

No. 45242-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Marcos Lozano,

Appellant.

Thurston County Superior Court Cause No. 09-1-00446-7

The Honorable Judge Christine Schaller

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Lozano's convictions infringed his Fourteenth Amendment right to due process.
2. The trial judge violated Mr. Lozano's Sixth and Fourteenth Amendment right to present a defense.
3. The trial court violated Mr. Lozano's right to present a defense under Wash. Const. art. I, § 22.
4. The trial judge violated Mr. Lozano's Sixth and Fourteenth Amendment right to confront adverse witnesses.
5. Mr. Lozano's conviction violated his confrontation right under art. I, § 22.
6. The trial court infringed Mr. Lozano's confrontation rights by restricting cross-examination of Mohamed Young.
7. The trial court erred by admitting one portion of Mr. Lozano's statement to Young while excluding another portion.
8. The trial court erred by refusing to admit a portion of Mr. Lozano's statement under ER 106 and the common law rule of completeness.

ISSUE 1: An accused person has a constitutional right to present relevant admissible evidence. Here, the trial judge admitted one portion of Mr. Lozano's statement to Young, while excluding another portion that should have been admitted under ER 106 and the common law rule of completeness. Did the trial judge violate Mr. Lozano's right to present a defense under the Sixth and Fourteenth Amendments and Wash. Const. art. I, § 22 by excluding relevant, admissible evidence?

ISSUE 2: An accused person has a constitutional right to cross-examine adverse witnesses. Here, the trial judge admitted one portion of Mr. Lozano's statement to Young, while excluding another portion that should have been admitted under ER 106 and the common law rule of completeness. Did the trial judge violate ER 106, the common law rule of completeness, and Mr. Lozano's right to cross examine adverse

witnesses under the Sixth and Fourteenth Amendment and Wash. Const. art. I, § 22?

9. Mr. Lozano was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
10. Defense counsel was ineffective for failing to propose an instruction supporting Mr. Lozano's defense.

ISSUE 3: The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. Here, defense counsel unreasonably failed to propose appropriate instructions outlining Mr. Lozano's defense. Was Mr. Lozano deprived of the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Marcos Lozano and Candace Charette¹ met online in early 2009. RP (7/2/13) 54, 56. On her Myspace account, Charette had posted several photos, including some of herself with her close friend A.B.² In the photos, both women appeared intoxicated. The photos featured the women in provocative poses. In one photo, A.B. was depicted passed out. RP (2/4/13) 11, 14; RP (7/23/13) 54-55, 74, 97; RP (7/24/13) 233.

Mr. Lozano and Charette arranged to meet on February 9, 2009. RP (7/23/13) 57,

Charette went to Mr. Lozano's work, had a drink while waiting for him, and then got a call from A.B. RP (7/23/13) 57. A.B. was at a party at a bar in Spanaway and wanted Charette to come and get her. RP (7/24/13) 198-200. Charette picked her up and brought her back to Mr. Lozano's work, at the Red Wind Casino south of Olympia. RP (7/23/13) 57-60, 78-80, 201.

The two women followed Mr. Lozano to his house after he got off work, and all three went up to his bedroom. RP (7/23/13) 59-62 82; RP

¹ Her last name was Greco at the time of the incident, but she went by Charette at the time of trial. RP (7/23/13) 53-54.

² Mr. Lozano could see these photos. RP (2/4/13) 9-11.

(7/24/13) 206. Once, there, they drank beer, talked, listened to music and watched videos. RP (7/23/13) 62-63.

Charette and Mr. Lozano had sex while A.B. slept on the loveseat next to the bed. RP (7/23/13) 62-64; RP (7/24/13) 208. After some time, Charette went to sleep. RP (7/23/13) 65. When Mr. Lozano went to put a blanket over A.B., she sat up and kissed him. They kissed and she took off her clothes. They had sex while Charette slept. RP (7/24/13) 335-339.

