FILED
COURT OF APPEALS
DIVISION II

2014 DEC 22 AM 9:21

STATE OF WASHINGTON
BY DEPUTY

No. 92775-8

COURT OF APPEALS NO. 46162-5-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON,
DIVISION TWO

---

MIGUEL A. ALBARRAN,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

---

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

The Honorable Barbara D. Johnson, Judge

---

# BRIEF OF APPELLANT

---

JAMES R. DIXON
Attorney for Appellant

Dixon & Cannon, Ltd.
601 Union Street, Suite 3230
Seattle, WA 98101
(206) 957-2247

P.M. 12-19-2014

## TABLE OF CONTENTS

Page

I. ASSIGNMENTS OF ERROR ..... 1

II. STATEMENT OF FACTS ..... 3

1. Procedural Facts ..... 3

2. Trial Testimony ..... 5

III. ARGUMENT ..... 12

1. THE COURT VIOLATED APPELLANT'S RIGHT TO CONFRONTATION WHEN IT PREVENTED THE DEFENSE FROM INTRODUCING SPECIFIC ACTS DEMONSTRATING A KEY WITNESS'S MOTIVE AND BIAS ..... 12

a. The Sixth Amendment requires an opportunity to cross-examine a witness as to motive and bias ..... 12

b. A defendant is entitled to introduce specific facts exposing a witness's motive and bias .. 15

c. More latitude in cross-examination is required for key prosecution witnesses ..... 17

d. The defense should have been allowed to question the State's witness about her Facebook entries ..... 18

e. The court erred in prohibiting Mr. Albarran and a defense witness from testifying about the GPS tracker and Denise's assaultive behavior ..... 19

f. The denial of an adequate opportunity to cross-examine the prosecution's key witness was not harmless beyond a reasonable doubt ..... 20

2. THE COURT VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE WHEN IT EXCLUDED AN ALTERNATIVE SOURCE FOR THE DNA ..... 20

3. THE COURT ERRED IN REFUSING TO DISMISS THE CHARGE OF SECOND DEGREE RAPE, AS THAT CHARGE VIOLATED THE GENERAL/ SPECIAL DOCTRINE ..... 26

a. Separate convictions for rape and child rape violate the prohibition against double jeopardy ..... 26

b. The State should have dismissed the rape conviction, as rape of a child is the more specific charge ..... 28

V. CONCLUSION ..... 33

## TABLE OF AUTHORITIES

**Page**

**Cases**

*State v. Brooks*,
25 Wn. App. 550, 611 P.2d 1274 (1980) ..... 15, 18

*State v. Cann*,
92 Wn.2d 193, 595 P.2d 912 (1979)..... 29

*State v. Chase*,
134 Wn. App. 792 (2006)..... 32

*State v. Clements*,
78 Wn. App. 458, 898 P.2d 324 (1995) ..... 27

State v. Conte,
159 Wn.2d 797, 154 P.3d 194,
cert. denied, 552 U.S. 992 (2007)..... 28

*State v. Danforth*,
97 Wn.2d 255, 643 P.2d 882 (1982)..... 29, 32

*State v. Darden*,
145 Wn.2d 612, 41 P.3d 1189 (2002)..... 14, 17

*State v. Dolan*,
118 Wn. App. 323, 73 P.3d 1011 (2003) ..... 14, 19

*State v. Fisher*,
165 Wn.2d 727, 202 P.3d 937 (2009)..... 14, 17

*State v. Guloy*,
104 Wn.2d 412, 705 P.2d 1182 (1985)..... 20

*State v. Haley*,
39 Wn.App. 164, 692 P.2d 858 (1984) ..... 29

*State v. Hudlow*,
99 Wn.2d 1, 659 P.2d 514 (1983)..... 14, 21, 22

*State v. Hughes*,
166 Wn.2d 675, 212 P.3d 558 (2009).....passim

*State v. Jones*,
168 Wn.2d 713, 230 P.3d 576 (2010)..... 21, 22, 25

*State v. Medina*,
112 Wn. App. 40, 48 P.3d 1005 (2002) ..... 14

*State v. Roberts*,
25 Wn. App. 830, 611 P.2d 1297 (1980) ..... 13

*State v. Shriner*,
101 Wn.2d 576, 681 P.2d 237 (1984)..... 29, 30, 32

*State v. Wilson*,
158 Wn. App. 305, 242 P.3d 19 (2010) ..... 31, 32

**Statutes**

RCW 9.94A.507..... 4

RCW 9.94A.837..... 4

RCW 9A.44.050(1)(b)..... 30

RCW 9A.44.076..... 30

**Other Authorities**

3A J. Wigmore, Evidence sec 940, pg. 775 (1970) ..... 15

Robert H. Aronson, The Law of Evidence in Washington, Sec.
607.042(2) (4th ed. 2005) ..... 13

**U.S. Cases**

*Chambers v. Mississippi*,
410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) ..... 21

*Chapman v. California*,
386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) ..... 25

*Davis v. Alaska*,
415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) ..... passim

*United States v. Platero*,
72 F.3d 806 (10th Cir. 1995)..... 22

*Washington v. Texas*,
388 U.S. 14, 87 S. Ct. 1920 18 L. Ed. 2d 1019 (1967) ..... 19

## I. ASSIGNMENTS OF ERROR

1. The court erred in suppressing evidence relating to a vibrator, where that evidence was necessary to explain how the appellant's DNA was transferred to the complaining witness.

