

FILED

APR 28, 2016

Court of Appeals
Division III
State of Washington

COA No. 32968-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ERNEST GLASGOW BARELA, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY

The Honorable Michael McCarthy

REPLY BRIEF

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A. SUMMARY OF APPEAL

The State understandably emphasizes in its Brief of Respondent that Mr. Barela's counsel did not object to the make-up of the jury after it was selected, such as by means of a motion to strike the panel, if defense counsel believed that the jury panel's "delayed reporting" discussion had irreparably tainted it. See BOR, at pp. 12, 15-16.

However, Mr. Barela's appeal invokes the Cumulative Error doctrine, under which all errors, including imperfectly preserved errors, can be considered by this Court in assessing whether the defendant's trial, as a whole, was unfair. AOB, at pp. 20-26.

Mr. Barela, on appeal, focuses most closely on two particular errors – the tainted jury panel, and Detective's Janis's trial testimony, because both errors pertained to the same issue --- whether "delayed reporting" impaired or supported victim credibility.

(1), the trial court denied Mr. Barela's post-judgment Motion based on multiple issues that he argued had arisen, including the question of jury taint. See AOB, at pp. 1-2, 9-19. Appellant Mr. Barela argued in Assignment of Error (1)(a) that the trial court erred in denying the defendant's Motion for a new trial, arguing that the prosecutor violated what was, in Mr. Barela's estimation, a final order *in limine* allowing only

limited discussion of delayed reporting during *voir dire*/jury selection.

That violation allowed:

the jury to be tainted with discussions from a self-professed expert potential juror, stating that a child's sex abuse complaint is normally credible, with a delay in reporting.

(Emphasis added.) AOB, at p. 1 (assignment of error (1)(a)).

Appellant's arguments in Assignment of Error (2) regarding Cumulative Error, overlap with some of the errors that were a part of the previously mentioned Motion for new trial below. See AOB, at pp. 1-2, 20-26. In particular, Mr. Barela argued that the "jury taint" described above caused cumulative prejudice when considered in combination with the subsequent trial event of

the court's erroneous order allowing Detective Janis to testify regarding "delayed reporting" and his theory that it is normal or common for child sex abuse victims.

AOB, at p. 2 (assignment of error (2)(a)).

Although the State is correct that the defense did not object below when the potential jurors' discussions in *voir dire* about "delayed reporting" became more extensive than counsel believed the trial court had authorized, Mr. Barela did, after trial, file his Motion to arrest judgment arguing that this earlier jury error, combined with multiple later trial

errors, warranted a new trial. CP 109-15 [Brief in Support of Motion to Arrest Judgment]; CP 126-30.¹

As to the other assignments of error or issues argued by the Respondent in its brief and not further argued here, Mr. Barela relies on his Appellant's Opening Brief.

B. REPLY ARGUMENT

ALTHOUGH MR. BARELA DID NOT PERFECTLY PRESERVE OBJECTION TO THE MACH V. STEWART--TYPE TAINT IN JURY SELECTION, CUMULATIVE PREJUDICE, IN THE ENTIRE CIRCUMSTANCES OF THE CASE, MERITS REVERSAL.

(1). Under the Cumulative Error doctrine, this Court can assess whether the prejudice of multiple errors, including imperfectly preserved errors, may be considered for purposes of determining whether the defendant had a fair trial, or whether instead cumulative prejudice caused his trial to be unfair under Due Process.

Regarding jury taint, the appellant's argument in seeking reversal is premised on several independent bases for purposes of the cumulative error doctrine under State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995); State v. Alexander, 64 Wn.

¹ The citation on page 10 of the Opening Brief to CP 124 as the pre-trial briefing on the topic of delayed reporting was erroneous; the citation is CP 129 ("Motions"). The defense's second pre-trial brief was provided to the trial court only as a working copy but was later attached to the Motion for arrest of judgment as an exhibit. See 5/29/14RP at 49-50. Appendix A to this Brief is the Motion for arrest of judgment, along with the two pre-trial briefs; appellate counsel regrets the confusion in the Opening Brief's numbering of the Clerks Papers.

App. 147, 150-51, 822 P.2d 1250 (1992); and State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

Mr. Barela acknowledged in his Appellant's Opening Brief that there was no defense challenge to the ultimate petit jury as constituted. AOB, at pp. 9-15 and n. 4, n. 5; see BOR, at pp. 12-14. Indeed, as Respondent correctly points out, after jury selection, defense counsel made affirmative statements of satisfaction with the jury. BOR, at p. 15.

However, before jury selection, Mr. Barela had predicted below that during the *voir dire* process, the prosecutor might encourage the jury to engage with him and amongst themselves, in extensive, prejudicial discussions about the topic of delayed reporting in child sex abuse that would taint the eventual jury. AOB, at p. 9; see CP 29-31 (Defendant's First Supplemental Motions in Limine, p. 2) ("Motion to limit brainstorming type of discussion of delayed reporting with potential jurors").