Charette woke and yelled either “get the f*** off her” or “what the f*** are you doing?”. RP (7/23/13) 65, 94. Mr. Lozano moved away and the two women hurriedly left. RP (7/23/13) 65-67; RP (7/24/13) 209-211. Charette and A.B.’s friendship did not survive the night. RP (7/23/13) 70; RP (7/24/13), 222.

On February 28, 2009, A.B. heard from mutual friend Mohamed Young that Mr. Lozano had been arrested.³ RP (7/24/13) 220. She called the police and reported that Mr. Lozano raped her. RP (7/23/13) 147-148.

In March of 2009, the state charged Mr. Lozano with Rape in the Second Degree. CP 3. Trial was held in July of 2010. A jury convicted Mr. Lozano, but the Court of Appeals overturned the conviction. RP (2/4/13) 5-6; CP 4-19.

³ Mr. Lozano was charged with, and acquitted of, an unrelated sex offense. RP (2/4/13) 5; RP (7/23/13) 149-154.

Retrial was held in July of 2013. The defense theory was that A.B. initiated the sexual contact and consented to intercourse. RP (7/24/13) 238-254, 316-353; RP (7/25/13) 365-379, 423-439. The defense also presented the testimony of Dr. David Moore, to explain how alcohol and memory work, and to explain the concept of confabulation.⁴ RP (7/24/13) 263-310.

The state theory was that Mr. Lozano took advantage of a sleeping and/or intoxicated person, and was well aware that he did not obtain consent for his acts. RP (7/23/13) 65-72, 135-157; RP (7/24/13) 194-254, 340-353; RP (7/25/13) 365-379, 392-421, 440-447.

To support this theory, the prosecutor called Mohamed Young as a witness. Young was a friend of both A.B. and Mr. Lozano. RP (7/23/13) 166-170, 213-214. Young confirmed that he had discussed the incident with Mr. Lozano. The prosecutor asked Young about a statement he'd made to police in 2010. RP (7/23/13) 178-180). Young confirmed that in his statement, he'd said Mr. Lozano had told him that

[O]ne of the girls said, "Oh, my god. Get the hell off of me."
RP (7/23/13) 179-180.

⁴ Confabulation occurs when a person has partial amnesia, often due to alcohol consumption, and subconsciously fills in the blanks in their memory with socially positive logical conclusions or overheard information. RP (7/24/13) 267-270.

When the defense tried to show the jury the rest of the statement, or even the rest of the sentence, the court sustained the state's objection. RP (7/23/13) 179-181. The quoted passage of Young's recorded statement was excerpted from the following:

[E]verything, from what he told me, was fine. I mean she never said no or anything, and apparently the door was open and my two other buddies who live in the house were home. They said they heard like, sexual moans, like, they didn't hear anything like stop. And then the girl who was in the bed, she woke up and saw them having sex and was like, you know, what, you know, what's going on, what's going on. And then that's when I believe Ashley kind of, *oh, my God, get the hell off me*, what are you doing-kind of thing. That's what I was told. So not like she asked him to stop before, just once she was caught by her friend, she was like, stop, you're, what are you doing, where are my clothes. Ex. 8 (page 3), Supp CP (emphasis added).

The prosecutor proposed an instruction on the affirmative defense contained in RCW 9A.44.030(1). Defense counsel did not object to this instruction. RP (7/25/13) 358-364.

Mr. Lozano's attorney did not propose an instruction regarding the defense of consent. Nor did he request an instruction defining consent for the jury.

The jury voted to convict Mr. Lozano. He was sentenced, and he timely appealed. CP 174-187, 156-170.

ARGUMENT

I. MR. LOZANO WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND TO CONFRONT ADVERSE WITNESSES.

A. Standard of Review

Constitutional errors are reviewed *de novo*.⁵ *McDevitt v. Harbor View Med. Ctr.*, --- Wn.2d ---, ___, 316 P.3d 469, 472 (Wash. 2013).

