

No. 47480-8-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

MARCOS A. APODACA,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 14-1-04610-5  
The Honorable Stanley Rumbaugh, Judge

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OPENING BRIEF OF APPELLANT

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STEPHANIE C. CUNNINGHAM  
Attorney for Appellant  
WSBA No. 26436

4616 25th Avenue NE, No. 552  
Seattle, Washington 98105  
Phone (206) 526-5001

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court violated Marcos Apodaca's constitutional right to present a defense by prohibiting defense counsel from questioning the alleged victim about her potential bias and motive to fabricate the allegations against Apodaca.
2. The trial court abused its discretion when it found that evidence showing that the alleged victim had a motive to fabricate the allegations was of minimal relevance.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Did the trial court abuse its discretion, and violate Marcos Apodaca's constitutional right to present a defense, when it found that evidence showing the alleged victim had a motive to fabricate the allegations was minimally relevant, and its relevance did not outweigh the risk of undue prejudice or waste of time, where the jury's determination rested entirely on whether it believed Apodaca or the alleged victim?  
(Assignments of Error 1 & 2)

## **III. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

The State charged Marcos Apodaca with one count of theft of a motor vehicle (RCW 9A.56.020(1)(a), .065) and one count of

violation of a no contact order (RCW 26.50.110(1)). (CP 25-26) The State also alleged that the offenses were domestic violence incidents. (CP 25-26) The jury convicted Apodaca of the substantive crimes, but rejected the domestic violence allegations. (CP 56-58; 4RP 3-4)<sup>1</sup> The trial court rejected Apodaca's request for a sentence under the special drug offender alternative. (5RP 13, 17) The court imposed a sentence within Apodaca's standard range, and ordered him to pay only the mandatory legal financial obligations. (CP 60-61, 152, 153, 155, 161-65; 5RP 18) This appeal timely follows. (CP 166)

#### B. SUBSTANTIVE FACTS

Marcos Apodaca and Sabra Kelly met in July of 2012 and began dating. (3RP 37-38) Apodaca would often spend the night at Kelly's home, but they never lived together. (3RP 38-39) The relationship ended in late 2013 or early 2014. (3RP 39) But, according to Kelly, Apodaca continued to contact her after they broke up. (3RP 39-40)

Kelly testified that she was at home and in the shower on the afternoon of November 16, 2014, when she heard what sounded

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<sup>1</sup> The trial transcripts labeled volumes I through V will be referred to by their volume number (#RP). The remaining transcript will be referred to by the date of the proceeding.

like the garage door opening and her car being started. (3RP 40) She ran into her bedroom and saw that her car keys, which she had thrown on the bedroom floor, were no longer there. (3RP 42-43) She looked out the window and saw Apodaca sitting in the driver's seat of her car, a blue 1999 Mercedes-Benz, and then watched as he backed the car out of her driveway. (3RP 43) Kelly ran outside and yelled at him to stop, but Apodaca continued to drive away. (3RP 43-44) Kelly went back inside the house and called 911 to report that her car had been stolen. (2RP 103; 3RP 44; Exh. P1)

Apodaca had driven Kelly's car with her permission many times when they were dating. (3RP 45) However, Kelly testified that she had not invited Apodaca to her house on November 16 and had not given him permission to drive her car that day. (3RP 44, 45)

Kelly also reached out through social media for information on the whereabouts of Apodaca or her car. (3RP 53) The next day, she received a tip from a friend that Apodaca was staying at a house near Pacific Lutheran University. (3RP 49-50) Kelly and her friend, Doug Stenge, drove to the area and on the way they saw Kelly's car in a parking lot on the university campus. (3RP 55) Kelly did not have keys to the car, so she and Stenge continued to

the house, which was about two blocks away. (3RP 56)

When they arrived, Kelly saw Apodaca through the living room window, so she banged on the door and demanded to talk to him. (3RP 57-58) Apodaca came to the door and Kelly told him to return her car keys. (3RP 58) Apodaca gave Kelly the keys, then she returned to her car and again called the police. (3RP 58)

Pierce County Sheriff's Deputies Inga Carpenter and Alexa Moss responded and contacted Kelly. (2RP 112, 113, 124) Kelly showed them the car, and told them where Apodaca was staying. (2RP 113, 114, 125, 129-30) The Deputies went to that house and contacted Apodaca. (2RP 114, 126) At first, Apodaca told the Deputies that he had not seen Kelly for several weeks and that he had not taken her car. (2RP 116, 127) Apodaca later told the Deputies that he had spent the night at Kelly's and that she refused to drive him home in the morning, so he took the car and drove himself home. (2RP 117, 128-29) Apodaca did not intend to steal Kelly's car. (2RP 117)

