimony of a witness in rebuttal purportedly to rebut the claimed alibis of Alexis Sanchez-Balbuena and his codefendant. Where the State was aware the witness would not actually offer testimony rebutting the claimed alibis, but instead was merely a means by which to introduce otherwise improper hearsay evidence, did the trial court err in permitting the state to call the witness in rebuttal?

C. STATEMENT OF THE CASE

Matthew Koesema was a sometime-dealer of methamphetamine and heroin. 2/13/14 RP 38, 2/18/14 RP 51. Near midnight one evening, as Mr. Koesema was returning to his Bellevue apartment, he was confronted by two men in the parking lot who asked if he was selling drugs. 2/13/14 RP 31, 37. Believing they were “collecting taxes,” or charging for the right to sell drugs in the neighborhood, Mr. Koesema denied he was selling drugs. *Id.* at 38, 40.

One of the men stood in front him and accused him of lying. 2/13/14 RP at 40-41. According to Mr. Koesema, the man swung at him. *Id.* at 43. When he did so, Mr. Koesema ducked and struck the man in the stomach with a taser he happened to be holding. *Id.* Mr. Koesema turned to flee, but soon tripped. *Id.* at 48-49. When he did so, the two men and perhaps two others began kicking him. *Id.* at 48-51.

Residents of the apartments called police. Mr. Koesema told police that he was only missing a phone. 2/13/14 RP 186. At trial, however, Mr. Koesema claimed a taser, rings, and his wallet were taken from him. 2/13/14 RP 53-54.

Mr. Koesema claimed the two men who initially approached him were Mr. Sanchez-Balbuena and Pablo Delacruz-Perez. Mr. Koesema, also claimed the men took a his phone

The State charged Mr. Sanchez-Balbuena and Mr. Delacruz-Perez with second degree assault and first degree robbery. CP 65-66.

At a joint trial, Mr. Sanchez-Balbuena and Mr. Delacruz-Perez each offered testimony that they were elsewhere at the time of the assault. 2/18/14 RP 78; 2/19/14 RP 14.

A jury acquitted Mr. Sanchez-Balbuena of robbery but convicted him of the assault. CP 69-70.

D. ARGUMENT

The trial court erred in permitting the State to call a witness solely for purposes of impeaching her with otherwise inadmissible evidence.

1. There was no independent relevance of the rebuttal testimony of Ashley Hamilton beyond its use as a conduit to admit otherwise inadmissible evidence.

The State offered Ashley Hamilton as a rebuttal witness purportedly to rebut the claimed alibis offered by Mr. Sanchez-Balbuena and Mr. Delacruz-Perez. 2/19/14 RP 30. The State claimed Ms. Hamilton would place Mr. Sanchez-Balbuena and Mr. Delacruz-Perez in the neighborhood of the assault at or shortly before the time of the assault. 2/19/14 RP 37.

But, the State knew Ms. Hamilton was not going to testify that she saw the two in the neighborhood shortly before the assault. When the court asked the State for an offer of proof the deputy prosecutor explained

She indicates she doesn't remember the time today. She says she believed it was light outside still. When she spoke with police on that particular night, she said it was the hour before, which would have been somewhere in the neighborhood of 10:30.

2/19/14 RP 30. Because the State knew that Ms. Hamilton was going to testify that she saw Mr. Sanchez-Balbuena and Mr. Delacruz-Perez

much earlier in the day, the State had Officer Jay Moriarty ready to “impeach” Ms. Hamilton’s testimony. *Id.* As defense counsel stated, “[i]ts only Officer Moriarty that says it was an hour earlier.” *Id.* at 36.

ER 609 permits a party to impeach its own witness. However, it is improper for a party to call a witness merely to introduce otherwise improper evidence under the guise of impeachment. *State v. Lavaris*, 106 Wn. 2d 340, 345, 721 P.2d 515, 518 (1986).

ER 802 provides “Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.”

“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”

ER 801. A statement is offered for the truth of the matter asserted where the statement is not relevant unless the asserted fact is true. *State v. Stenson*, 132 Wash.2d 668, 710-11, 940 P.2d 1239 (1997); *State v. Stubsjoen*, 48 Wn. App. 139, 147, 738 P.2d 306 (1987).

Ms. Hamilton’s testimony had no relevance beyond serving as means to introduce hearsay. The statement attributed to her, in turn, had no relevance aside from its truth. There was no value to Ms. Hamilton’s testimony as a rebuttal witness. As the State predicted in its offer of proof, Ms. Hamilton testified only that she had seen the two earlier in

the day, when it was still light out. 7/19/14 RP 50. As such her testimony was not particularly relevant, if at all, and certainly did not rebut the alibis.