The defendant asked that the court order that only a small *limited* amount of this type of discussion occur, if at all. 9/29/14RP at 52.

It is Mr. Barela's assessment of the record that the trial court granted this motion, stating that the topic of delayed reporting was appropriate to some degree, but that the defendant's concern was well-taken. 9/29/14P at 53. Accordingly, the prosecutor promised that he would not "hammer" the theory during jury selection. 9/29/14RP at 53.

But, the prosecutor then did hammer this sort of discussion, resulting in juror comments and statements of increasing prejudice by several jurors including Wilkensen, who professed to be knowledgeable in the area of child sex abuse. He opined that genuinely abused children typically do delay reporting. See AOB, at pp. 9-15.

Mr. Barela argues that the prosecutor violated a pre-trial court order *in limine* that he reasonably thought to be final. See AOB, at p. 10 n. 4. Mr. Barela notes the Respondent's discussion on pages 12 and 13 of its brief regarding when review would be appropriate, and why it is not appropriate here. But this supports Mr. Barela's position – he, the moving party, sought to utilize the unusual procedure of a before-the-fact motion to limit prejudicial discussions during jury selection, so as to be spared the necessity of calling unwanted attention to the matter by having to object later. See BOR, at pp. 12-13. The purpose of a motion prior to the prejudicial matter being interjected into the case is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation. State v. Kelly, 102 Wn.2d 188, 193, 685 P.2d 564 (1984) (quoting State v. Evans, 96 Wn.2d 119, 123–24, 634 P.2d 845 (1981)). “Unless the trial court indicates further objections are required when making its ruling, its decision is final, and the party losing the motion *in limine* has a standing objection.” Kelly,

102 Wn.2d at 193, 685 P.2d 564. Mr. Barela contends that the circumstances show that he had a standing objection, just as the party in McDaniel. State v. McDaniel, 155 Wn. App. 829, n. 18 230 P.3d 245, 258 (2010) (standing objection to evidence interjected into trial allowed review) (citing Kelly). When the “delayed reporting” discussions progressed so extensively beyond a brief discussion, Mr. Barela argues that this is ultimately what he objected to pre-trial, and he argues he should not be faulted for believing that highlighting the matter by objection would cause further unfair prejudice.

Further, Mr. Barela also argues that the jury selection error combined together with the later error regarding Detective Janis’s trial testimony on the very same topic – delayed reporting – created cumulative prejudice – ultimately requiring reversal under Alexander, Coe, and Russell, supra. With regard to review of the issue, this new event in the trial regarding Detective Janis, because it carried not only its own prejudice but also magnified the prejudice of the comments in jury selection, created twin errors that were more prejudicial than the sum of their parts. This Court can exercise discretion to review the error, given RAP 2.5(a) is discretionary. “The appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a). Because of the prejudice involved, this Court should review the error.

(2). The cumulative prejudice of the jury taint when combined with the closely related error of allowing Detective Janis to testify regarding delayed reporting caused Barela's trial to be unfair under Due Process.

Under the cumulative error doctrine, this Court is permitted to assess the prejudice caused by multiple trial court errors, including errors that were imperfectly preserved below. A defendant may argue that his trial was unfair and violated his Due Process rights under the Fourteenth Amendment as a result of Cumulative Error. U.S. Const. amend. 14; see, e.g., State v. Russell, 125 Wn.2d at 93-94; State v. Alexander, 64 Wn. App. at 150-51; State v. Coe, 101 Wn.2d at 789.

Further, this Court can review any matter if it determines it presents a basis for fair review of an important issue on appeal, in the entire circumstances of the case. Here, at the motion for arrest of judgment, the trial court heard Mr. Barela's continued arguments that the jury selection discussion rendered trial unfair. 12/1/14RP at 920-25. The trial court entertained the argument, even after counsel noted that there had been no request to strike the panel, and denied the argument based on the court's perception that there had been no error, and not by ruling that the argument could not be raised at that juncture. 12/1/14RP at 925-26. On appeal this Court can entertain the argument -- RAP 2.5(a) is

permissive, merely providing that the "appellate court may refuse to review any claim of error which was not raised in the trial court." See McDaniel; supra; Kelly, supra; Pulcino v. Federal Express, 141 Wn.2d 629, 649, 9 P.3d 787 (2000) ("RAP 2.5(a) is permissive in nature and does not automatically preclude the introduction of an issue at the appellate level"); State v. Lee, 96 Wn. App. 336, 338 n. 4, 979 P.2d 458 (1999) (same)).

However, cumulative prejudice had resulted at trial. Mr. Barela did, after trial, file his Motion to arrest judgment, in which he argued that the jury had been tainted before the trial and that this and other errors warranted a new trial. See AOB, at p. 4 (citing CP 29-31 [Motions in limine]; "CP 92" [correct citation is CP 98²]).