Although evidentiary rulings are ordinarily reviewed for an abuse of discretion,⁶ this discretion is subject to the requirements of the constitution: a court necessarily abuses its discretion by denying an accused person her or his constitutional rights. *See, e.g., State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009); *see also United States v. Lankford*, 955 F.2d 1545, 1548 (11th Cir. 1992). Where the appellant makes a constitutional argument regarding the exclusion of evidence, review is *de novo*. *Iniguez*, 167 Wn.2d at 280-81.

Constitutional errors are presumed prejudicial, and the prosecution bears of the burden of establishing harmlessness beyond a reasonable

⁵ A constitutional error may be raised for the first time on review if it is “manifest.” RAP 2.5(a)(3). An error is manifest if it had “practical and identifiable” consequences. *State v. Schaler*, 169 Wn.2d 274, 284, 236 P.3d 858 (2010).

⁶ A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). This includes reliance on unsupported facts, application of the wrong legal standard, or taking an erroneous view of the law. *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009).

doubt. *State v. Jones*, 168 Wn.2d 713, 724, 230 P.3d 576 (2010); *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). The state must show that any reasonable jury would reach the same result absent the error. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

B. An accused person has a constitutional right to introduce relevant evidence and to confront adverse witnesses.

An accused person has a constitutional right to confront her or his accuser. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22. The primary and most crucial aspect of confrontation is the right to conduct meaningful cross-examination of adverse witnesses *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002); *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). The only limitations on the right to confront adverse witnesses are (1) that the evidence sought must be relevant and (2) that the right to admit the evidence “must be balanced against the State’s interest in precluding evidence so prejudicial as to disrupt the fairness of the trial.” *Darden*, 145 Wn.2d at 621.

The due process clause (along with the Sixth Amendment right to compulsory process) guarantees criminal defendants a meaningful opportunity to present a complete defense. U.S. Const. Amends. VI; XIV; Wash. Const. art. I, § 22; *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). The accused must be able to present her version of the facts, so the fact-finder may decide where the truth lies. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996); *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The U.S. Supreme Court has called this right “a fundamental element of due process of law.” *Washington v. Texas*, 410 U.S. at 19.

The right to present a defense includes the right to introduce relevant and admissible evidence.⁷ *State v. Lord*, 161 Wn.2d 276, 301, 165 P.3d 1251 (2007). Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Unless otherwise limited, all relevant evidence is

⁷ Denial of this right requires reversal unless it can be shown beyond a reasonable doubt that the error did not affect the verdict. *State v. Elliott*, 121 Wn. App. 404, 410, 88 P.3d 435 (2004). An appellate court will not “tolerate prejudicial constitutional error and will reverse unless the error was harmless beyond a reasonable doubt.” *State v. Fisher*, 165 Wn.2d 727, 755, 202 P.3d 937 (2009).

admissible. ER 402. The threshold to admit relevant evidence is low; even minimally relevant evidence is admissible. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

Relevant evidence can be excluded if the court finds that its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. But where evidence is highly probative, no state interest can be compelling enough to preclude its introduction. *Jones*, 168 Wn.2d at 721. Evidence tending to establish the defendant's theory of the case or to disprove the state's theory is highly probative. *Jones*, 168 Wn.2d at 721.

- C. The court improperly limited cross-examination of Young in violation of ER 106, the common law rule of completeness, and Mr. Lozano's constitutional rights to confront adverse witnesses and to present a defense.

The common law rule of completeness requires that "when a confession is introduced, the defendant has the right to require that the whole statement be placed before the jury." *State v. Stallworth*, 19 Wn. App. 728, 734-735, 577 P.2d 617 (1978). This is so even where the evidence would have not have been admissible in the first place. *State v. West*, 70 Wn.2d 751, 754-755, 424 P.2d 1014 (1967).

