

No. 44992-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Francisco Castro,

Appellant.

Mason County Superior Court Cause No. 12-1-00412-9

The Honorable Judge Amber L. Finlay

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Castro's bail jumping conviction violated his Fourteenth Amendment right to due process.
2. Mr. Castro's bail jumping conviction was based on insufficient evidence.
3. The prosecution failed to prove that Mr. Castro was released by court order or admitted to bail.
4. The prosecution failed to prove that, at the time he was allegedly released by court order or admitted to bail, Mr. Castro had knowledge that he was required to personally appear in court.

ISSUE 1: A conviction for bail jumping requires proof that the accused person was released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance. Here, the prosecution failed to present evidence establishing that Mr. Castro was released by court order or admitted to bail, or that he knew, at the time of any order releasing him or setting bail, that he was required to personally appear in court. Was the evidence insufficient to prove bail jumping beyond a reasonable doubt?

5. Mr. Castro was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
6. Defense counsel provided ineffective assistance by failing to call a witness critical to Mr. Castro's case.

ISSUE 2: An accused person is guaranteed the effective assistance of counsel. Here, defense counsel unreasonably failed to call a witness who could have corroborated Mr. Castro's claim that he'd appeared for court on December 24th. Did counsel's deficient performance prejudice Mr. Castro in violation of his Sixth and Fourteenth Amendment right to counsel?

7. The trial court abused its discretion by allowing the state to introduce extrinsic evidence for impeachment on a collateral matter.
8. The trial court abused its discretion by allowing the state to call Fox to testify that she did not have sex with Mr. Castro on October 7th.
9. The trial court abused its discretion by allowing the state to call Fox's friend to testify that Fox did not have sex with Mr. Castro on October 7th.

ISSUE 3: A party may not introduce extrinsic evidence to impeach a witness on a collateral matter. Here, the trial judge allowed the state to call Fox and her friend to testify that Fox did not have sex with Mr. Castro on October 7th. Did the trial court abuse its discretion by allowing the state to introduce extrinsic evidence to impeach Mr. Castro on a collateral matter?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Francisco Castro and Jennifer Fox were married in 2007. They had two children. By the fall of 2012, they had separated. RP 29-30.

In the early morning hours of October 8, 2012, someone drove Fox's Lexus into a lake. She did not see who had done it, but accused Mr. Castro. He denied the allegation. RP 30-36, 38-39, 78.

The state charged Mr. Castro with Malicious Mischief in the First Degree. CP 19. A hearing was set for Christmas Eve, December 24, 2012. RP 62-64. Mr. Castro appeared, but found the courtroom closed. RP 80. He asked the clerk at the counter what he should do. RP 80-81. The clerk's office has a general practice in such situations. When a person comes to court and his or her attorney isn't in the courtroom, the clerk's office tells the person to call the attorney about quashing a warrant. RP 68-70. Mr. Castro was given this information when he asked at the clerk's office. RP 68, 70.

The court had issued a warrant for Mr. Castro on December 24th. Mr. Castro appeared with counsel the next court date, December 26, 2012. He quashed the warrant. RP 64-65, 75-76; Ex. 14.

The state added a charge of Bail Jumping. CP 19-20. At trial, Mr. Castro's defense attorney told the court that he had interviewed the clerk

who spoke with Mr. Castro when he came to the counter. She confirmed that she had spoken to Mr. Castro and acknowledged that she had told him to contact his attorney and instructed him on how to quash his warrant. RP 70. Counsel told the court that the clerk wasn't sure about the date of her conversation with Mr. Castro. As a result, counsel said, he could not call the clerk as a witness. RP 70.

The prosecutor called the in-court clerk who'd assisted at the Christmas Eve hearing. RP 62-77. No questions were asked about Mr. Castro's release or whether he was admitted to bail. RP 62-77. The state did not introduce a release order, or an order setting bail. The prosecution did introduce a setting notice from December 24th. Ex. 9. The notice did not indicate that Mr. Castro had been released by court order or admitted to bail. Ex. 9.

Mr. Castro testified that he had not gone to Fox's on October 8th. RP 78, 80. He said that his relationship with Fox had not been characterized by hostility at the time. Instead, Fox had been trying to reunite with him. RP 78-79. On the night of October 7th, Fox had come to his house. They had played with their children, eaten dinner together, and made love. RP 83-84.

Over defense objection, the state recalled Fox. RP 86-87, 101. She claimed that she had dinner with a friend on October 7th. She denied

having dinner with Mr. Castro, having a nice evening with him, having sex with him, or playing with their children together. RP 101-103. Also over defense objection, the state also called the friend that Fox said she had dinner with. The friend supported Fox's version of events the night before the incident. RP 95, 105-108.