Crucially, it was after the testimony of Detective Chad Janis, that the previous "jury taint" issue became so reversibly prejudicial, because the two matters pertained to the same topic. Detective Janis, the Yakima police officer with the Sexual Assault Unit, was permitted to tell the jury his opinion of what a delay in reporting means, even though there had not been a defense founded on a targeted attack on E.B.'s truthfulness on this

² The Opening Brief incorrectly cites Sub # 92 (in addition to CP 98), for Mr. Barela's post-trial Motion to arrest judgment. See AOB, at p. 4; BOR at p. 13. The Brief's citation on page 10 should be pages 921-22 of the cited volume, 12/1/14RP. In addition, on page 10 of the Brief, the correct page citation for this portion of Juror Wilkenson's *voir dire* answers is page 292 of 9/3/14RP, not page 262.

narrow basis. This prejudicial topic cause the defense, prior to trial, to move to limit general discussion of delayed reporting by Detective Janis, and alternatively, to preclude it prior to any attack on credibility for delayed reporting. CP 124 (First supplemental Defendant’s motions in limine); 9/29/14RP at 48-49, 51-52. Mr. Barela’s motion was denied, the trial court holding that it was appropriate to allow some testimony in this regard, and to allow it in the prosecution’s case-in-chief. 9/29/14RP at 53.

As a result, and over Mr. Barela’s re-raised, contemporaneous objection, Detective Janis did testify extensively about the concept of “delayed disclosure” and discuss this as a phenomenon associated with traits the jury would associate with actually abused children – such as fear of the abuser, or on the other hand, dependence or loyalty. 10/1/14RP at 540-42. In other words he testified as to his belief that delays in reporting are a result of natural occurrences incident to actual sexual abuse and post-abuse periods. Janis’s testimony likely swayed the lay jurors – particularly when combined with the still-lingering taint of the discussions of the very same topic during jury selection, causing cumulative prejudice that should merit a new trial.

As noted, as to one of the defense experts, it is true that defense witness Dr. Christopher Johnson was asked questions about delayed reporting. See AOB, at pp. 12-13. However, any questions on that topic

was the understandable defense effort to attempt to defuse the prejudice of “delayed reporting” discussed in *voir dire*, and during Detective Janis’s testimony – a topic that the defense had been unsuccessful in attempting to preclude.

Cumulative prejudice requires reversal of Mr. Barela’s convictions. All of these circumstances rendered the post-trial motion a proper manner of re-raising the issue of jury taint that Mr. Barela, before jury selection, had unsuccessfully sought to avoid. Mr. Barela had also moved unsuccessfully in limine to prevent Detective Chad Janis from testifying regarding delay in victim reporting, a similarly prejudicial topic. Reversal is also required for these errors, under the permissive Cumulative Error doctrine.

C. CONCLUSION

Based on the foregoing and on his Appellant’s Opening Brief, Mr. Barela asks this Court to reverse his convictions.

Respectfully submitted this 28th day of April, 2016.

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Appendix A

Brief in Support of Defendant's Motion to Arrest
Judgment and For New Trial – CP 114 to 130

(with Motions *in Limine* and Supplemental Motions *in Limine* as exhibits)

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SUPERIOR COURT
YAKIMA CO WA

**SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR YAKIMA COUNTY**

STATE OF WASHINGTON,

Plaintiff,

v.

ERNEST GLASGOW BARELA,

Defendant.

NO. 12-1-00556-2

BRIEF IN SUPPORT OF DEFENDANT'S
MOTION TO ARREST JUDGMENT
AND FOR NEW TRIAL
(CrR 7.4 A(3) and CrR 7.5 (a)(1), (2), (5),
(6), (7), and (8))

MOTION

COMES NOW the Defendant, ERNEST GLASGOW BARELA, by and through his attorney of record, Brian A. Walker, of the Brian Walker Law Firm, P.C., pursuant to (CrR 7.4 A(3) and CrR 7.5 (a)(1), (2), (5), (6), (7), and (8)), and submits the following Brief in support of his motion for an order arresting judgment on all of Defendant's convictions, and for a new trial.

FACTS

Between September 29, 2014 and October 7, 2014, Defendant was tried upon the following charges:

- Count 1 Rape of a Child in the First Degree
- Count 2 Incest in the First Degree

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO ARREST JUDGMENT AND FOR NEW TRIAL	Page 1 of 7	
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- Count 3 Child Molestation in the First Degree
- Count 4 Rape of a Child in the Second Degree
- Count 5 Child Molestation in the Second Degree
- Count 6 Incest in the First Degree
- Count 7 Child Molestation in the Second Degree
- Count 8 Incest in the Second Degree

Prior to trial, Defendant filed a motion and limine and a supplemental motion in limine, both of which are attached hereto and incorporated herein as Exhibit's 1 and 2, respectively.