2. The court erred in suppressing evidence that the State's key witness assaulted the appellant out of anger and jealousy.

3. The court erred is suppressing evidence that the State's key witness used a GPS tracker to follow appellant to another woman's house, and then assaulted appellant in front of that woman.

4. The court erred in not allowing cross-examination relating to statements the key witness made about appellant on her Facebook page.

5. The court erred in not granting the defense motion to dismiss the charge of rape in the second degree.

6. The court erred in giving jury instructions 14, 15, and 16, which all related to the charge of rape in the second degree.

7. The court erred in entering judgment against the defendant for rape in the second degree, rather than the more specific crime of rape of a child in the second degree.

## Issues Pertaining to the Assignments of Error

1. The only person who claimed to have witnessed appellant commit this offense was appellant's live-in girlfriend. The defense theory was that the girlfriend was intensely jealous, and would often fly into assaultive rages as a result of appellant's sexual infidelity. She had even used a GPS tracker to follow appellant to the home of another woman, and then assaulted him there in front of the other woman. The court excluded most of this evidence, however, and only allowed more general questions about bias as opposed to specific acts. Did the court's ruling violate appellant's Sixth Amendment right to confront a key witness with evidence of bias and motive?

2. T.P. was 13 ½ years old at the time of this incident. She lived in the house with appellant and her mom. The State relied upon the appellant's DNA that was found around T.P.'s vaginal area. In order to explain the presence of the DNA, the defense sought to introduce evidence that appellant and T.P.'s mom regularly used a vibrator together in intimate moments, and that T.P. had access to the drawer where the vibrator was stored. The trial court, however, excluded all mention of the vibrator. As a result, the jury was not presented with any alternative to the State's theory.

Did the trial court violate defendant's right to present a defense when it excluded this crucial evidence?

3. A child under the age of sixteen is incapable of consenting to sex. The crime of rape of a child is committed when a defendant has sexual intercourse with a child. The more general crime of rape in the second degree is committed when a defendant has sexual intercourse with any person incapable of giving consent. Did the trial court violate the general/special statute doctrine when it entered judgment for the general crime of second degree rape?

## II. STATEMENT OF FACTS

### 1. Procedural Facts

The Clark County Prosecutor charged Miguel Albarran with one count of child molestation in the second degree, alleged to have occurred on April 1, 2013. CP 1. The alleged victim was listed as T.P., who was 13 years old at the time. *Id.* Mr. Albarran entered a plea of not guilty, and the office of public defense assigned David Kurtz to represent him.

In response to Mr. Albarran setting the case for trial, the State amended the Information to add three additional charges. This included rape of a child in the second degree, 2) attempted rape of a child in the second degree, 3) rape in the second degree

(incapable of consent prong), and 4) child molestation in the second degree. CP 21-24. The State also alleged three sentence aggravators: violation of a position of trust, invasion of the victim's privacy, and victim less than 15 years old. *Id.*

A jury trial began on January 13, 2014. On January 13, 2014, a jury found Mr. Albarran guilty of all four counts, and all three aggravating factors. CP 31-34, 52-55. At sentencing, the defense argued that "rape of a child" is the more specific statute, while "rape in the second degree" under the unable to consent prong is the more general statute. Accordingly, the conviction for rape in the second degree should be dismissed under the general/specific doctrine. RP 39-47. The judge disagreed and imposed sentence on the conviction for rape in the second degree. RP 484-943; CP 48-62. By statute, the court was required to impose a mandatory 25-year sentence on the rape in the second degree conviction, given the jury finding that the victim was under the age of 15. RCW 9.94A.507; RCW 9.94A.837; RP 494; CP 39-47. Upon joint motion of the parties, the trial court dismissed the other three convictions based on double jeopardy concerns. RP 473; CP 39-47. Mr. Albarran filed a timely appeal. CP 63.

2. Trial Testimony

Miguel Albarran and Denise Domke began dating in 2010. RP 260. When they first met, Miguel worked for Denise as part of her office staff. Miguel transferred to a different department so that Denise would not be supervising him. *Id.*

Although the relationship was a good one in many ways, Miguel was not faithful. He had multiple affairs with other women while he was together with Denise. RP 343. Even when Miguel moved in with her, he continued to sleep with other women. RP 361, 243. This created a great deal of stress. Denise would become angry; they would fight, split up, he would apologize, and then they would get back together. RP 265. Denise described it as an on and off relationship. RP 261.

Denise had a daughter (referred to as "T.P." herein) who was born on December 4, 1999. RP 54. Although Miguel was not T.P.'s biological father, he acted like a father nonetheless, driving P.T. to the shopping mall and similar places. RP 244-245. Up until the date of this purported incident, there had never been any suggestion that Miguel had acted inappropriately around T.P. RP 261.