Moreover, there was no independent relevance to impeaching Ms. Hamilton's credibility. Ms. Hamilton denied telling Officer Moriarty anything different on the night of the incident. 7/19/14 RP 48. Even if the jury found her testimony was not credible, the State was still left with no substantive evidence rebutting the evidence that Mr. Sanchez-Balbuena and Mr. Delacruz-Perez were somewhere else at the time of the assault. At best calling Ms. Hamilton as a witness was impeachment for impeachment sake as impeaching her testimony did not make any fact more or less probable. Only if Officer Moriarty's testimony was used as substantive evidence did the rebuttal evidence have any relevance at all. That was a plainly improper purpose for calling Ms. Hamilton, yet at the end of the day was the State's only purpose for doing so.

The State's intent was made clear in closing argument in which the prosecutor pointed to Ms. Hamilton's testimony as placing Mr. Sanchez-Balbuena and Mr. Delacruz-Perez in the neighborhood and "discredit[ing their] alibis." CP 24. Again, Ms. Hamilton did not

discredit their alibis and did not place the two in the neighborhood at the time of the offense. Only Officer Moriarty testified to that fact. Ms. Hamilton's testimony was merely a conduit through which the State could get to the evidence it truly wanted, the hearsay testimony of Officer Moriarty. Ms. Hamilton's testimony was not relevant and was not proper.

2. The improper admission of Ms. Hamilton's testimony requires reversal.

The erroneous admission of evidence requires reversal if the error, within reasonable probability, materially affected the outcome. *Stenson*, 132 Wn.2d at 709. This Court must assess whether the error was harmless by measuring the admissible evidence of guilt against the prejudice caused by the inadmissible testimony. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Mr. Koesema was the only individual who claimed Mr. Sanchez-Balbuena was present. Mr. Koesema was under the influence of several illicit drugs at the time of the events in this case. Mr. Koesema acknowledged he had used methamphetamine earlier that day and was "probably high" at the time he was assaulted. 2/13/14 RP 38; 2/18/14 RP 50. Blood tests confirmed the presence of methamphetamine, amphetamines, and opiates in Mr. Koesema's

blood. 2/13/14 RP 144. Mr. Koesema had not previously told the investigating officers that he was using drugs on the day he was assaulted. 2/18/14 RP 31-32.

Beyond his intoxication at the time of the offense, Mr. Koesema's credibility as a witness was questionable. Officer Colin Culfey testified Mr. Koesema told him on the night of that assault that he was only missing a phone. 2/13/14 RP 186. Yet at trial, Mr. Koesema claimed a taser, rings, and his wallet were taken from him. 2/13/14 RP 53-54.

The jury plainly found much of Mr. Koesema's testimony lacked credibility, as illustrated by its verdict acquitting Mr. Sanchez-Balbuena on the robbery charge. The jury seemingly believed only those facts which were verifiable independent of Mr. Koesema's testimony. There was such independent evidence of the fact that Mr. Koesema was assaulted by way of officers' observations of him following the assault and medical testimony. But only Officer Moriarty's improper rebuttal testimony provided independent evidence that Mr. Sanchez-Balbuena had been in the neighborhood at the time of the assault.

At Mr. Sanchez-Balbuena's request, the court instructed the jury it could not consider Officer Moriarty's testimony as substantive evidence. CP 51. The efficacy of that instruction was undercut by the State's own closing argument with its claim that Ms. Hamilton's testimony "discredited" the alibi evidence. Plainly the State urged the jury to consider the rebuttal testimony as substantive evidence.

The evidence had a substantial likelihood of effecting the verdict and requires reversal of Mr. Sanchez-Balbuena's conviction.

E. CONCLUSION

For the reasons above, this Court should reverse Mr. Sanchez-Balbuena's conviction.

Respectfully submitted this 14th day of November, 2014.



GREGORY C. LINK – 25228
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 71653-1-I
v.)	
)	
ALEXIS SANCHEZ-BALBUENA,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF NOVEMBER, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY	(X)	U.S. MAIL
APPELLATE UNIT	()	HAND DELIVERY
KING COUNTY COURTHOUSE	()	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		
[X] ALEXIS SANCHEZ-BALBUENA	(X)	U.S. MAIL
NW DETENTION CENTER	()	HAND DELIVERY
1623 E J STREET STE 5	()	_____
TACOMA, WA 98421		

SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF NOVEMBER, 2014.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710