The jury convicted Mr. Castro on both counts. After sentencing, he timely appealed. CP 5-18, 4.

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MR. CASTRO OF BAIL JUMPING.

A. Standard of Review.

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied*, 176 Wn.2d 1003, 297 P.3d 67 (2013).

B. No rational jury could have found beyond a reasonable doubt that Mr. Castro had been released by court order or admitted to bail with knowledge of a required subsequent personal appearance.

In order to support a conviction for bail jumping, the state must prove that the accused has:

... been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state...

RCW 9A.76.170(1). Under the plain language of the statute, the state must prove that the accused person knew of the requirement of a subsequent personal appearance when released by court order or admitted to bail. The state's evidence was deficient in two respects.

First, the state presented insufficient evidence that Mr. Castro had been released by court order or admitted to bail. The court clerk did not testify regarding any order releasing Mr. Castro or setting bail in his case. RP 62-77. Nor did the state offer such an order into evidence. RP 62-77.¹ No rational trier of fact could have found beyond a reasonable doubt that Mr. Castro had been released by court order or admitted to bail. RCW 9A.76.170(1); *Chouinard*, 169 Wn. App. at 899.

Second, the prosecutor did not present any evidence that Mr. Castro knew he was required to personally appear in court when he was released by court order or admitted to bail. RCW 9A.76.170(1) (emphasis added). The state introduced a notice showing that Mr. Castro was told he was required to be in court on December 24th. Ex. 9. The notice does not indicate that Mr. Castro was in custody when the hearings were set. It does

¹ The clerk's minutes mention that the state asked for forfeiture of Mr. Castro's bail. Ex. 10. A request by the prosecutor, however, does not establish that the court took the necessary action of releasing Mr. Castro by court order or admitting him to bail.

not show that he had ever been in custody. Ex. 9. The notice does not say anything about bail. Ex. 9. The state presented no other evidence regarding what Mr. Castro knew when he was allegedly released by court order or admitted to bail. No rational trier of fact could have found beyond a reasonable doubt that Mr. Castro was released by court order or admitted to bail with knowledge of a required subsequent appearance.

The state presented insufficient evidence to convict Mr. Castro of bail jumping. *Chouinard*, 169 Wn. App. at 899. His conviction must be reversed. *Id.*

II. MR. CASTRO RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review.

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kylo*, 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. *Kylo*, 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. Defense counsel provided effective assistance by failing to call a witness critical to Mr. Castro's 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. Amend VI; *Kyllo*, 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.*

Counsel provides ineffective assistance by failing to offer admissible testimony that is necessary to the defense. *State v. Horton*, 116 Wn. App. 909, 920, 68 P.3d 1145 (2003).

Mr. Castro testified that he was present in the courthouse on the day of his scheduled hearing but was unable to locate his attorney. RP 80. He spoke to a clerk named Vicki.² She told him to call his attorney and come back on the next court day to quash the warrant. He did so. RP 80-81.

Testimony from Vicki would have confirmed Mr. Castro's testimony that he appeared for court. Defense counsel spoke to her and confirmed Mr. Castro's version of events. RP 70. However, counsel did

² No disrespect is intended by the use of the clerk's first name. Her last name does not appear in the record.

not call her as a witness. RP 70. Counsel stated that he could not call Vicki to testify because she did not remember the date that she had interacted with Mr. Castro. RP 70.

Defense counsel's failure to offer Vicki's testimony constituted deficient performance. *Horton*, 116 Wn. App. at 920. There was no valid tactical justification for the failure. *Kyllo*, 166 Wn.2d at 862. The justification counsel proffered – that Vicki could not remember the date of her interaction with Mr. Castro – was not reasonable. Vicki's testimony was more than minimally relevant even without the date. ER 401, 402. She could have testified that she spoke with Mr. Castro on a day that he was in court and his attorney was absent. This would have created the reasonable inference that it was the day on which he was charged with failing to appear.

In order to convict Mr. Castro of bail jumping, the state had to prove that he did not appear for court. RCW 9A.76.170. Vicki's testimony would have corroborated Mr. Castro's assertion that he did appear for court. Defense counsel's failure to introduce Vicki's testimony fell below an objective standard of reasonableness. *Kyllo*, 166 Wn.2d at 862.