On April 1, 2013, thirteen year old T.P. was on spring break from school. RP 55.. She had stayed up late watching a movie,

first on the couch in the living room, and then later on the TV located in her room. RP 57, 67. Denise and Miguel had to work that day. RP 246. Denise got up and took a shower, and Miguel went to the kitchen to get coffee. As is often the case, he walked through the house turning off lights that had been left on over night. RP 341. The TV in the living room had been left on, so he turned that off as well. Walking back towards their bedroom he passed by T.P.'s room. The lights and the TV were still on, so he stopped in her room to turn them off. He went into her room while she was sleeping to turn off the lights and TV, something he does almost every day. RP 341. As he was covering her with a blanket, Denise came into the room and began accusing him of touching her daughter. *Id.*

At first, Miguel thought this was some type of April Fools joke. But when he saw that Denise was serious, he tried explaining that he was just covering T.P. up. RP 341-42. As they stepped out of the room, Denise began yelling louder and socked Miguel in the eye. RP 342. She called him a dog, because of all of the times he cheated on her. RP 342.

Denise told the story differently. According to her, after getting out of the shower, she walked past her daughter's bedroom.

The door was open and she saw her daughter lying on the bed with her knees up and Miguel's face in her crotch area. RP 250-251. Denise could see that T.P.'s panties were still on. RP 254. According to Denise, Miguel had one leg on the floor and one leg on the bed. Denise yelled, which caused T.P. to wake up. As Miguel stood up, he put a blanket on T.P. RP 256. Denise did not see the blanket until she screamed at him. RP 256. When they stepped out of the room, Miguel told her that he was just covering T.P. up. RP 251. Miguel was wearing boxer shorts and Denise did not notice anything unusual about his appearance. RP 268.

T.P. testified that she was asleep and has no recollection of anything that Miguel was doing or not doing before she woke up to the screaming. RP 68-69. She didn't feel that she was being touched in any way. RP 68. She does remember hearing Miguel and her mom arguing. She specifically recalled Miguel saying that he did not do anything, that he was just covering her up. RP 74-75.

The police were called and took statements from everyone. Miguel told the police the same thing he told Denise, that he was just putting a blanket on T.P. RP 129-130. As part of the initial investigation, the police had T.P. go into the bathroom and take off

the panties she was wearing. The underwear she brought back out was somewhat wet in the crotch area. RP 50-51.

Charges were not filed until many months later. The defense theory was that Denise was angry with Miguel as a result of his continued infidelity, and that she made up this story as a means of taking revenge. RP 31, 234. Given that most people who are angry or jealous do not take such extreme actions, it was incumbent upon the defense to show that Denise's rage and jealousy was much greater than in the typical case. To that end, the defense sought to cross examine Denise about how two weeks prior to this incident, Denise used a GPS tracker to locate Miguel at the house of another woman, where she then confronted Miguel and punched him. RP 30-32, 235. The defense also wanted to cross-examine Denise on other instances of her rage and assaults on Miguel sparked by his constant cheating. In addition to addressing these issues in cross examination, the defense was prepared to call in a rebuttal witness to establish these facts in the event it was necessary to do so. RP 30-32, 234-240.

The prosecutor objected to evidence of the assaultive behavior and the tracking device, arguing that neither the assaults nor the tracking was relevant to the issue of bias. The judge granted

the State's motion to exclude this evidence. The court said that defense counsel could ask questions about whether she was angry over affairs from the previous eight months, but could not bring in specific acts: "As far as specific incidents, this gets into more of the domestic affairs of people that can be outside the scope of what we're concerned with here. So a specific incident as to GPS, a tracking and so on, I would exclude." RP 240.

The defense also sought to question Denise about her Facebook entries, in which she expressed a desire to assist another person in going after Miguel in court. RP 30-32, 237. In not allowing questions about the Facebook entry, the judge stated that because the entries were made after the April 1, 2013 incident, the entries would not be relevant to Denise bias. RP 240-241. The court also stated that because the Facebook entries had not been previously disclosed, Denise could not be questioned about them. *Id.*

As a result of these limitations, when Denise testified, she was able to downplay the significance of her anger. According to Denise, Miguel's cheating had made her angry, but "we had patched things up and things were going great." RP 266. Denise

stated that their relationship for the previous eight months had been going well. RP 245.

In addition to Denise's testimony, the State relied upon DNA evidence. Lab results showed small amounts of Miguel's DNA on T.P.'s inner thigh, panties, and vagina area. RP 218. The question for the jury was if Miguel did not have sexual contact with T.P., then how did the DNA end up there? In order to answer that question, the defense sought to introduce evidence of a vibrator that Miguel and Denise used almost every time they had sex. RP 352. This vibrator was located in the top drawer next to their bed. *Id.* The defense theory is that T.P. used her mom's vibrator. Miguel recalled Denise talking about how the vibrator and lubricant were missing one day. RP 352. The defense also believed it was quite possible the police or the mom could have used the vibrator to obtained a sample of his DNA. RP 8, 353-354. Consistent with those theories, the State's expert agreed that DNA could be transferred from one object to another thing or person. Further, there would be no means of determining how the transfer occurred, but only that it had occurred. RP 227-229.

