

34052-0-III
COURT OF APPEALS
DIVISION III

FILED
SEP 23, 2016
Court of Appeals
Division III
State of Washington

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

DANILO SALGUERO-ESCOBAR, RESPONDENT

APPEAL FROM THE SUPERIOR COURT
OF FERRY COUNTY

REPLY BRIEF OF APPELLANT

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I. ARGUMENT IN REPLY

Defendant argues that “there is no question that all five factors” required for a trial court to grant a new trial were satisfied. Resp’t Br. at 8. However, as argued previously by the State and herein, none of the five factors were satisfied, and it was a clear abuse of the trial court’s discretion to grant Mr. Salguero-Escobar a new trial after the jury returned verdicts convicting him of first degree rape and first degree burglary. The State maintains those arguments made in its opening brief, and replies to the defendant’s claims in response as discussed below.

A. DEFENDANT FAILS TO CITE TO ANY CASE THAT HOLDS THAT OBTAINING “CONFIRMATION EVIDENCE” OF FACTS ALREADY KNOWN TO THE DEFENDANT IS A PROPER BASIS UPON WHICH A COURT MAY GRANT A NEW TRIAL.

In response to the State’s argument that the existence of the telephone record in question was both known to the defendant and could have been discovered by the exercise of due diligence, defendant contends that, although defense counsel was “aware of the existence of a possible telephone call” prior to the start of trial, “confirmation of the existence of the telephone call was not discovered until after trial.” Resp’t Br. at 9. Defendant fails to cite *any* case that supports this proposition or is contrary to those cases cited by the State in its opening brief, including, among others, *State v. Jackman*, 113 Wn.2d 772, 781-782, 783 P.2d 580 (1989)

and *Davenport v. Taylor*, 50 Wn.2d 370, 374, 311 P.2d 990 (1957). Apparently, no such authority exists.

A holding by this Court that the trial court properly determined a defendant may proceed to trial, testify to facts within his knowledge but without any “confirmation evidence” in support, and then be granted a new trial based on the “discovery” of that “confirmation evidence,” does nothing but encourage litigants to fail to seek out such “confirmation evidence” prior to trial, “gamble on the verdict” and then, if the verdict is unfavorable, produce additional evidence confirming his prior testimony to the same facts. *See Davenport*, 50 Wn.2d at 374. The defendant’s argument that “confirmation evidence” is evidence that qualifies as “newly discovered evidence” is simply an attempt to put a different label on the term “cumulative evidence” so that his argument does not fail based on the requirement of CrR 7.5(a)(3) or *State v. Williams*, 96 Wn.2d 215, 222-223, 634 P.2d 868 (1981) (party moving for a new trial must demonstrate, among other things, that the proffered evidence is not merely cumulative).

Defendant also claims that the defense attorney exercised due diligence in his attempts to procure this “confirmation evidence,” but argues that because the defense attorney “had no documentation other than his client’s word” that the call existed, he had to make a choice of whether to request a continuance to procure confirmation that his client was being

truthful to him, or run the risk that the State would be able bolster its case. Resp't Br. at 10. Again, defendant fails to cite any authority that contravenes those cases cited by the State in its opening brief, or that hold that a defense attorney may avoid his duty to investigate on his client's behalf. Because a defense attorney's *strategic* decision to "select[] a defense" and "fail to pursue alternative defenses" is not grounds for an ineffective assistance of counsel claim, *see, e.g., In Re Pers. Restraint of Davis*, 152 Wn.2d 647, 721-722, 101 P.3d 1 (2004), it should also not be grounds, in a motion for a new trial, to argue that due diligence was actually exercised by defense counsel. Here, defense counsel deemed it strategically more important to keep the case on a tight speedy trial clock, to prevent the State from being able to "bolster[] up their expert witness in any way," RP 555, than to procure "confirmation evidence" that would bolster his client's own testimony. Such is not the exercise of due diligence necessary to prevail on a motion for a new trial. *See, e.g., Jackman*, 113 Wn.2d at 781-782.

B. THE "CONFIRMATION" RECORD OF THE TELEPHONE CALL ALLEGEDLY PLACED BY MS. TALLEY TO MR. SALGUERO-ESCOBAR IS IMMATERIAL AND WOULD NOT PROBABLY CHANGE THE OUTCOME OF THE TRIAL.

Defendant claims that the telephone record "confirms Mr. Salguero-Escobar's testimony that he went to the complaining witness's home on that date and spent seven hours there. It also tends to confirm his testimony that

he had consensual sex with her on that date.” Resp’t Br. at 13. Defendant further asserts that, regardless of whether the telephone call was made on June 8, 2015, as argued by the defendant at the motion for a new trial, or on June 7, 2015, as established in the State’s opening brief, based on a correct conversion of the record from UTC time to Pacific Time Zone time, the record was material. However, defendant conflates the definition of materiality with the definition of relevancy.¹ Despite any conceptual overlap between the two concepts, they are distinct. Relevant evidence is evidence that has any tendency to make the existence of any fact that is of consequence more probable or less probable than it would be without the evidence. ER 401. This threshold is very low and even minimally relevant evidence is admissible. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). In contrast, material evidence, in the context of what is required for a new trial, requires more than a showing of mere relevance.