Mr. Castro was prejudiced by his attorney's deficient performance. *Kyllo*, 166 Wn.2d at 862. Without Vicki's testimony, the jury was left

only with Mr. Castro's statement that he'd appeared for court. The prosecutor introduced evidence to impeach Mr. Castro's credibility.³ Absent corroboration, it is likely that the jury did not believe Mr. Castro's assertion that he appeared for court. There is a substantial likelihood that defense counsel's failure to introduce Vicki's testimony affected the verdict. *Kyllo*, 166 Wn.2d at 862.

Mr. Castro's defense attorney provided ineffective assistance by failing to introduce testimony that was necessary to his defense. *Id.* Mr. Castro's conviction must be reversed. *Id.*

III. THE COURT ERRED BY ADMITTING EXTRINSIC EVIDENCE TO IMPEACH MR. CASTRO ON COLLATERAL MATTERS.

A. Standard of Review.

A court's decision to admit evidence is reviewed for abuse of discretion. *State v. Fuller*, 169 Wn. App. 797, 828, 282 P.3d 126 (2012) *review denied*, 176 Wn.2d 1006, 297 P.3d 68 (2013). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Robbins v. Legacy Health Sys., Inc.*, 43666-3-II, --- Wn. App. ---, 2013 WL 5728111 (Oct. 22, 2013).

³ As argued elsewhere in this brief, the court erred by permitting the prosecutor to introduce extrinsic evidence to impeach Mr. Castro on collateral matters.

B. The court abused its discretion by permitting the state to introduce extrinsic evidence to impeach Mr. Castro's testimony that he and Fox had sex the night before the incident.

A party may not introduce extrinsic evidence to impeach a witness on a collateral matter. *State v. Fisher*, 165 Wn.2d 727, 750, 202 P.3d 937 (2009); ER 402. A matter is collateral if it would not be admissible for a purpose other than impeachment. *State v. Fankhouser*, 133 Wn. App. 689, 693, 138 P.3d 140 (2006). Improper admission of evidence requires reversal if there is a reasonable probability that it materially affected the outcome of the case. *Fuller*, 169 Wn. App. at 831.

Mr. Castro testified that he and Fox spent time together and had sex the night before the car appeared in the lake. RP 84. Over his objection, the court permitted the state to call Fox in rebuttal to say that she had not had sex with Mr. Castro that night. RP 86-87, 101. Also over Mr. Castro's objection, the court allowed the state to call Fox's friend, who was with her that night, to say that Fox was only in Mr. Castro's house for ten to fifteen minutes. RP 86-87, 106.

Whether Mr. Castro and Fox had had sex the night before the incident was not admissible for any reason other than impeachment. ER 401, 402. The matter was purely collateral and the state should not have been permitted to impeach Mr. Castro with extrinsic evidence. *Fankhouser*, 133 Wn. App. at 693; *Fisher*, 165 Wn.2d at 750. The court's

decision to permit the state to use extrinsic evidence to impeach Mr. Castro regarding whether he had slept with Fox was manifestly unreasonable.

Mr. Castro was prejudiced by the improper admission of evidence. *Fuller*, 169 Wn. App. at 831. The case was a pure credibility contest. There was no physical evidence linking Mr. Castro to the car in the lake. The use of extrinsic evidence to impeach Mr. Castro on a collateral matter undermined his credibility in the eyes of the jury. There is a reasonable probability that the court's error affected the outcome. *Fuller*, 169 Wn. App. at 831.

The court abused its discretion by permitting the state to introduce extrinsic evidence to impeach Mr. Castro on a collateral matter. *Fisher*, 165 Wn.2d at 750. The error prejudiced him. *Fuller*, 169 Wn. App. at 831. Mr. Castro's convictions must be reversed. *Id.*

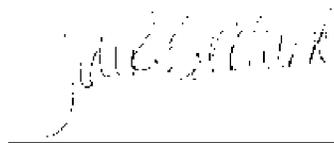
CONCLUSION

The state presented insufficient evidence to convict Mr. Castro of bail jumping. Mr. Castro's defense attorney provided ineffective assistance by failing to introduce testimony necessary to his defense. The court committed prejudicial error by permitting the state to introduce extrinsic evidence to impeach Mr. Castro on a collateral matter. Mr.

Castro's convictions must be reversed. The bail jumping charge must be dismissed with prejudice.

Respectfully submitted on November 4, 2013,

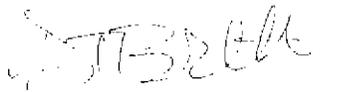
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CERTIFICATE OF SERVICE

I certify that on today's date:

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

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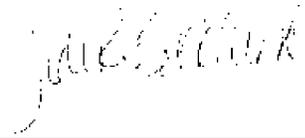
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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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 November 4, 2013.



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BACKLUND & MISTRY

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