When questioning the alleged victim's mother, Michele Barela, regarding her infidelity early on in the relationship, the State's objection to the question was sustained and the Defense was not allowed to inquire even though the Defense explained that the purpose was to show the family dynamic which would have been useful to one of the Defense's experts.

During opening and closing, the State indicated that it "believed" that the evidence would be sufficient for the jury to find guilt beyond a reasonable doubt. At other points during its closing, the State further restated its belief in the evidence, and in the credibility of the alleged victim.

At closing, the State embarked upon an impassioned and extremely inflammatory argument referring to Defense arguments as a "money shot" among others, and inviting the jury to disregard Defense experts, characterizing one of them as an out-of-stater who was insulting local law enforcement by suggesting that there existed a better method of

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1 investigating allegations of child sexual abuse. The State also inserted its personal belief
2 of the evidence against the Defendant stating, among others, "I didn't see it ..." when
3 commenting on evidence suggested by the Defense.

4 Other fact are set forth below and are incorporated into the respective arguments.

5 Instructional error

6 "The usual test for the sufficiency of jury instructions is "whether the
7 instructions, read as a whole, correctly state the applicable law, are not misleading, and
8 allow counsel to argue their theory of the case." *MacMaster*, 51 Wash.App. at 233, 752
9 P.2d 954. *State v. Mark*, 94 Wash.2d 520, 526, 618 P.2d 73 (1980).

10 In Barela, Instructions numbers 5, 10, 21, and 22 included the date range of
11 offense language, "on, about, during or between [two dates separated by a week or more],
12 the defendant ...". Read as a whole, these instructions are confusing and appear to give
13 jurors a broad range of possibilities, including dates which are substantially before or
14 after the actual dates indicated. As such, they undermine confidence in the outcome on
15 these charges and a new trial should be ordered with proper instructions.

16 Eliciting Testimony going to Ultimate Issue.

17 In spite of an order in limine placing an affirmative duty upon the attorneys to
18 admonish witnesses not to testify as to the ultimate issue, when asked her first question,
19 "why are you here"?, EB replied, "because my dad raped me".

20 Such evidence was, at the least, careless; at the most, misconduct. Such a
21 statement is highly inflammatory and cannot be cured by an instruction. Further, a ruling
22 upon this very issue had been issued by the Court not more than a few hours earlier.

23 Discussion of Delayed Reporting during Voir Dire.

1 During Voir Dire, in spite of the Court's ruling that only a limited inquiry into
2 juror's opinions and idea regarding delayed reporting so as to avoid a prejudicial
3 brainstorming session, the State repeatedly pressed the issue with numerous jurors.
4 Finally, following an objection from the defense and a warning from the bench, the State,
5 yet again, invited a ¹juror, whose background made him obviously predisposed to
6 believing children "victims" of child sexual abuse, to speculate upon the issue. As
7 expected, this particular juror began a speech regarding his experience and "expertise"
8 into children who report sexual abuse, saying that children never lie regarding such
9 claims.

10 The subject of permissible voir dire questioning was addressed extensively in
11 *State v. Frederiksen*, 700 P.2d 369, 40 Wn.App. 749 (Wash.App. Div. I 1985).

12 CrR 6.4(b) provides in pertinent part: (b) Voir Dire. A
13 voir dire examination shall be conducted for the
14 purpose of discovering any basis for challenge for
15 cause and for the purpose of gaining knowledge to
16 enable an intelligent exercise of peremptory
17 challenges.... The judge and counsel may ... ask the
18 prospective jurors questions touching their
19 qualifications to serve as jurors in the case, subject
20 to the supervision of the court as appropriate to the
21 facts of the case. Thus to gain information that may
22 lead to a challenge for cause or a peremptory
23 challenge, counsel may ask juror qualification
24 questions, subject to the court's supervision.
25 The voir dire scope should be coextensive with its
purpose, which is to enable the parties to learn the
state of mind of the prospective jurors, so that they
can know whether or not any of them may be subject to
a challenge for cause, and determine the advisability
of interposing their peremptory challenges.
State v. Laureano, 101 Wash.2d 745, 758, 682 P.2d 889
(1984) (quoting *State v. Tharp*, 42 Wash.2d 494, 499-

¹ It was obvious that this particular juror had a time conflict with the trial, wanted off of the jury, and would not likely be selected to serve.

1 500, 256 P.2d 482 (1953)). Moreover, it is not "a
2 function of the [voir dire] examination ... to educate
3 the jury panel to the particular facts of the case, to
4 [700 P.2d 372] compel the jurors to commit themselves
5 to vote a particular way, to prejudice the jury for or
6 against a particular party, to argue the case, to
7 indoctrinate the jury, or to instruct the jury in
8 matters of law."