At arraignment, the trial court entered a protective order prohibiting Apodaca from contacting Kelly. (3RP 61-62; Exh. P8) Kelly testified that she received a phone call on February 19, 2015, from the Pierce County Jail. (3RP 64, 66) The automated

message identified the caller as someone other than Apodaca. (3RP 66) According to Kelly, she said “who is this,” and a voice she recognized as Apodaca’s answered “You know who this is.” (3RP 66-67) A Pierce County corrections officer testified that several calls were placed to Kelly’s phone number on February 19, 2015, but were all placed using a pin number associated with an inmate named Benjamin Morrison. (2RP 132, 142-43, 145)

Apodaca was at Beverly Wilcoxson’s house on November 17, 2014, when Kelly came to find him. (3RP 26, 27, 28) Wilcoxson heard Kelly knock on the door and ask Apodaca for her keys. (3RP 28) Wilcoxson testified that the incident was uneventful, and that Apodaca was acting normal and not at all agitated either before or after his contact with Kelly. (3RP 27, 29-30) She also testified that Kelly came to her home several months earlier also asking Apodaca for her car keys. (3RP 30-31)

Apodaca testified that he rode his bicycle to Kelly’s house on November 15, to help her shampoo the carpets. (3RP 87, 89) They had sex, and Apodaca spent the night. (3RP 87, 89, 107-08) The next morning they awoke late, and Apodaca asked Kelly to give him a ride so he could run errands. (3RP 89) Kelly was in the shower at the time, and Apodaca heard her yell “You’ve got my

keys.” (3RP 90) He had driven Kelly’s car with her permission in the past, so he assumed Kelly was telling him to take the keys and drive himself. (3RP 90, 97) He believed, when he left in Kelly’s car, that he had her permission to take it. (3RP 91)

Apodaca also testified that he parked her car at the university parking lot near Wilcoxson’s house because Wilcoxson does not like Kelly. (3RP 91-92) The next day, Kelly came to get her keys and he returned them to her. (3RP 92) He did not recall making the statements to the Deputies that they attributed to him. (3RP 94-95)

#### **IV. ARGUMENT & AUTHORITIES**

A defendant seeking to present evidence must show that the evidence is at least minimally relevant to a fact at issue in the case. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); ER 402. 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. Facts tending to establish a party’s theory of the case will generally be found to be relevant. State v. Mak, 105 Wn.2d 692, 703, 718 P.2d 407 (1986). However, relevant evidence may be excluded if “its probative value is substantially outweighed

by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” ER 403.

Aside from the court rules, however, a defendant in a criminal case also has a constitutional right to present a defense and to present his version of the facts. State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984); State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992); Washington v. Texas, 388 U.S. 14, 17-19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); U.S. Const. amend. VI; Wash. Const. art. 1, § 22.

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington, 388 U.S. at 19.

In this case, Apodaca's defense was that he had permission to take Kelly's car and that Kelly fabricated the allegation. (3RP 14, 91) Apodaca sought to introduce evidence that Doug Stenge was her "male benefactor," and that Kelly knew he would be angry and

potentially stop supporting her if he knew she was still seeing Apodaca and knew she loaned Apodaca her car. (3RP 14) Apodaca's attorney explained that Apodaca had first-hand knowledge of this relationship, and that the defense had documentation showing that Stenge owned the home that Kelly lived in at the time of the incident. (3RP 14, 17) Apodaca argued that Kelly's credibility was vital to the jury's determination of the case, and that the dynamic of Kelly and Stenge's relationship provided a motive for Kelly to fabricate the allegation that Apodaca stole her vehicle. (3RP 14, 16-17, 18)

The trial court refused to allow this line of inquiry, stating: "[I]t would provide some motivation for Ms. Kelly to falsify her testimony. I just think that on balance I don't like it. It takes us too far afield from the actual event of [November] the 17th." (3RP 15-16) The court, after being reminded that Kelly's credibility would be an important issue in this case, stated: "Well, credibility is always an integral part of the jury's contemplation. I think that just inquiring into the nature of other relationships and who owns the house and does she pay rent there and what are the circumstances, it may have some marginal relevance. But under the 403 balancing test, I don't think you're there." (3RP 18)

The trial court's decision on the admissibility of evidence is reviewed for abuse of discretion. See State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). The trial court in this court abused its discretion, because the evidence Apodaca sought to admit met the low threshold of relevance under ER 401, and its probative value outweighed any slight danger of unfair prejudice or confusion under ER 403.

