

No. 72503-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

BERNARDO BASAVE,

Appellant.

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

BRIEF OF APPELLANT

JAN TRASEN
Attorney for Appellant

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

72503-3-1
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COURT APPELLATE
STATE OF WASHINGTON

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Rules

ER 40111
ER 40211

A. ASSIGNMENT OF ERROR

The trial court denied Mr. Basave his right to present a defense in violation of the Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington Constitution.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Sixth Amendment's guarantee of the right to present a defense and the Fourteenth Amendment guarantee of due process, along with similar guarantees of the Washington Constitution, are violated where a trial court bars a defendant from presenting relevant evidence. Washington courts have concluded that so long as evidence is minimally relevant, the refusal to admit violates a defendant's rights unless the State can establish the relevance is outweighed by potential prejudice to the fairness of the process. Where the trial court restricted cross-examination of State witnesses related to the alleged victim's motive to lie, did the court violate Mr. Basave's rights under the United States and Washington Constitutions?

C. STATEMENT OF THE CASE

Bernardo Basave and his wife, Ana Laura, are Mexican-American agricultural workers. 8/4/14 RP 8-12.¹ They have lived in Skagit County for many years, and up until shortly before the allegations in this case occurred, they shared a home with Ana Laura's brother, Gerardo S. and his wife, S.O.S.² The two families shared a residence which was owned by their employer at 7679 Worline Road in the town of Bow; the Basaves lived downstairs and S.O.S. and her family lived upstairs. Id. at 1-13. The Basave family lived with their two children, and the S. family with their five children. Id. at 9; 8/6/14 RP 127.

A few months before the alleged incident, the farm owner gave the Basave family the lease to the house next door, at 6611 Worline Road. 8/4/14 RP 13-15, 194-95. The Basaves' new house was bigger than the house in which the S. family remained. Id. at 194-95.

Now that the S. family remained alone in the smaller house, Ms. S. allowed her children to take the bedrooms upstairs, and she and her

¹ The verbatim report of proceedings is referred to by date. Because many of the individuals named in the proceedings are related by marriage, first names are used; no disrespect is intended.

² Due to the nature of the allegations, only the alleged victim's initials will be used, as well as those of her husband's last name.

husband took the downstairs bedroom. Id. at 14. This is the bedroom which had formerly belonged to Mr. Basave and Ana Laura. Id. at 14.

On, December 31, 2012, the S. family had a New Year's Eve party in their home. Id. at 17. Approximately 30 family members attended, and a great deal of tequila was consumed by the party-goers. Id. Ms. S. stated that she was intoxicated and that she could not remember leaving the party and returning to her room that night. Id. at 19. She also stated that Mr. Basave was drinking, as was her husband, Gerardo. Id. at 18. Ms. S. later reported that she felt someone pulling on her hair and believed she had been pressed against the bed, and that the person's hands had been near her stomach. Id. at 19-20. She could not see the person and could not remember anything else. Id. at 20-21.

Ms. S.'s teenaged daughter, Jessica,³ stated that she remembered seeing her mother acting intoxicated at the party, and that she had taken her downstairs to her bedroom to go to sleep. 8/4/14 RP 168-71. At approximately 3:00 or 4:00 a.m., after the party guests had gone home, Ms. S.'s teenaged son, Agustin, went to check on Ms. S. because he heard a noise in her room, as if something had fallen. Id. 86. He saw

³ Ms. S.'s daughter's name is variously spelled "Yesica" and "Jessica" in the record.

his mother crying and saw his uncle, Mr. Basave, standing in her room without any pants. Id. at 86-87.

Agustin and Jessica assisted Ms. S., and Mr. Basave left through the living room, where Mr. S. was still apparently passed out on the living room sofa. Id. at 90-92. Ms. S. rested, then woke up the next day and showered. Id. at 23. She also showered the following day and laundered all of her clothing and bed linens. Id. at 27-29. Ms. S. told Jessica that “she felt like something had happened to her, because when you’re a woman, you know when something happens, and that her body was really sore.” Id. at 180. She did not tell Jessica she believed she had been raped.

On January 3rd, Ms. S. reported to the police that she believed “someone had done something to me” after the New Year’s Eve party. Id. at 23 (description of incident at trial), 51-52. Ms. S. did not tell the police on January 3rd that she thought she had been raped. Id. 52. In addition, Ms. S. lied to the police about the whereabouts of her husband, Geraldo S., stating they were separated and had not had sexual relations for over a month. 8/4/14 RP 25, 49, 63-66. She also told the police that her husband lived abroad. 8/4/14 RP 25, 49, 63-66. Ms. S. insisted that her children lie to the police, as well as to the

prosecutor's and defense counsel's offices on her behalf. Id. at 165-67, 186-88, 194-95.⁴ Once Ms. S. finally revealed her husband's location, he was asked to provide a DNA sample. Id. at 154.