9 [T]he defendant should be permitted to examine
10 prospective jurors carefully, 'and to an extent which
11 will afford him every reasonable protection.' "
12 (Citation omitted.). *Laureano*, supra. However, the
13 limits and extent of voir dire examination fall within
14 the trial court's discretion. *Laureano*, 101 Wash.2d at
15 757, 682 P.2d 889. The trial court's exercise of
16 discretion is limited only by the need to assure a
17 fair trial by an impartial jury. *United States v.*
18 *Jones*, 722 F.2d 528, 529 (9th Cir.1983).

19 The trial court is vested with discretion (1) to see
20 that the voir dire is effective in obtaining an
21 impartial jury and (2) to see that this result is
22 obtained with reasonable expedition. Therefore, the
23 trial court may refuse to permit questions that are
24 only speculatively related to prejudice. *Jones*, supra.
25 Three situations require specific voir dire questions
because of a real possibility of prejudice: (1) when
the case carries racial overtones; (2) when the case
involves *other matters (e.g., the insanity defense)*
concerning which either the local community or the
population at large is commonly known to harbor strong
feelings that may stop short of presumptive bias in
law yet significantly skew deliberations in fact; and
(3) when the case involves other forms of bias and
distorting influence which have become evident through
experience with juries (e.g., the tendency to
overvalue official government agents' testimony).
Jones, supra at 529-530 (citing *Robinson*, supra at
381); see *Williams*, supra 29 Cal.3d 392, 174 Cal.Rptr.
at 325, 628 P.2d 869.

22 In the present case, the State went well beyond the permissible, and even allowed,
23 scope of examination. The additional and repeated discussions served no legitimate
24

1 purpose and were nothing more than an effort to predispose the potential jurors to the
2 State's case and to deprive the Defendant of a fair trial.

3 Expressions of Personal Belief and Inflammatory Comments

4 Prosecuting attorneys are quasi-judicial officers who hold a special position with
5 regard to the public and jurors in a jury trial. Prosecutors are "presumed to act
6 impartially in the interest only of justice. If he lays aside the impartiality that should
7 characterize his official action to become a heated partisan ... he ceases to properly
8 represent the public interest, which demands no victim, and asks no conviction through
9 the aid of passion, sympathy or resentment." *State v. Reed*, 102 Wn.2d 140, 684P.2d
10 699 (1984). Further, expressions of personal belief or inflammatory statements
11 regarding witnesses or evidence are improper and a violation of the Rules of
12 Professional Conduct. If it is determined that such comments presented a substantial
13 likelihood that the jury's outcome was affected thereby, the confidence in the jury
14 verdict is undermined and a reversal is required. *Id.*

15 Here, the State's insult-laced closing filled with negative personal reflections
16 upon the experts who testified, and mockish, derisive comments implying that out-of-
17 towners had no business telling local professionals and citizens how things should be
18 done, were passionate arguments better suited to a civil plaintiff's lawyer than to a
19 quasi-judicial officer. Referring testily to Defense counsel's arguments as "money
20 shots" among other similarly inappropriate characterizations were little more than ill
21 considered, prejudicial comments unbecoming the office of the prosecutor, and the Court,
22 and designed to deprive the Defendant of a fair trial based solely upon the facts
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1 presented. Such misconduct requires reversal and a new trial. Id. See also all remaining
2 cases cited in Defendant's Motion in Limine.

3 Eliciting Testimony Regarding Witness's fear of Testifying, and Allowance
4 of Repeated Questions until Desired Answer was Given, and Insufficient Evidence.

5 Not only is offering such testimony improper and a violation of the Order in
6 Limine, but EB denied that it was hard for her to talk about the matter and did not express
7 that she had any reluctance until the State asked her repeatedly about her "reluctance" in
8 order to explain her inconsistencies.

9 The State was also allowed, over objection to ask repeatedly whether EB was
10 penetrated on any occasion in response to a question to which she initially said "no".
11 Even though the Defendant was ultimately acquitted on the rape charges, such evidence
12 had a highly prejudicial and cumulative effect.

13 Add to this the fact that all evidence presented by EB was largely bookended by
14 "pretty much ... could have been ... I think so ...", such evidence does not sustain a
15 conviction beyond a reasonable doubt.

16 It was further error to not allow inquiry into Michelle Barela's infidelity early on
17 in the relationship as it was essential to expert Dr. Kirk Johnson's testimony and in
18 effectively arguing the Defense's theory of the case.

19 The effect of the above errors, irregularities, violations, both individually and
20 together, deprived Mr. Barela of a fair trial as guaranteed under the Constitution.