The judge excluded this evidence. According to the judge, the foundation for the evidence was Denise's statement that the vi-

brator was missing one day, and that because this statement was hearsay, the defense could not lay the necessary foundation. RP 355. Thus, the defense was not allowed to present facts establishing an alternative explanation for the presence of the DNA. The prosecutor relied upon the DNA evidence in closing. *See e.g.*, RP 416, 462.

When Miguel was on the stand, he testified that Denise frequently became angry over his affairs and assaulted him. RP 347. The prosecutor objected and the court sustained the objection. A moment later, Miguel tried describing Denise's violent responses when he either told her or she found out about his cheating. RP 348. This time the court asked the jury to step out and addressed the issue again with the parties. The court stated, "But anything having to do with somebody hitting or striking or taking specific actions, it was the Court's intent by our previous conversation by this to exclude this as not relevant and prejudicial." RP 350. Furthermore, "specific acts of conduct are excluded by the rules of evidence in the impeachment of a witness." RP 350. The court additionally held that questions as to Denise's anger over the affairs should be limited to an eight- month period. RP 351. Accordingly, defense counsel instructed his client: "So Mr. Albarran, remember

the Judge said, don't use – don't bring up any incidents of the violence in terms of being hit." RP 355. Miguel said he understood. After successfully excluding Denise's specific acts of domestic violence, including a witness who could have testified to that violence, the defense was left with just the general statement that Denise had struck Miguel in the past. The State took advantage of that ruling by calling a CPS caseworker as a rebuttal witness. That caseworker had previously spoken with Miguel on the telephone, during which time Miguel had denied a history of domestic violence. RP 372. In closing, the prosecutor cited to the CPS testimony as proof that Miguel "lied" about Denise's rages. RP 425-26.

## III. ARGUMENT

### 1. THE COURT VIOLATED APPELLANT'S RIGHT TO CONFRONTATION WHEN IT PREVENTED THE DEFENSE FROM INTRODUCING SPECIFIC ACTS DEMONSTRATING A KEY WITNESS'S MOTIVE AND BIAS.

#### a. The Sixth Amendment requires an opportunity to cross-examine a witness as to motive and bias.

Denise was the only witness against Miguel who claimed to have first hand knowledge of his actions. T.P. was asleep, and the police merely took statements from the witnesses. The defense plan was to establish through cross examination Denise's motive to

fabricate and her bias against Miguel. The evidence would focus upon her rage and jealousy over Miguel's affairs with other women. The defense intended to show that Denise used a GPS tracker to follow Miguel to another woman's house, and that she then punched him in front of that woman. The defense intended to present evidence of other instances of jealousy and assaults perpetrated by Denise upon the defendant, as well as cross examine Denise about entries on her Facebook page in which she offered to help one of Miguel's girlfriends get Miguel in trouble. But on the day of trial, the court prevented the defense from cross-examining Denise as to the specific acts that established her motive to fabricate. This was reversible error.

"A trial court's denial of a criminal defendant's right to adequately cross-examine an essential state witness as to relevant matters tending to establish bias or motive will violate the Sixth Amendment right of confrontation." Robert H. Aronson, The Law of Evidence in Washington, Sec. 607.042(2) (4th ed. 2005). Accordingly, a defendant "should be given great latitude in the cross-examination of prosecution witnesses to show motive or credibility." *State v. Roberts,* 25 Wn. App. 830, 834, 611 P.2d 1297 (1980).

A defendant is entitled to confront the witnesses against him with bias evidence when the evidence is at least minimally relevant. *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983). "Bias includes that which exists at the time of trial, for the very purpose of impeachment is to provide information that the jury can use, during deliberations, to test the witness' accuracy while the witness was testifying." *State v. Fisher,* 165 Wn.2d 727, 752-753, 202 P.3d 937 (2009); quoting, *State v. Dolan,* 118 Wn. App. 323, 327-328, 73 P.3d 1011 (2003). The defendant is granted more "latitude to expose the bias of a key witness. " *Fisher,* 165 Wn.2d at 752-753, citing, *State v. Darden,* 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). Violations of the state and federal confrontation clauses are reviewed de novo. *State v. Medina*, 112 Wn. App. 40, 48, 48 P.3d 1005 (2002).

By its very nature, evidence of bias is always relevant to discredit the witness and to help the jury weigh the testimony. *Davis v. Alaska,* 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). In *Davis*, the primary witness was a teenager living near the defendant. The witness was on probation for a prior criminal offense. The defense sought to introduce that fact in support of the theory that the witness was acting out of fear his probation might be re-

voked if he did not incriminate Mr. Davis. *Id.* at 310-311. The trial court barred reference to the witness's probation status. The defendant was convicted. The Alaska Supreme Court affirmed the conviction, holding that despite the limitations on cross-examination, the defendant was permitted to sufficiently develop the issue of bias.