A few days after the party, Ms. S. went to a local hospital at the suggestion of the police, and was examined by a Sexual Assault Nurse Examiner (SANE). 8/4/14 RP 51-52, 110. At both appointments, Ms. S. was accompanied by her daughter, Jessica, who interpreted for her at times. Id. at 50, 55. The State also provided an interpreter for Ms. S. to use at defense interviews. Id. at 51.

In Ms. S.'s examination and interview with the SANE nurse, no injuries were noted. Id. at 124-25. At this appointment, Ms. S. told the nurse there had been vaginal penetration, although Ms. S. had not told the police about this when she made her police report earlier that same day. Id. at 52.

A small amount of DNA was recovered from the sexual assault kit, which was sent to the Washington State Crime Lab. 8/4/14 RP 155; 8/6/14 RP 37-38. Only one spermatozoon was recovered from the kit. 8/6/14 RP 39. This one spermatozoon was recovered from the

⁴ Ms. S. later revealed that her husband had a warrant for his arrest, stemming from several arrests for DUI and other matters. 8/4/14 RP 63. After Ms. S. revealed the truth about Mr. S.'s whereabouts, he was arrested and Ms. S. posted his bail. Id.

perineal sample; none were recovered from the vaginal sample or from any other samples taken, including the clothing. Id. at 38-39. The DNA extracted from the single spermatozoon revealed a mixed-DNA profile. Id. at 44. This indicated at least two individual contributors, male and female, with a possible trace contributor present. Id.

The State's expert testified at trial that the female component matched the DNA profile obtained from Ms. S., while the male component matched that of Mr. S., once his DNA profile was obtained. Id. at 45, 57. The third possible trace contributor, according to the State's expert, was consistent with the known profiles of Ms. S., Mr. S., and Mr. Basave. Id. at 58. The State's expert calculated that it was 14,000 times more likely that the mixed DNA profile occurred as a result of these three individuals, than had it occurred from only Ms. S., Mr. S., and a third unrelated individual selected at random from the United States population. Id.

Mr. Basave was charged with rape in the second and third degrees. CP 1-2.

Following trial, the jury found Mr. Basave guilty as charged; however, the trial court vacated the third degree rape conviction as violative of double jeopardy provisions. CP 47-60.

D. ARGUMENT

THE TRIAL COURT'S EXCLUSION OF RELEVANT EVIDENCE DEPRIVED MR. BASAVE OF HIS SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE

- a. The Sixth Amendment guarantees an individual the right to present a defense.

The Sixth Amendment guarantees a defendant the right to present a defense. Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). A defendant must receive the opportunity to present his version of the facts to the jury so that it may decide “where the truth lies.” 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); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). “[A]t a minimum . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt.” Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

So long as evidence is minimally relevant,

“. . . the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” The State's interest in excluding prejudicial evidence must also “be balanced against the defendant's need for the information sought,” and

relevant information can be withheld only “if the State's interest outweighs the defendant's need.”

Jones, 168 Wn.2d at 720 (quoting State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)) (internal citations omitted).

- b. The trial court may not arbitrarily abridge a criminal defendant's constitutional right to cross-examine a witness.

A criminal defendant's right to confront the witnesses against him is guaranteed by both the United States⁵ and the Washington Constitutions.⁶ In addition, the right to confront witnesses has long been recognized as essential to due process.⁷ Chambers, 410 U.S. at 294.

The main and essential purpose of confrontation is to secure the opportunity for meaningful cross-examination of adverse witnesses.

Davis, 415 U.S. at 315. The purpose of cross-examination is to test the

⁵ The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor.”

⁶ Article 1, section 22 of the Washington Constitution guarantees that “[i]n all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face, [and] to have compulsory process to compel the attendance of witnesses in his own behalf.”

⁷ The Fourteenth Amendment provides no state shall “deprive any person of life, liberty, or property, without due process of law.”

perception, memory and credibility of the witness. Id. at 316.

Confrontation therefore helps assure the accuracy of the fact-finding process. Chambers, 410 U.S. at 295. Whenever the right to confront is denied, the ultimate integrity of the fact-finding process is called into question. Id.

A defendant's constitutional right to confrontation is violated where he is unreasonably precluded from cross-examining a witness on a subject that is probative of the witness's motive to lie. Olden v. Kentucky, 488 U.S. 227, 231-32, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988). The defendant must be allowed to conduct reasonable cross-examination on a subject relevant to the witness's motive to lie, even if the subject matter is potentially inflammatory to the jury. Id. Such cross-examination is designed to expose a witness's motivation in testifying and thereby "expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." Id. at 231 (quoting Davis, 415 U.S. at 316-17); Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

c. The excluded evidence was relevant and admissible in this case.