21 DATED this 14 day of November, 2014.



23 BRIAN A. WALKER, WSBA # 27391
24 Of Attorneys for Defendant

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4:20 PM Declaration of Mailing
On 4/11/14, I sent by facsimile a copy of the document to which this declaration is affixed to the attorney for PETITIONER/RESPONDENT.
On _____, I sent by courier a copy of the document to which this declaration is affixed to the attorney for PETITIONER/RESPONDENT.
On _____, I deposited in the U.S. mail in a properly stamped envelope a copy of the document to which this declaration is affixed to the attorney for PETITIONER/RESPONDENT.
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATE: 4/11/14 SIGNED: *[Signature]*
PLACE: Vancouver, Washington

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SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR YAKIMA COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

ERNEST GLASGOW BARELA,

Defendant.

NO. 12-1-00556-2

DEFENDANT'S MOTION IN LIMINE

COMES NOW ERNEST GLASGOW BARELA, Defendant herein, by and through his attorney of record, Brian A. Walker, and respectfully requests that this Court enter an order in limine in accordance with the requests set forth below.

FACTS

Defendant is charged with one count of First-Degree Rape of a Child; two counts of First-Degree Incest; one count of First-Degree Child Molestation; one count of Second-Degree Rape of a Child; two counts of Second-Degree Child Molestation; and one count of Second-Degree Incest; all alleged to have occurred at various times between January 1, 2012 and April 9, 2012. These charges generally arise from the Defendant allegedly touching his then 11-12 year-old daughter, E.B., once on her breasts, and penetrating her rectum with his penis on multiple occasions.

On, April 11, 2012, E.B. told a church youth group leader, Sydney Mutch, that she had been "molested" by her father, the defendant herein. Mutch told the church



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1 pastor's wife who then told E.B.'s mother, Michelle Barela. Yakima police detective
2 Chad Janis was notified and then interviewed E.B. on April 13, 2012. During her
3 meeting with the detective, E.B. claimed that her father had "anally raped her" on April
4 9, 2012 while she slept. E.B. also described one incident where her father removed her
5 bra and kissed her breasts, and one incident where her father pressed his fully clothed
6 penis against her lower back.

7 Following a subsequent interview of E.B.'s mother, Detective Janis wrote in his
8 report that he was told by Michelle Barela that Mr. Barela admitted to "touching their
9 daughter inappropriately".

10 That same day, Detective Janis met with Mr. Barela and read him his *Miranda*
11 rights after which Mr. Barela immediately exercised his right to have an attorney present.
12 Specifically, after the detective read both the adult and juvenile *Miranda* warnings, the
13 somewhat heated conversation went as follows:

14 Q: Having these rights in mind, do you wish to speak
with us at this time?

15 A: If I have an attorney present.

16 Q: Okay. Okay. Well, that's that. I'm not gonna ask
17 you anything. Um, You are gonna be booked into
jail right now for rape of a child and child molest.

18 A: Okay.

19 Q: Um, I'd ah, offering you an opportunity to ...

A: I didn't rape her.

20 Q: I can't ah

21 A: And ...

22 Q: I can't ask you anything; you ah, you requested an
23 attorney. All I really needed to do was giving you
an opportunity to tell your side of the story, okay?
Um, I'm gonna move you to a different room.

24 A Okay.



1
2 Detective then Janis placed Mr. Barela under arrest and placed him in the jail.

3 Later that day, Detective Janis executed a search warrant at the Barela family
4 home and seized E.B.'s bedding after it fluoresced under an alternative light source.

5 During the search of the home, police also took numerous photographs of the inside of
6 the home, several of which depict portions of the home being in considerable disarray.

7 On April 13, 2012, E.B. was examined at Yakima Valley Memorial Hospital
8 Primary pursuant to her claims of sexual abuse. No signs of sexual abuse were
9 observed, and no evidence was collected.

10 On May 31, 2012, police obtained buccal swabs from Mr. Barela pursuant to a
11 court order; and on June 19, 2012, police obtained buccal swabs from E.B. as well.

12 Laboratory testing revealed no evidence of Mr. Barela's DNA on the bedding.

13 A. Motion To Exclude Witnesses.

14 All witnesses not actively testifying should remain outside the courtroom. ER
15 615. If the State is choosing to have one officer stay in the courtroom to assist, the
16 Defendant requests that the designated officer be called to testify first.

17 The Court has the obligation to order the testimony in a manner most "effective for
18 the ascertainment of the truth." ER 611(a).

19
20 B. Motion To Admonish Witnesses Not To Testify To The Ultimate
21 Issue; Not to Repeat Statements of Others During Testimony; and
Not To Discuss Their Testimony With Each Other.

22 The Defendant moves the Court to instruct the State to admonish its witnesses not
23 to discuss their testimony with one another; to admonish the witnesses to testify as to
24



1 their personal observations only, and not to use terms that go to the ultimate issue at trial.
2 Such terms include but are not limited to the terms, "rape", "molest", or "victim".