The United States Supreme Court disagreed and reversed the conviction. The Court explained, "The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.'" *Davis* at 316 (quoting 3A J. Wigmore, Evidence sec 940, pg. 775 (1970)).

**b. A defendant is entitled to introduce specific facts exposing a witness's motive and bias.**

"The right of cross-examination allows more than the asking of general questions concerning bias; it guarantees an opportunity to show specific reasons why a witness might be biased in a particular case." *State v. Brooks,* 25 Wn. App. 550, 551-552, 611 P.2d 1274 (1980). In our case, the only way in which the defense could attack Denise's credibility was with specific, concrete facts. It is one thing for the defense to say that Denise was a jealous person, who was angry with Miguel for his repeated infidelities. It is another to show that her jealousy and rage were great enough to cause her

to frame Miguel for a crime he did not commit. After all, most jurors have probably experienced some feelings of anger or jealousy, yet would never consider falsely accusing someone of a crime. Only by showing Denise's specific actions—the use of a GPS tracker, showing up at another woman's house, assaulting Miguel in front of others—could the jury begin to understand the extent of Denise's rage and jealousy. Without exposing those facts to the jury, the defense could not adequately convey the intensity of Denise's feelings toward Miguel.

The trial court's exclusion of specific facts relating to bias in cross examination is similar to the limitations placed on the defendant in *Davis v. Alaska, supra.* Again, in that case, defense counsel was allowed to ask general questions about bias but could not go into the specific facts establishing that bias. The Court found this to be an unconstitutional limitation on the right to cross examine a witness as to bias:

> We cannot accept the Alaska Supreme Court's conclusion that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury. While counsel was permitted to ask Green whether he was biased, counsel was unable to make a record from which to argue why Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. . . . On these facts it seems clear to us that **to**

> **make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.**

*Davis v. Alaska*, 415 U.S. at 318 (emphasis added). Similarly, Miguel was entitled to expose to the jury those facts from which the jurors could appropriately draw inferences regarding Denise's motive and credibility.

The court in our case believed that allowing the specific acts would get "into more of the domestic affairs of people that can be outside the scope of what we're concerned with here." RP 240. This is incorrect. To the contrary, it is the domestic affairs of these two people that demonstrates Denise's bias and motive to seek revenge on Miguel by fabricating the facts that were the basis for the criminal charges.

**c. More latitude in cross-examination is required for key prosecution witnesses.**

A defendant is granted more "latitude to expose the bias of a key witness." *Fisher,* 165 Wn.2d at 752-753, citing, *State v. Darden,* 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). For instance, in *Davis* the Supreme Court found it significant that "[t]he accuracy and truthfulness of [the witness's] testimony were key elements in the State's case against petitioner." *Davis,* 415 U.S. at 317. Similarly,

in *Brooks*, the court explained, "great latitude must be allowed in cross-examining a key prosecution witness." *Brooks*, 25 Wn. App. at 551. Applying that rule here, since Denise was a key witness for the State, Miguel was entitled to significantly more latitude to expose the extent of her anger and rage, and thus her bias, against him.

**d. The defense should have been allowed to question the State's witness about her Facebook entries.**

The court also excluded evidence relating to posts on Facebook made by Denise. These posts related to Denise's expressed desire to get Miguel in trouble. RP 237. The State argued that it was inadmissible because it had not been previously produced in discovery in a timely fashion, and because the statements on Facebook were made after this incident with T.P. had occurred. RP 238-239. The judge accepted the State's argument, thereby depriving Miguel of evidence of bias. RP 240.

The trial court's ruling was mistaken in two regards. First, whether the defense produced the actual Facebook prior to trial merely limits the use of that document at trial. The State did not cite to any rule, nor is the defense aware of any rule, that would prevent the defense from asking questions relating to the subject

matter of the Facebook entries. This was an improper basis for excluding the evidence.

Further, relevancy does not relate just to bias or motive at the time of the initial complaint. Rather, "bias includes that which exists at the time of trial." *State v. Dolan,* 118 Wn. App. at 327. The trial court erred in excluding Denise's statements demonstrating bias on the basis that they were made after April 1, 2013.

**e. The court erred in prohibiting Mr. Albarran and a defense witness from testifying about the GPS tracker and Denise's assaultive behavior.**

In addition to prohibiting cross-examination of Denise regarding the tracking device and Denise's assaultive rages stemming from Miguel's infidelities, the court also prohibited Miguel from testifying to these events. Further, the court prohibited similar testimony from a potential defense rebuttal witness, who had witnessed one of the assaults. For the reasons set forth above, this restriction on Miguel's ability to show bias and motive was error. *See also, Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920 18 L. Ed. 2d 1019 (1967) (recognizing Sixth Amendment right of defendants to present evidence on their own behalf).

