No. 95905-6

COA NO. 484534-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LEONEL ROMERO OCHOA,

Appellant.

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

The Honorable Stanley J. Rumbaugh, Judge

BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR 1

Issues Pertaining To Assignments Of Error 1

B. STATEMENT OF THE CASE 1

1. Procedural Facts 1

2. Pre-trial ruling excluding evidence of U-Visa application . 2

3. Trial evidence 11

C. ARGUMENT 19

1. THE COURT VIOLATED OCHOA'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND TO CONFRONT THE WITNESSES AGAINST HIM WHEN IT BARRED HIM FROM CROSS-EXAMINING THE STATE'S CHIEF WITNESS ON HER MOTIVE TO FABRICATE THE ALLEGATIONS AGAINST HIM 19

a. The right to present a defense and the right to confront adverse witnesses through cross-examination are fundamental to the integrity of the criminal justice system 20

b. The constitutional right to present a defense and to confront witnesses required that Ochoa be allowed to cross-examine Isidor about her pending U-Visa application, and the trial court's ruling prohibiting him from doing so was unjustified in light of the rights at stake 22

c. Reversal is required because this constitutional error is not harmless beyond a reasonable doubt 38

TABLE OF CONTENTS

Page

2. THE COURT ERRED IN FAILING TO COUNT OFFENSES AS THE SAME CRIMINAL CONDUCT IN COMPUTING THE OFFENDER SCORE 42

3. IN THE EVENT THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, ANY REQUEST FOR APPELLATE COSTS SHOULD BE DENIED 47

D. CONCLUSION 49

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Allied Fin. Servs., Inc. v. Mangum,
72 Wn. App. 164, 864 P.2d 1, 871 P.2d 1075 (1993) 31

Fenimore v. Donald M. Drake Constr. Co.,
87 Wn.2d 85, 549 P.2d 483 (1976) 24

In re Detention of Stout,
159 Wn.2d 357, 150 P.3d 86 (2007) 31

Salas v. Hi-Tech Erectors,
168 Wn.2d 664, 230 P.3d 583 (2010) 9, 11, 30-32

State v. Abd-Rahmaan,
154 Wn.2d 280, 111 P.3d 1157 (2005) 30

State v. Blazina,
182 Wn.2d 827, 344 P.3d 680 (2015) 47, 48

State v. Burns,
114 Wn.2d 314, 788 P.2d 531 (1990) 43, 44, 46

State v. Burri,
87 Wn.2d 175, 550 P.2d 507 (1976) 32

State v. Cardenas-Flores,
194 Wn. App. 496, 374 P.3d 1217 (2016) 48

State v. Calvert,
79 Wn. App. 569, 903 P.2d 1003 (1995),
review denied, 129 Wn.2d 1005, 914 P.2d 65 (1996) 44

State v. Cayetano-Jaimes,
190 Wn. App. 286, 359 P.3d 919 (2015) 20

State v. Darden,
145 Wn.2d 612, 41 P.3d 1189 (2002) 23, 29, 32, 34

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Deharo,
136 Wn.2d 856, 966 P.2d 1269 (1998) 45

State v. Dobbs,
180 Wn.2d 1, 320 P.3d 705 (2014) 21

State v. French,
157 Wn.2d 593, 141 P.3d 54 (2006) 47

State v. Graciano,
176 Wn.2d 531, 295 P.3d 219 (2013) 42

State v. Grisby,
97 Wn.2d 493, 647 P.2d 6 (1982) 37, 38

State v. Gunderson,
181 Wn.2d 916, 337 P.3d 1090 (2014) 21

State v. Hart,
__Wn. App.__, __P.3d__, 2016 WL 4366948
(slip op. filed Aug. 16, 2016) 49

State v. Hudlow,
99 Wn.2d 1, 659 P.2d 514 (1983) 21, 29, 32, 33

State v. Johnson,
90 Wn. App. 54, 950 P.2d 981 (1998) 27, 38

State v. Jones,
168 Wn.2d 713, 230 P.3d 576 (2010) 21, 29, 33, 38

State v. Kloepper, 179 Wn. App. 343, 317 P.3d 1088,
review denied, 180 Wn.2d 1017, 327 P.3d 55 (2014) 46

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Latham,
30 Wn. App. 776, 638 P.2d 592 (1981),
aff'd, 100 Wn.2d 59, 667 P.2d 56 (1983) 36

State v. Lessley,
118 Wn.2d 773, 827 P.2d 996 (1992). 45

State v. Lewis,
115 Wn.2d 294, 797 P.2d 1141 (1990) 45

State v. Maupin,
128 Wn. 2d 918, 913 P.2d 808 (1996) 32, 38, 41

State v. McDaniel,
83 Wn. App. 179, 920 P.2d 1218 (1996),
review denied, 131 Wn.2d 1011, 932 P.2d 1255 (1997) 38