Impeachment evidence is relevant where "(1) it tends to cast doubt on the credibility of the person being impeached, and (2) the credibility of the person being impeached is a fact of consequence to the action." State v. Allen S., 98 Wn. App. 452, 459-60, 989 P.2d 1222 (1999). With regard to the first requirement, evidence that Kelly could lose her source of financial support if that source learned that she spent time with and loaned her car to Apodaca, tended to establish Kelly's potential motive to fabricate the allegations against Apodaca and, thus, was relevant to challenge her credibility. See, e.g., State v. Lubers, 81 Wn. App. 614, 623, 915 P.2d 1157 (1996) (Where an accuser's credibility is crucial, the accuser's motive to lie is not a collateral issue and, thus, extrinsic evidence may be used to impeach the accuser).

With regard to the second requirement, Kelly's credibility was clearly a fact of consequence in the proceeding against Apodaca, because the State's entire case depended on the jury believing her accusations. See State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980) ("Where a case stands or falls on the jury's belief or disbelief of essentially one witness, that witness's credibility or motive must be subject to close scrutiny"). Because the evidence Apodaca sought to admit related to Kelly's credibility, and because Kelly's credibility was a fact of consequence in the trial, the evidence clearly met the test for relevance under ER 401.

If the defendant establishes the minimal relevance of the evidence sought to be presented, the burden shifts to the State "to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). A trial court must then balance "the State's interest to exclude prejudicial evidence ... against the defendant's need for the information sought," and may exclude such evidence only where "the State's interest outweighs the defendant's need." Darden, 145 Wn.2d at 622.

The State's only objection was that the testimony was impermissible character evidence. (3RP 13) But evidence of a

witness' "character for truthfulness or untruthfulness" is admissible under ER 608.<sup>2</sup> And evidence of a witness' bad acts or unpopular behavior are admissible under ER 404 if relevant to assessing a witness' credibility.<sup>3</sup> See State v. Grant, 83 Wn. App. 98, 106, 920 P.2d 609 (1996) (finding bad acts admissible under ER 404(b) because they were relevant and necessary to assess the victim's credibility as a witness). So the State's evidentiary objections were not well founded. Furthermore, the State did not make any argument below that this evidence was prejudicial, or that any prejudice outweighed the relevance to Apodaca's defense.

The trial court's determination that any prejudice outweighed the highly relevant nature of this evidence was an abuse of discretion. The court's belief that evidence showing Kelly had a

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<sup>2</sup> ER 608 states, in relevant part:

**(a) Reputation Evidence of Character.** The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness....

**(b) Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility ... may ... if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness....

<sup>3</sup> ER 404 states, in relevant part:

**(b) Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

motive to fabricate “takes us too far afield” was simply incorrect. The State’s case rested entirely on whether the jury believed Kelly’s version of events. Evidence that Kelly was, at the time of the allegation, dating and financially supported by another man who was prone to jealousy, was not tangential. It was critical evidence that the jury needed to hear in order to make a fully informed decision.

The relevance of this evidence, coupled with Apodaca’s constitutionally protected right to present evidence in his defense, far outweighs any danger that the evidence would be a waste of the court’s time. And because the determination of Apodaca’s guilt or innocence rested entirely on whether the jury believed Kelly or Apodaca, it is clear the error was prejudicial. Apodaca’s conviction must therefore be reversed.

## **V. CONCLUSION**

The trial court abused its discretion, and violated Apodaca’s constitutional right to present a defense, when it refused to allow Apodaca to present evidence showing Kelly had a motive to fabricate the allegations—on the ground that it was only minimally relevant—because the jury’s opinion of Kelly’s credibility was crucial to the outcome of Apodaca’s trial. Apodaca’s convictions

should be reversed, and his case remanded for a new trial.

DATED: November 16, 2015



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STEPHANIE C. CUNNINGHAM

WSB #26436

Attorney for Marcos A. Apodaca

**CERTIFICATE OF MAILING**

I certify that on 11/16/2015, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Marcos A. Apodaca, DOC# 786736, Cedar Creek Corrections Center, PO Box 37, Littlerock, WA 98556-0037.



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STEPHANIE C. CUNNINGHAM, WSBA #26436

# CUNNINGHAM LAW OFFICE

**November 16, 2015 - 9:35 AM**

## Transmittal Letter

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