**f. The denial of an adequate opportunity to cross-examine the prosecution's key witness was not harmless beyond a reasonable doubt.**

Constitutional error is presumed to be prejudicial and the State has the burden of proving the error was harmless. *State v. Guloy,* 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). In determining whether constitutional error is harmless, Washington courts use the "overwhelming untainted evidence test" to decide whether it appears beyond a reasonable doubt that a fact finder would have reached the same result in the absence of the error. *Id.* at 425-426. As noted earlier, Denise was the only witness who claims to have seen Miguel engaged in unlawful activity. Like the witness's testimony in *Davis*, Denise's testimony was "a crucial link in the proof... of petitioner's act." *Davis*, 415 U.S. at 317. Denise's bias was relevant under *Davis*, and directly undermined her credibility. Reversal is required.

2. THE COURT VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE WHEN IT EXCLUDED AN ALTERNATIVE SOURCE FOR THE DNA.

In addition to the right of cross-examination, a defendant has the right to present evidence in his or her defense. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d

297 (1973). Washington courts recognize that the defendant's interest in presenting relevant evidence is strong, and "the integrity of the truth finding process" and the right to a fair trial are also at stake." *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). Generally, evidentiary issues are reviewed for an abuse of discretion; however, a de novo review applies when the defendant is denied the opportunity to present a meaningful defense. *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010).

In *State v. Hudlow*, the Washington Supreme Court set out a test for determining the admissibility of evidence in the defense case. *Hudlow,* 99 Wn.2d at 14. More recently, the Supreme Court in *State v.* Jones reaffirmed the applicability of that test. *Jones*, 168 Wn.2d at 720. First, the evidence "must be of at least minimal relevance." *Jones,* at 720. Second, if evidence passes the threshold of minimal relevance, the burden shifts to the prosecution "to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Id.* Only if the State's need to exclude the evidence is "compelling in nature" may the trial court exclude even minimally relevant evidence. *Id.* at 723.

Third, assuming the evidence to be true, the Court looks at the probative value of the evidence to the issues in the case; the

greater the probative value, the greater the State's burden to justify exclusion. Consequently, when the evidence is of a high probative value, there is **no** State interest that can justify its exclusion. *Jones,* at 720; *Hudlow*, 99 Wn.2d at 16.

A trial court is not allowed to substitute its judgment for that of the jury, excluding evidence because the court finds it unpersuasive. *See e.g.*, *United States v. Platero*, 72 F.3d 806, 813 (10th Cir. 1995) ("If a rule were to say that a defendant may not offer evidence in defense unless the Judge believes it, that rule would violate the right to jury trial.").

The fact that evidence may involve a subject matter some witnesses find uncomfortable to talk about does not mean the evidence should be excluded. A case in point is the Washington Supreme Court's 2010 decision in *State v. Jones, supra.* In that case, the trial court had excluded evidence that the complaining witness in a rape case had attended a sex party and had sex with multiple men the night of the incident. The defendant was one of those men. *Jones*, 168 Wn.2d at 717-718. The trial court had excluded evidence of the sex party under the Rape Shield Law, reasoning that whether the woman consented to sex with other men that night was not relevant to whether she consented to sex with the defendant.

Accordingly, the defendant was allowed to say that the complaining witness consented to sex, but the defendant could not bring in the surrounding circumstances. *Id.* at 721.

In reversing the lower courts, the Washington Supreme Court explained that this type of evidence did not involve the Rape Shield Law, but even if it did, the defendant would have a right to present this evidence. *Id.* at 722-723. Because the defendant's need was great, there was no State interest that could justify exclusion of the evidence.

In the current case, Miguel had a great need to provide the jury with an alternative means as to how his DNA ended up on T.P.'s vaginal area and panties. In order to do this, Miguel was prepared to introduce evidence that T.P. had access to a vibrator that would have had his DNA on it. Miguel's theory as to how this transfer could have happened was consistent with much of the scientific evidence in the case. The State's own expert testified that DNA can be transferred from an inanimate object to a person or to items of clothing. RP 227-229. Further, explained the expert, DNA can last a long time, as evidenced by the DNA from Egyptian mummies. RP 227-228. Finally, there would be no way of distin-

guishing the transfer of DNA via personal contact or the vibrator. RP 229

The court believed that Denise's statement that she thought T.P. had taken the vibrator was hearsay, and that the defense could not therefore lay the necessary foundation without Denise's statement. This is not accurate. While such a statement from Denise may have increased the weight of Miguel's testimony about the vibrator, Denise's statements are not part of the necessary foundation. The fact is that a vibrator can transfer DNA, and there was a vibrator used by the defendant in the house with T.P.

Without this vibrator evidence, Miguel was not able to present his defense. In closing, defense counsel had little to offer the jury to explain the vibrator. He told the jury, "the defendant said, I don't know how my semen and my saliva got on her, but I didn't put it there." RP 439. The prosecutor in rebuttal was able to hammer away at the DNA evidence, reminding the jury that the possibility the DNA belonged to someone else was "one in 780 quadrillion." RP 452.

The State may argue on appeal that the error was harmless. Any such argument should be rejected. A violation of the right to present a defense requires reversal of a guilty verdict unless the

State proves that the error was harmless beyond a reasonable doubt. *Jones*, 168 at 724; *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In our case, the DNA evidence went to the heart of the defense case. As such, the exclusion of evidence explaining the DNA transfer to T.P. cannot be harmless.