State v. Pepoon,
62 Wn. 635, 114 P. 449 (1911) 38

State v. Persinger,
62 Wn.2d 362, 382 P.2d 497 (1963) 36

State v. Perez-Valdez,
172 Wn.2d 808, 265 P.3d 853 (2011) 24

State v. Reed,
101 Wn. App. 704, 6 P.3d 43 (2000) 33

State v. Sinclair,
192 Wn. App. 380, 367 P.3d 612,
review denied, 185 Wn.2d 1034 (2016 (2016) 47, 48

State v. Taylor,
90 Wn. App. 312, 950 P.2d 526 (1998) 45

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Tharp,
42 Wn.2d 494, 256 P.2d 482 (1953) 36

State v. Thompson,
192 Wn. App. 733, 370 P.3d 586,
review denied, 185 Wn.2d 1041, 377 P.3d 766 (2016) 47

State v. York,
28 Wn. App. 33, 621 P.2d 784 (1980) 27

State v. Young,
48 Wn. App. 406, 739 P.2d 1170 (1987) 27, 33

Zillah Feed Yards, Inc. v. Carlisle,
72 Wn.2d 240, 432 P.2d 650 (1967) 41

FEDERAL CASES

Chambers v. Mississippi,
410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) 20

Chapman v. California,
386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) 38

Crane v. Kentucky,
476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) 20

Davis v. Alaska,
415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) 21, 27, 34, 41

Delaware v. Van Arsdall,
475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) 21, 38, 39

Napue v. Illinois,
360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959) 41

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Olden v. Kentucky,
488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988)..... 33, 34

Pennsylvania v. Ritchie,
480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987)..... 20

United States v. Dennis,
625 F.2d 782 (8th Cir. 1980) 27

United States v. Wasman,
641 F.2d 326 (5th Cir. 1981) 27

OTHER STATE CASES

Romero-Perez v. Commonwealth,
__S.W.3d__, 2016 WL 3462241 (Ky. Ct. App., filed June 24, 2016)
....22, 25, 27

State v. Del Real-Galvez,
270 Or. App. 224, 346 P.3d 1289 (Or. Ct. App. 2015)..... 25

State v. Hernandez,
269 Or. App. 327, 344 P.3d 538 (Or. Ct. App. 2015)..... 24

State v. Valle,
255 Or. App. 805, 298 P.3d 1237 (Or. Ct. App. 2013)..... 10, 24

OTHER AUTHORITIES

4A Wash. Prac., Rules Practice CrR 6.6 (7th ed.) 36

8 C.F.R. § 214.14 (2013) 22

8 C.F.R. § 214.14(b)(3)..... 23

8 C.F.R. § 214.14(f)(7)(2013)..... 22

TABLE OF AUTHORITIES

Page

OTHER AUTHORITIES

8 U.S.C. § 1255(m) (2012) 22

CrR 6.4(b) 36

CrR 6.6 36

ER 401 24

ER 403 ..... 26, 27, 33

Karl B. Tegland, Washington Practice, Evidence § 105 (2d ed. 1982) 27

KY ST RCP Rule 76.28(4)(a) 23

Michael Kagan, Immigrant Victims, Immigrant Accusers, 48 U. Mich. J.L. Reform 915 (2015) 26

RCW 9.94A.525 42

RCW 9.94A.530(1) 42

RCW 9.94A.589(1)(a) 42, 43

RCW 10.73.160(1) 47

RAP 15.2(f) 48

U.S. Const. amend. V 20

U.S. Const. amend. VI 20, 21, 31-33

U.S. Const. amend. XIV 20

Wash. Const. art. I, § 3 20

Wash. Const. art. I, § 22 ..... 20, 21, 33

A. ASSIGNMENTS OF ERROR

1. The court erred in preventing appellant from cross-examining the complaining witness with evidence of motivation to testify falsely against him, in violation of his constitutional rights to present a defense and to confront the witnesses against him.

2. The court erred in failing to count current offenses as "same criminal conduct" in calculating the offender score.

Issues Pertaining to Assignments of Error

1. Whether the court committed constitutional error in ruling appellant could not cross-examine the complaining witness about her pending U-Visa application, which provided a motive to falsify allegations and testimony concerning appellant's actions toward her?