3 C. Motion To Suppress Evidence of Defendant's Exercise of Right to
4 Representation by Attorney (right to remain silent).

5 In this case, the Defendant invoked his right to have an attorney present and to
6 remain silent at the beginning of his interrogation by police.

7 The right to counsel is constitutionally compelled by the Fifth Amendment
8 and Sixth Amendment of the United States Constitution. *Kirby v. Illinois*, 406 U.S.
9 682, 688-89; *Miranda v. Arizona*, 384 U.S. 437. Both amendments, made
10 applicable to the states through the Fourteenth Amendment, provide for the right to
11 counsel, each accruing at distinct times. *Malloy v. Hogan*, 378 U.S. 1; *City of*
12 *Tacoma v. Heater*, 67 Wn.2d 733, 735, 409 P.2d 867 (1966).

13 Eliciting the fact that the Defendant exercised his right to remain silent may lead
14 the jury to believe that the Defendant had something to hide, preventing him from having
15 a fair trial, and infringing upon his Fifth or Sixth Amendment right to counsel and to
16 remain silent. Defendant requests that witnesses be instructed not to mention
17 Defendant's election to have an attorney present and to remain silent.

18 D. Motion to Preclude the State from Committing the Following:

19
20 1. The State is not to argue questions of law not covered by instructions.
21 *State v. Estill*, 80 Wn.2d 196 (1972); *State v. Brown*, 35 Wn.2d 397 (1949).

22 2. The State is not to argue law which conflicts with the Court's instructions
23 under *State v. Davenport*, 100 Wn.2d 757 (1984).



1 3. The State may not express to the jury his or her belief in the testimony of
2 the State's witness. *State v. Papadopoulos (Kantas)*, 34 Wn.App. 397 (1983) (improper
3 for prosecutor to express personal opinion regarding testimony); *State v. Sargent*, 40
4 Wn.App. 340 (1985); *United States v. Young*, 84 L.Ed2d 1 (1985).

5 4. The State may not vouch for the credibility of a witness. *State v. Reed*,
6 102 Wn.2d 140 (1984).

7 5. The State may not term witness testimony as "fabrication" or "lie", even if
8 qualified by the terms, "the evidence shows." *State v. Martin*, 41 Wn.App. 133, 140
9 (1985).

10 6. The State may not express a personal opinion of defendant's guilt. *United*
11 *States v. Young*, 84 L.Ed.2d 1 (1985).

12 7. The State may not shift the burden to the defense by suggesting the
13 defense could have presented certain corroborative evidence or called or subpoenaed
14 witnesses or by asking the jury speculate as to why a defense witness is not present. *State*
15 *v. Fowler*, 114 Wn.2d 59 (1990).

16 8. The State may not argue in closing that the defendant has an attorney who
17 would not have overlooked an opportunity to present helpful, admissible evidence. *State*
18 *v. Cleveland*, 58 Wn.App. 634 (1990).

19 9. The State may not ask a witness to express an opinion about whether
20 another witness is lying, including asking this question of the defendant. *State v. Stover*,
21 67 Wn.App. 228 (1992); *State v. Padilla*, 69 Wn.App. 295 (1993); *State v. Thach*, 30757-
22 0-II (01/19/05); *State v. Dunn*, 222-5-III (02/03/05); *State v. Kirkman*, 31093-27-II
23 (02/23/05); *State v. Jungers*, 30110-5-II (02/15/05); *State v. Holmes*, 122Wn. App. 438.

24
25

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1 10. The State may not ask a witness if another witness is mistaken. *State v.*
2 *Walden*, 69 Wn.App. 183 (1993).

3 11. The State may not elicit evidence that a witness is fearful of testifying or
4 reluctant to testify as a means of bolstering the witness credibility absent a challenge to
5 the credibility of the witness by the defense. *State v. Bourgeois*, 133 Wn.2d 389, 401
6 (1997).

7 12. The State may not comment on a non-testifying defendant's demeanor and
8 invite the jury to draw negative inferences regarding character. *State v. Klok*, 99
9 Wn.App. 81 (2000).

10 13. The State may not use prejudicial, or inflammatory language to
11 characterize the alleged acts of the defendant, either in its questioning of witnesses,
12 argument to the Court in the presence of the Jury, or in Opening Statement, and Closing
13 Arguments. *State v. Pirtle*, 127 Wn.2d 904 (1995); *State v. Guizzotti*, 60 Wn.App. 289
14 (1991).

15 E. Motion To Exclude Evidence of the Following:

- 16 1. Photographs of rooms which are in disarray.
17 2. Bedding taken from the child's bed.

18 All of the above items represent evidence of conduct which is uncharged,
19 irrelevant, or completely innocent. In any event, such evidence is not relevant in this
20 matter and would be merely prejudicial to the Defendant. Defendant requests that these
21 items be suppressed under ER 402 and 403.