In *State v. Jones* the prosecutor argued that the error was not prejudicial because there were some significant holes in the defendant's theory. The Supreme Court agreed that there were weakness in the defendant's sex party story, but those weaknesses were for the jury to decide:

> Admittedly, Jones's version of the events is not airtight. He did not call any of the other members of the alleged sex party as witnesses, K.D.'s testimony directly contradicted Jones's account, and only Jones's semen was found on K.D. Nevertheless, a reasonable jury that heard of a consensual sex party may have been inclined to see the sexual encounter in a different light.

*Jones,* at 724. Similarly, in our case, a reasonable jury would likely have been inclined to view the case differently if they were aware that there was another means by which Miguel's DNA ended up on T.P.

3. THE COURT ERRED IN REFUSING TO DISMISS THE CHARGE OF SECOND DEGREE RAPE, AS THAT CHARGE VIOLATED THE GENERAL/SPECIAL DOCTRINE.

**a. Separate convictions for rape and child rape violate the prohibition against double jeopardy.**

As previously noted, the State charged Miguel with both rape of a child in the second degree as well as second degree rape under the incapable of consent prong. Prior to the start of trial, defense counsel moved to dismiss the second degree rape charge as a violation of double jeopardy. The defense cited to the Washington Supreme Court's decision in *State v. Hughes*, 166 Wn.2d 675, 212 P.3d 558 (2009). RP 4-7. The defense argued that it was unfairly prejudicial to have multiple charges for the same act before the jury. RP 5. The State pointed out that the double jeopardy issue does not arise until there are multiple convictions. The trial court denied the motion. RP 6-7.

The defense raised the issue again after the State rested, explaining that rape in the second degree does not apply in this situation when there is an underage child. RP 332-333 The court again denied the motion. RP 335-336. The defense also objected to the jury instructions relating to second degree rape on the same basis. RP 391-392. The court gave the challenged instruction over

defense objection. The defendant was convicted of both rape charges. At sentencing the defense argued that the second degree rape conviction should be dismissed because of double jeopardy and the general/special statute rule. The trial court disagreed and sentenced Miguel on the second degree rape conviction. This was error.

In *State v. Hughes, supra*, the State charged the defendant with two counts of rape resulting from one act of sexual intercourse with a twelve-year-old girl who suffered from cerebral palsy. As in the present case, the prosecutor in *Hughes* charged the defendant with rape of a child in the second degree and rape in the second degree. The rape charge was based on the victim's inability to consent by reason of physical helplessness or mental incapacity. *Hughes,* 166 Wn.2d at 678-679. Mr. Hughes pled guilty to both offenses, but raised a doubt jeopardy violation at the time of sentencing.

The State in *Hughes* argued that the victim's inability to consent was an element of second-degree rape, but not of child rape. *Id.* at 682. The Supreme Court rejected that argument, noting that a child is incapable of consent. *Id.* at 683-684; *See State v. Clements,* 78 Wn. App. 458, 467, 898 P.2d 324 (1995) (courts pre-

sume minors lack capacity to consent to sexual relations because they are too immature to rationally or legally consent.) Accordingly, it was impossible to commit rape of a child without also committing the crime of second-degree rape under the "incapable of consent" prong. The Court concluded that Hughes' convictions for rape and rape of a child violated double jeopardy. *Hughes* at 686.

In *Hughes*, the defendant did not challenge the rape charge under the general-special rule. Accordingly, the question before the Supreme Court became which of the two charges should be dismissed. The court noted that because both offenses shared the same seriousness level and the same offender score, it was necessary to remand the case back to superior court for the trial judge to make that determination. *Hughes* at 686. As discussed below, the general-specific rule dictates which charge should stand.

**b. The State should have dismissed the rape conviction, as rape of a child is the more specific charge.**

When a specific statute proscribes conduct that is also prohibited by a more general statute, the "general-special" rule requires the State to prosecute only under the more specific statute. *State v. Conte*, 159 Wn.2d 797, 803-804, 154 P.3d 194 *cert. denied*, 552 U.S. 992 (2007); *State v. Shriner*, 101 Wn.2d 576, 580, 681

P.2d 237 (1984). The rule is designed to promote equal protection of the laws by subjecting people committing the same misconduct to the same potential punishment. *State v. Cann*, 92 Wn.2d 193, 196, 595 P.2d 912 (1979). If the State may elect which statute to charge, it may control the degree of punishment for identical criminal elements. *Cann*, 92 Wn.2d at 196.

The Washington Supreme Court utilized this principle to vacate a conviction for second degree escape because the defendant's conduct was more properly prosecuted as a failure to return to work release. *State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982). The court pointed out that the general-special rule is necessary to give effect to the specific statute, which, the prosecutor might be less willing to charge. *Danforth*, 97 Wn.2d at 258-59. "This result is an impermissible potential usurpation of the legislative function by the prosecutors." *Id.* at 259. *State v. Haley*, 39 Wn.App. 164, 169, 692 P.2d 858 (1984) (to grant the prosecutor "unbridled discretion" to charge manslaughter instead of negligent homicide "is to emasculate" the more specific negligent homicide statute).