2. Whether the offenses of rape and assault constitute the "same criminal conduct" in calculating the offender score because each offense involved the same time, place, victim and objective intent?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Leonel Romero Ochoa with first degree rape (four counts), first degree burglary, first degree kidnapping and second degree assault (by strangulation) against Victoria Isidor Cordero. CP 11-14. The latter three counts carried sexual motivation enhancements. CP

12-14. The jury found Ochoa guilty as charged for rape counts 1 and 3, the burglary count, and the assault count. CP 120, 122, 124-25, 128-29. It found him guilty of second degree rape on counts 2 and 4, and unlawful imprisonment as a lesser offense to kidnapping. CP 121, 123, 126. The court merged the lesser rape counts to avoid double jeopardy and imposed an indeterminate sentence of 30 years to life in prison. 13RP 4; CP 140-41. Ochoa appeals. CP 180-200.

2. Pre-trial ruling excluding evidence of U-Visa application.

Before trial, the State moved to exclude evidence of Isidor's immigration status. CP 213. During a break in voir dire, the court addressed the State's motion. 3RP 91. Defense counsel told the court that Isidor had previously put in a request to get legal status based on being a crime victim, but she was not approved. 3RP 91. She brought a second claim based on the present charges, which was still pending. 3RP 91. The immigration authorities would not act on the claim until the prosecutor's office signed off on it, and the prosecutor's office would not sign off until the criminal proceeding was completed. 3RP 91.

The State objected to evidence that Isidor had previously made a crime-victim application for legal status because it raised collateral issues. 3RP 92-93. The court responded the jury would not necessarily learn of

the prior application, but that the court could consider it in terms of contributing to Isidor's general knowledge of immigration and the opportunity that being the victim of a crime posed insofar as getting "temporary documentation status." 3RP 93. The State said its policy was that the prosecutor's office would not consider the application while the criminal case was pending. 3RP 93.

Defense counsel wanted to get into the fact that she made a prior application to show that she knew how to try to get legal status and her motive to try to gain that status again by bringing the present application in connection with this case. 3RP 94. The court said the only relevance of the first application would be to show she knew it was possible. 3RP 95. "The issue in this case is whether by alleging that she was the victim of a crime or alleging her cooperation with police for the potential beneficial treatment from immigration, does that establish a motive in this case. I don't think the prior application comes in. I'm less certain about this particular application, and I'm going to take this under advisement as well so that I can do a little bit of research." 3RP 95.

Before the court ruled on the State's motion, jury selection took place. During voir dire, defense counsel asked jurors, over the State's objection, what they thought about immigration and whether it was a problem. 4RP 54-55. Juror 7 said he worked in a company that has

immigrants from all over the world, a lot of them came here as refugees, they are bravest people the juror ever met, and they deserve to be here because this is a safe place. 4RP 55.

Defense counsel narrowed the question to whether immigration from Mexico needed to be fixed. 4RP 55. Juror 3 said it was a problem, as the country could not support the number of people coming here illegally. 4RP 55-56. Juror 16 said "You have to make sure they're legal when they come in" and the border should be secure because drugs are coming across. 4RP 56. Juror 20 agreed with allowing people in through legal means, but the system should not allow anyone to come in at any time. 4RP 56. Juror 44 complained communication is difficult due to language issues, and something should be done in terms of dealing with people here who are doing something illegal. 4RP 56-57. Juror 23 thought immigration was great, but that it had to be managed so that the people who come here have education and skills and want to build a family, "not people that come here for benefits," referencing Medicare and "welfare." 4RP 57. Juror 11 said she did not disagree with anyone, but felt it was our duty to help anyone who needs help: "We're all here because we are all immigrants." 4RP 57-58. Juror 29 thought some immigrants provide a service by working in various job sectors. 4RP 58. Juror 15 said employers take advantage of illegal immigrants and should

be punished for hiring them, and "we should have a better way that people actually want to become good citizens." 4RP 58. Juror 32 thought people deserve an opportunity to make their money if they can, there are good immigrants, and they make a positive difference. 4RP 58-59.

Defense counsel asked "Do you think that people that are here, that are here illegally, should they have less rights or the same rights as people living here in the United States?" 4RP 59. Juror 15 said they have the same rights as everyone else, and that people needed to be treated how we expect to be treated, as it should be in a civilized country. 4RP 59.

Defense counsel asked for viewpoints to the question "If you're not here legally, you shouldn't receive rights?" 4RP 59. Juror 8 said "I think if you are illegal, then you're not qualifying for the same rights as the legal people have." 4RP 59. Counsel asked juror 28 "what do you think?" 4RP 59. Juror 28 said "I think for criminals, yes. You should have the same rights, but you shouldn't have the right to vote or some of the civil rights, I don't think, if you're not here legally." 4RP 59-60. Juror 35 thought anyone here should have the same rights as any other human being, though perhaps not the same benefits if they're here illegally. 4RP 60.