For example, in *State v. Harper*, 64 Wn. App. 283, 294, 823 P.2d 1137 (1992), the Court of Appeals rejected the contention that a new trial should have been granted where after trial, new defense counsel hired a new expert who reached a different conclusion than the expert who testified on the defendant’s behalf at trial. While this evidence was certainly

¹ “‘Material evidence’ is also included in the definition of relevant evidence.” Resp’t Br. at 12.

relevant, the Court of Appeals determined that the doctor's opinion did not "constitute material facts not previously presented and heard."

The defendant is unable to explain how the trial court could reasonably find that a record of a telephone call from three months before the rape demonstrated consensual intercourse, rather than rape, occurred on September 8, 2015, or how it demonstrated any "prior relationship" between the victim and defendant. RP 569. The existence of a telephone call on either the 7th or the 8th of June does not prove that the defendant was invited to Ms. Talley's house. It does not prove that the two engaged in prior consensual intercourse or that the defendant was present at Ms. Talley's home for seven hours. It does not even prove that Ms. Talley made the telephone call to Mr. Salguero-Escobar. The trial court erred in determining that this evidence was material to the defendant's claim of consent. While it is fair to say that the "confirmation" telephone record was minimally relevant, it was not material to the case.

C. THE "CONFIRMATION" RECORD WAS MERELY CUMULATIVE AND IMPEACHING.

The defendant characterizes the telephone record at issue as evidence "confirming the existence of the telephone call" Resp't Br. at 9, that corroborates Mr. Salguero-Escobar's testimony regarding the length of [the] conversations and the extent of [the] relationship" between himself

and Ms. Talley, Resp't Br. at 15. Without intending to do so, the defendant concedes that this "confirmation" evidence was cumulative with his own trial testimony. *See Williams*, 96 Wn.2d at 223-224 (cumulative evidence is additional evidence of the same kind to the same point, and where the only proffered purpose of the evidence is to corroborate other testimony that was actually offered at trial, it is cumulative).

Defendant's continued reliance on the holding of *State v. Savaria*, 82 Wn. App. 832, 838, 919 P.2d 1263 (1996), is misplaced because the telephone record at issue in *Savaria* was not the defendant's *own* record, nor was the existence of that record known before trial. Moreover, Ms. Talley's trial testimony could not be "devastated" by the existence of a record that she was never asked about nor called upon to confirm or deny. Defendant could have re-called Ms. Talley to give additional testimony on this point at trial, but tactically opted not to do so.

The proffered evidence also impeaches the defendant's own sworn testimony that the victim called him on June 8, 9 or 10 from her home. RP 381. Although he could not remember which day it was, he was clear that it was "maybe one day after [the garage sale]. It was a couple of days after the garage sale." RP 459. He testified that she called him around

7:00 and that he went to her house “right before dinner.”² RP 381, 393. Evidence that “impeach[es a] defendant’s own evidence ... fail[s] to comply” with the requirement that the “newly discovered evidence must not be either merely cumulative or impeaching.” *State v. Letellier*, 16 Wn. App. 695, 701, 558 P.2d 838 (1977).

D. THE “CONFIRMATION” RECORD WOULD NOT LIKELY CHANGE THE OUTCOME OF THE TRIAL.

Defendant argues that because this case is a “he-said, she-said” case, hinging on the credibility of the testimony given by Ms. Talley and Mr. Salguero-Escobar, the telephone record purporting to confirm Mr. Salguero-Escobar’s testimony regarding events that occurred three months before the rape would “swing the balance of credibility in Mr. Salguero-Escobar’s favor,” and would therefore, probably change the result of the trial. Resp’t Br. at 18.

The ultimate issue answered by the jury at trial was whether the victim consented to sexual intercourse with the defendant on September 8, 2015. Assuming that the jury believed the defendant’s testimony that he and Ms. Talley had a prior sexual encounter in June 2015, the jury still found that the victim did not consent to intercourse three months later. The

² The defendant testified on direct that Ms. Talley called him at 7:00 on the 8th, 9th or 10th, RP 381, but on cross-examination, he testified that the telephone call was made between 5:00 and 7:15. RP 393.

existence of the telephone record does nothing but bolster the defendant's testimony regarding a prior alleged sexual encounter, but does not bear on whether, in September 2015, the defendant forcibly compelled Ms. Talley to have sexual intercourse with him. The telephone record at issue does not have the possibility, let alone the probability, of changing the jury's determination. *See, e.g., State v. Peele*, 67 Wn.2d 724, 727, 409 P.2d 663 (1966).

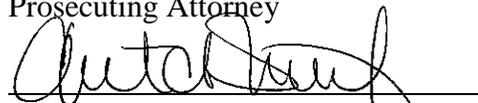
II. CONCLUSION

The State respectfully requests that this court vacate the trial court's order granting a new trial in Mr. Salguero-Escobar's matter. The trial court abused its discretion in granting the defendant a new trial where none of the *Williams*/CrR 7.5(a)(3) criteria were met.

Dated this 23 day of September, 2016.

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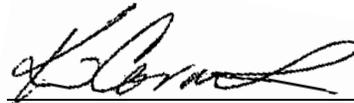
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on September 23, 2016, I e-mailed a copy of the Reply Brief of Appellant filed in this matter, pursuant to the parties' agreement, to:

David Gasch
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9/23/2016
(Date)

Spokane, WA
(Place)



(Signature)