In order to determine if the general-special rule applies, the reviewing court must look at the elements of both statutes. If it is

not possible to commit the special crime without also committing the general crime, the special supersedes the general. *Shriner,* 101 Wn.2d at 583. As noted above, *State v. Hughes* already concluded that a defendant necessarily commits the crime of second-degree rape whenever he commits the crime of rape of a child. *Hughes,* 166 Wn.2d at 683-685. The court also looks at the purpose of the two statutes. Again, *Hughes* is helpful. The Supreme Court explained, "both statutes protect individuals who are unable to consent by reason of their status." 166 Wn.2d. at 683-84. The difference between the two offenses is that rape of a child is specifically directed at protecting minors.

Here, Miguel was charged and convicted of rape in the second degree. In order to prove this crime, the State was required to prove that the defendant had sexual intercourse with someone who was mentally or physically incapable of giving consent. RCW 9A.44.050(1)(b). This was the general charge.

The more specific charge was rape of a child in the second degree. RCW 9A.44.076. This Court instructed the jury that in order to find Miguel guilty, the State must prove the defendant had sexual intercourse with a child under the age of fifteen. As previously noted, a child of that age is incapable of consenting to sexual

intercourse. *Hughes*, 166 Wn.2d. at 683-684. This means that in order to find the defendant guilty of rape of a child in the second degree, the jury would necessarily have to find all of the elements of rape in the second degree—the defendant had sexual intercourse with someone who was incapable of giving consent. The two statutes are thus concurrent.

An example of where the elements do not match up can be found in Division One's *State v. Wilson*, 158 Wn. App. 305, 314, 242 P.3d 19 (2010). There the defendant argued that attempted rape of a child in the second degree was the more general offense and that commercial sexual abuse of a minor was the specific offense. In rejecting that argument, the court of appeals noted that rape of a child requires sexual intercourse, while the commercial sexual abuse of a minor statute only required "sexual contact." As such, a person could violate the commercial sexual abuse of a minor statute (the specific offense) by engaging in sexual contact, without necessarily violating the rape of a child statute. *Id.* at 315-316. Accordingly, because "a person can violate the specific statute without violating the general statute, the statutes are not concurrent." *Id.* at 314.

Applying *Wilson* here, every time a defendant commits the specific crime of rape of a child, he necessarily commits the general crime of second degree rape under the incapacity prong. It is not possible to commit the specific without also committing the general. *See State v. Chase*, 134 Wn. App. 792, 800 (2006) (Statutes are concurrent only when every violation of the specific statute would result in a violation of the general statute).

"Sound principles of statutory interpretation and respect for legislative enactments require that the specific statute prevails to the exclusion of the general." *Shriner*, 101 Wn.2d at 583. Thus, when concurrent statutes cover a defendant's conduct, the State must charge the defendant under the more specific statute. *Danforth*, 97 Wn.2d at 257-258.

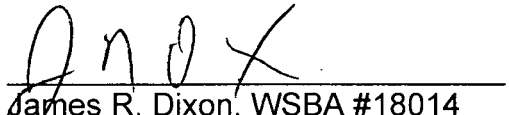
In the current case, the defense twice made a motion to dismiss the second-degree rape charge, relying upon *State v. Hughes, supra*. The court erred in denying those motions. At the time of sentencing, the defense again moved to dismiss the second-degree rape charge, this time presenting the court with the applicable case law relating to the general/specific doctrine. The court again denied the motion to dismiss. For the reasons set forth above, the general charge of rape in the second degree must give

way to the specific crime of child rape. Appellant respectfully requests that this Court vacate the conviction for second degree rape.

## V. CONCLUSION

Miguel Albarran did not have a fair trial. The trial court prevented him from conducting meaningful cross-examination of the key prosecution witness. The trial court also prevented the defense from introducing specific bias in the defense case-in-chief. Further, by excluding evidence of the vibrator, the court prevented the defense from arguing an alternative theory as to how Miguel's DNA was transferred to T.P. Finally, independent of the Sixth Amendment violations, the trial court violated the general/specific statute doctrine when it entered judgment on the charge of rape in the second degree. For all of these reasons, appellant respectfully requests that the court vacate his conviction and remand the case for a new trial.

Respectfully Submitted on this 19th Day of December, 2014.



James R. Dixon, WSBA #18014
Attorney for Appellant

CERTIFICATE OF SERVICE

I, James R. Dixon, certify that on December 19, 2014, I caused a true and correct copy of this Brief of Appellant to be served on the following in the manner indicated below:

Anne Cruser
Deputy Prosecutor
Clark County Prosecuting Attorney's Office
Appellate Division
1013 Franklin Center
PO Box 5000
Vancouver, WA 98666

(X) Email: anne.cruser@clark.wa.gov

FILED
COURT OF APPEALS
DIVISION II
2014 DEC 22 AM 9:21
STATE OF WASHINGTON
BY DEPUTY

Dated this 19th Day of December, in Seattle, WA

James R. Dixon