The common law rule has been partially codified by ER 106:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to

introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.

ER 106.⁸ Although ER 106 codifies the common law in part, the common law doctrine of completeness survives the partial codification and continues to have force and effect. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988).

The purpose of ER 106 “is ‘to prevent a party from misleading the jury.’” *U.S. v. Moussaoui*, 382 F.3d 453, 481 (4th Cir. 2004) (quoting *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996)). The rule applies to oral, written, and recorded statements. *State v. Larry*, 108 Wn. App. 894, 909-910, 34 P.3d 241 (2001), *review denied*, 146 Wn.2d 1022 (2002).

A statement is admissible under ER 106 if it passes either of two tests. Under the first test (the “*Alsup*” test), a partial statement must be completed where the partial statement distorts the meaning of the whole or excludes information that is substantially exculpatory. *Larry*, 108 Wn. App. at 909 (citing *State v. Alsup*, 75 Wn. App. 128, 133-134, 876 P.2d 935 (1994)). Under the second test (the “*Velasco*” test), a statement should also be admitted if it (1) explains other statements already

⁸ The Washington rule is substantially the same as the federal rule. Comment to ER 106.

admitted, (2) places the previously admitted portions in context, (3) helps avoid misleading the trier of fact, and (4) helps ensure fair and impartial understanding of the evidence. *Larry*, 108 Wn. App. at 910 (citing *United States v. Velasco*, 953 F.2d 1467 (7th Cir. 1992)).

In this case, the state introduced a misleading fragment of Mr. Lozano's statement to Young. Mr. Lozano attempted to correct the false impression by introducing the balance of the statement. RP (7/23/13) 179-181; Ex. 8, p. 3, Supp. CP. Stripped of context, Mr. Lozano's statement that "[O]ne of the girls said... 'Get the hell off of me'" sounded like a confession, at least to an attempted rape. RP (7/23/13) 179-180. It left the jury with the impression that he had confessed a sexual assault to Young. RP (7/23/13) 179-180.

In fact, as the balance of his statement demonstrates, Mr. Lozano specifically denied any sexual assault when he spoke to Young. He told Young that when Charette woke up and saw A.B. having sex with him, she confronted the two of them, and that only then, "once she was caught by her friend, [A.B.] was like, stop... what are you doing, where are my clothes." Ex. 8 p. 3, Supp. CP.

Mr. Lozano's entire statement to Young should have been admitted under ER 106. The balance of his statement "ought in fairness to [have been] considered contemporaneously with" the portion introduced by the

state. ER 106. The excluded portion should also have been admitted under both the *Alsup* and *Velasco* tests. The partial statement distorted the meaning of the whole, and the court's ruling excluded information that was substantially exculpatory. *Alsup*, 75 Wn. App. at 133-134. The excluded portion also explained the admitted statement and placed the admitted statement in context. *Velasco*, 953 F.2d at 1475. It would have helped avoid misleading the jury, and helped to ensure a fair and impartial understanding of the evidence. *Id.*

The evidence was at least minimally relevant under ER 401. *Salas*, 168 Wn.2d at 669. It was also highly probative, because it tended to establish Mr. Lozano's theory of the case and to disprove the state's theory. *Jones*, 168 Wn.2d at 721.

The exclusion of this evidence violated Mr. Lozano's right to cross examine Young. *Darden*, 145 Wn.2d at 620. It also violated his constitutional right to present his defense. *Holmes* 547 U.S. at 324. The error is presumed prejudicial. *Jones*, 168 Wn.2d at 724. Accordingly, his rape conviction must be reversed. *Id.* The charge must be remanded for a new trial, with instructions to admit the balance of his statement if any portion is introduced at trial. *Id.*; *Stallworth*, 19 Wn. App. 728, 734-735.

II. MR. LOZANO WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review.

Constitutional issues are reviewed *de novo*. *McDevitt*, at ____.