Shortly before these accusations, Mr. Basave had lived at No. 6611 Worline Road, in the larger of the two houses. 8/4/14 RP 49, 194-95. At trial, counsel for Mr. Basave had already established that Ms. S. and her husband had five children, and they were living in the smaller house located at 7679 Worline Road. Id. at 194-95. Shortly after Ms. S. accused Mr. Basave of rape, Ms. S.'s family took over the Basaves' larger house at 6611 Worline Road and began living there. Id. at 12-13, 49 (stating the S. family moved next door around February 2013, but Ana Laura Basave, the accused's wife, had moved out "about a month before I moved in").

That Ms. S. and her family gained a new and larger house after reporting these allegations was undisputed. However, Mr. Basave's ability to inquire about Ms. S.'s motivation in making the accusation was impermissibly limited by the trial court. 8/4/14 RP 194-95.

Mr. Basave first attempted to ask Jessica whether her parents had wanted to move into the house at 6611 Worline Road because it was larger; the State's objection was sustained. 8/4/14 RP 195. Mr. Basave then asked whether Jessica knew who currently lives at the (smaller) 7679 Worline house; she answered "yes." Id. All further

inquiry was precluded, following an unreported bench conference. Id. The record contains no judicial findings pertaining to the court's exclusion of this testimony.

The court rejected, without explanation or findings, the notion that under ER 401 and 402, Mr. Basave was permitted to offer evidence tending to show Ms. S. had a motive to lie. The trial court was required to apply the standard set forth in Jones -- specifically, that the evidence regarding the two houses was admissible, unless it was "so prejudicial as to disrupt the fairness of the fact-finding process at trial" and that this prejudice outweighed Mr. Basave's need for the evidence. See Jones, 168 Wn.2d at 720. The State did not meet that burden. The State made no showing of prejudice at all, much less a showing that admission of this relevant evidence would upset the fairness of the proceeding. The trial court's erroneous ruling deprived Mr. Basave of his right under the Sixth Amendment and Article 1, section 22 to present a defense and his right of confrontation.

In addition to the excluded testimony about the two houses, Mr. Basave was prevented from presenting testimony about Ms. S.'s other motivation to lie about being attacked by Mr. Basave. Counsel for Mr. Basave asked Agustin, Ms. S.'s teenaged son, whether his mother was

attempting to gain American citizenship by reporting this domestic violence rape allegation. 8/4/14 RP 101. Although defense counsel had a good faith basis for asking these citizenship questions, the court precluded this inquiry at trial, as well. See Jones, 168 Wn.2d at 720.⁸

d. This Court should reverse Mr. Basave's conviction so that he may have a trial that satisfies his right to present a defense and his right to due process.

A constitutional error requires reversal unless the State can establish beyond a reasonable doubt the error “did not contribute to the verdict obtained.” Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); United States v. Neder, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). To meet its burden here, the State must prove beyond a reasonable doubt that none of the jurors could have entertained a doubt as to Mr. Basave's guilt after hearing evidence that Ms. S. had reason to fabricate this alleged rape due to other motivations, specifically, her desire for a larger home, and her hopes of gaining American citizenship – both motivations she had expressed to family members. The State simply cannot meet that standard here, and this Court should reverse Mr. Basave's conviction.

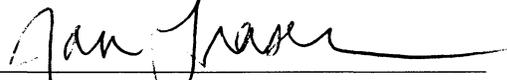
⁸ The single question that Agustin was permitted to answer revealed that Agustin had answered affirmatively concerning his mother's motivations regarding citizenship, during a defense interview. 8/4/14 RP 101.

E. CONCLUSION

For the reasons stated above, Mr. Basave respectfully asks this Court to reverse his conviction and remand for a new trial.

DATED this 4th day of March, 2015.

Respectfully submitted,



JAN TRASEN (WSBA 41177)
Washington Appellate Project (WSBA 91052)
Attorney for Appellant

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DIVISION ONE**

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Respondent,)	
)	NO. 72503-3-I
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BERNARDO BASAVE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF MARCH, 2015, 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:

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SKAGIT COUNTY PROSECUTOR'S OFFICE
COURTHOUSE ANNEX
605 S THIRD ST.
MOUNT VERNON, WA 98273 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| [X] BERNARDO BASAVE
376634
AIRWAY HEIGHTS CORRECTIONS CENTER
PO BOX 2049
AIRWAY HEIGHTS, WA 99001 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF MARCH, 2015.

X _____ 

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