22 F. Motion to Interview Sensitive Potential Jurors Individually During
23 Voir Dire



1 "Voir dire examination shall be conducted for the purpose of discovering any
2 basis for challenge for cause and for the purpose of gaining knowledge to enable an
3 intelligent exercise of peremptory challenges." CrR 6.4(b).

4 Potential jurors who have been past victims of violent or sex crimes, or who are
5 close to and have been affected by such a crime are not likely to be seated on the jury.
6 However, prior to their dismissal as jurors, they may offer views and insight which will
7 affect the deliberations of other jurors who are ultimately seated on the jury. Defendant
8 asks that when such potential jurors are detected, that further questioning of such witness
9 cease and that such potential jurors be placed on a list for individual questioning, outside
10 the hearing of other potential jurors.

11 Defendant asks that sensitive questions not be allowed in front of the venire
12 beyond those which are necessary to identify such potential juror as one best suited for
13 individual examination.

14 DATED this 11 day of April, 2012.



16
17 BRIAN A. WALKER, WSBA #27391
Attorney for Defendant



SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR YAKIMA COUNTY

STATE OF WASHINGTON,

NO. 12-1-00556-2

Plaintiff,

First Supplemental

v.

DEFENDANT'S MOTION IN LIMINE

ERNEST GLASGOW BARELA,

Defendant.

COMES NOW ERNEST GLASGOW BARELA, Defendant herein, by and through his attorney of record, Brian A. Walker, and respectfully requests that this Court enter a supplemental order in limine in accordance with the requests set forth below:

SUPPLEMENTAL FACTS

It appears that, in addition to being the lead investigator in this matter, the State intends to call Detective Chad Janis as an expert on forensic child abuse interviewing techniques, and delayed reporting. It is also common during jury selection for the State in such cases to attempt to invite the jury to speculate as to why a child might delay her reporting of abuse for a period of time.

As set forth in the original Motion in Limine, Detective Janis did not scrupulously honor Defendant's right to remain silent, but when Defendant did so, Detective Janis retorted that he had planned to give the Defendant a chance to tell his side of the story,

First Supplemental
DEFENDANT'S MOTIONS IN LIMINE



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and that the Detective was now going to book the Defendant into jail, eliciting, predictably, the Defendant's utterance, "I didn't rape her".

The State also intends to call Dr. Simms, who was the alleged victim's ¹treating pediatrician for her entire life, as an expert on the types of physical injury or suffering a child may or may not encounter as a result of, or during, the specific type of abuse being claimed by the alleged victim.

MOTIONS

1. Motion to limit general discussion of delayed reporting by Detective Janis.

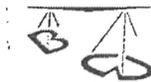
Without waiving a challenge to Detective Janis's expertise, such testimony would not be relevant unless first challenged, and should be excluded under ER 402. Therefore, unless first challenged by the Defense, Detective Janis should not be allowed to testify as to why the alleged victim in this matter chose to tell no one for several years or months.

2. Motion to limit brain-storming type of discussion of delayed reporting with potential jurors.

Often, during jury selection, the State will elicit from potential jurors speculative reasons which might cause a child to delay disclosure of abuse. Questions to a potential juror should be used to uncover potential bias and suitability to serve as a fair juror. CrR6.4(b). Such brainstorming sessions are designed to put jurors in a frame of mind favorable to the State and serve little other purpose.

3. Motion to admit Defendant's spontaneous statement that he did not rape his daughter.

¹ Dr. Simms was the treating physician when the alleged victim was examined in this matter, but did not actually perform the examination.



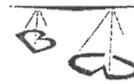
When a criminal suspect invokes his Fifth Amendment right to refuse to answer questions of law enforcement, all questions and other conduct by a police officer are to cease. This duty is to be performed with the utmost care. In this case, Detective Janis continued his questioning, or challenging conduct, well after the Defendant unequivocally invoked his right to remain silent. This conduct led to the Defendant's reasonable response, "I didn't rape her". Inquiry into this statement should be allowed upon cross examination of Detective Janis.

4. Motion to limit Dr. Simms' testimony to exclude discussion or implication of the alleged victim's history of reliable or honest reporting.

Though a treating physician is an unusual choice for an expert regarding the credibility of the claims being made, such is the case here. Any statements made by Dr. Simms regarding his opinion of the alleged victim's credibility or other personality traits should be excluded under ER 402 unless first inquired into by the Defense. Defense requests an offer of proof on this witness.

DATED this _____ day of September, 2012.

BRIAN A. WALKER, WSBA #27391
Attorney for Defendant



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 32968-2-III
)	
ERNEST BARELA, JR.,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF APRIL, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DAVID TREFRY	()	U.S. MAIL
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128 N 2 ND STREET, ROOM 211		VIA COA PORTAL
YAKIMA, WA 98901-2639		

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF APRIL, 2016.

X _____ 

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