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a). Reversal is required if counsel's deficient performance prejudices the accused person. *Kyлло*, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

B. Mr. Lozano's attorney provided ineffective assistance by failing to propose instructions outlining his defense.

Counsel's performance is deficient if it (1) falls below an objective standard of reasonableness based on consideration of all of the circumstances and (2) cannot be justified as a tactical decision. U.S. Const. Amends. VI; XIV; *Kyлло*, 166 Wn.2d at 862. To be minimally competent, an attorney must research the relevant law. *Kyлло*, 166 Wn.2d at 862. The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that it affected the outcome of the proceedings. *Id.*

An accused person is denied a fair trial when defense counsel fails to properly present the person's defense to the jury. *State v. Powell*, 150 Wn. App. 139, 156, 206 P.3d 703 (2009). This includes failing to propose instructions necessary to his or her client's defense. *Powell*, 150 Wn. App. at 158.

Although there is a statutory defense to second-degree rape⁹ as charged in this case, “[c]onsent itself provides an additional, common law defense.” *State v. Weaville*, 162 Wn. App. 801, 819, 256 P.3d 426 (2011) (citing *State v. Camara*, 113 Wn.2d 631, 636–37, 781 P.2d 483 (1989)). Consent means that there are “actual words or conduct indicating freely given agreement” to have sexual intercourse. See WPIC 18.25; RCW 9A.44.010(7). An accused person must prove consent by a preponderance of the evidence. WPIC 18.25.

In this case, Mr. Lozano testified that A. B. initiated sexual contact by kissing him when he asked her if she wanted a blanket. As they kissed, she went on to remove her own clothing, and actively participated. RP(7/24/13) 317-340; Ex 8, Supp CP. By initiating the encounter, A. B. necessarily indicated her agreement to the encounter.

⁹ See RCW 9A.44.030(1). The prosecution proposed an instruction based on this statutory defense. Mr. Lozano did not object to the instruction.

Despite this, defense counsel failed to propose an instruction outlining the defense of consent. No instruction defined “consent” for the jury; nor were they instructed that actual consent is a defense. CP 106-114. Instead, Instruction 9, outlining the statutory “reasonable belief” defense, provided the only avenue for acquittal. CP 111. But this was not the defense Mr. Lozano was pursuing. Instead, as his testimony and counsel’s closing argument suggest, the defense was that she not only had the capacity to consent, but that she actually consented. RP (7/24/13) 238-254, 316-353; RP (7/25/13) 365-379, 423-439.

Defense counsel’s deficient performance prejudiced Mr. Lozano. Without the benefit of information about the affirmative defense, the jury was left believing that it could only acquit Mr. Lozano if it had a reasonable doubt about A. B.’s mental or physical state, or if it believed that Mr. Lozano had established the affirmative defense outlined in Instruction No. 9. The jury had no way to act on Mr. Lozano’s defense that A. B. actually initiated the encounter. Accordingly, there is a substantial likelihood that counsel’s failure to propose the instruction affected the verdict. *Kyllo*, 166 Wn.2d at 862.

Mr. Lozano’s attorney provided ineffective assistance of counsel by failing to properly raise an available affirmative defense. *Powell*, 150

Wn. App. at 156. Mr. Lozano's conviction must be reversed, and the case remanded for a new trial. *Id.*

CONCLUSION

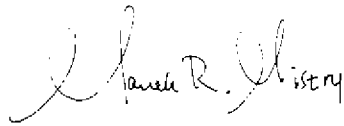
For the foregoing reasons, Mr. Lozano's conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on March 3, 2014,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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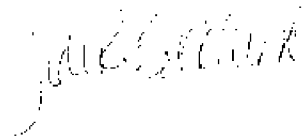
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 3, 2014.



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Transmittal Letter

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Case Name: State v. Marcos Lozano

Court of Appeals Case Number: 45242-1

Is this a Personal Restraint Petition? Yes No

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

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