Defense counsel asked "Do you think people that are here illegally should have the same rights or less rights than U.S. citizens?" 4RP 60. Juror 26 answered we're our "brother's keeper" and our doors should be

open to those escaping duress in their own countries. 4RP 60. Like some other jurors, he believed their rights should be equal, but that illegal immigrants should not be eligible for more benefits than those like himself who worked for decades contributing to government programs. 4RP 61.

During a break in voir dire, the State asked for clarification on whether the court had made a ruling on the "U visa" issue. 4RP 70. The court said it allowed inquiry into immigration status during voir dire because "we have an Hispanic defendant who is speaking Spanish, and we're having everything translated. I think it's appropriate to explore jury bias on national origin or race." 4RP 70-71. The court heard more argument on Isidor's immigration status. 4RP 72. The question was whether evidence of the prior denied "exemption" would be admitted, and what was to be done about status in relation to the current requested "exemption." 4RP 72. The State said it did not know what happened with the prior application, but argued admitting it would trigger collateral issues, such as whether Isidor was a "legitimate domestic violence victim" at the hands of her then-husband. 4RP 72. The court was disinclined to admit evidence of the prior application. 4RP 73. Defense counsel wanted to admit the prior application to show Isidor knew how to apply for status before she made the allegation against Ochoa. 4RP 73. The court said

there would be no reason to do that if Isidor did not deny previous knowledge of the program. 4RP 74.

Turning to the current application, defense counsel said Isidor gave it to the prosecutor's office, and it allowed someone to get a visa. 4RP 74-75. The prosecutor's office needs to certify that the alleged victim cooperated. 4RP 75. The trial prosecutor's husband was one of two attorneys in the prosecutor's office that would respond to the application, but there would be no response until after the case was completed. 4RP 75.[1] The State clarified the application at issue was for a U-Visa. 4RP 75-76. The prosecutor's office did not decide whether a person applying for a U-Visa gets status; that is up to the federal government. 4RP 76.

The court said it understood the pending U-Visa application provides a motive to falsify the allegations. 4RP 76-77. The problem, as described by the court, was that the same argument could be made "in every case involving an undocumented victim," and courts have taken a "restrictive view" concerning the admissibility of status evidence. 4RP 77.

Defense counsel pointed out the need take into account a criminal defendant's right to confrontation through cross-examination, as the U-Visa provided a motive for lying in this situation. 4RP 77. The court said

---

[1] The trial prosecutor later argued her spousal relationship with one of the two attorneys tasked with reviewing U-Visa applications was irrelevant. 5RP 27. The court agreed. 5RP 28.

"that was one of the factors," but the fact was "if you start allowing that in, any undocumented victim is going to be subject to the same cross-examination." 4RP 78. The court thought that would be an "extremely broad ruling," and did not "see any basis for distinguishing between this victim and any other victim who may have immigration issues." 4RP 78. Defense counsel responded the difference is that Isidor had actually filed the U-Visa application and knew of the procedure to get status in this manner, as opposed to undocumented immigrants who have not filed an application or know nothing about the application process. 4RP 78.

The court referenced the exchange during voir dire on immigration status and policy during which a variety of opinions were expressed, "including a potential juror that thought if you're not documented, you don't have any kind of rights, and that would extend to the victim as well. So once you start interjecting evidence of status, you are interjecting the potential for a juror to make a decision based on status, which is wholly irrelevant." 4RP 79. Defense counsel said "sometimes the facts are the facts, and you just have to deal with people's biases and you can't hide the facts." 4RP 79. The court responded "but you can do your best to eliminate bias, which is the role of the Court." 4RP 79.

When voir dire resumed, the State referenced the discussion on immigration and asked if anyone had an issue with the idea that the same

principles of fairness apply to everyone. 4RP 92. No one spoke up. 4RP 92. The State asked juror 8, who answered "I think it should be the same for everybody." 4RP 92. The State asked "Can everybody commit to that idea of being fair, the same for everybody?" 4RP 92. Receiving no response, the State asked juror 20, who said he had no issue with immigrants who come in lawfully, but was concerned about people who tried to circumvent the system because it was unfair to those who went through the process in a proper way. 4RP 92-93. The State asked if anyone thought that people of any particular group, including immigrants, don't deserve the same protections of the law. 4RP 93. Juror 11 said it is not right for those with a chemical dependence to hurt their kids, and in that situation she would not be able to be fair and unbiased. 4RP 93-94. The State then asked "Is there anyone else that's concerned about their ability to be fair and unbiased no matter who appears in the courtroom to give testimony?" 4RP 94. No one responded.

After the jury was selected, the court returned to the U-Visa issue. 5RP 28. Citing Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 230 P.3d 583 (2010), the court remarked "once you start bringing in the issue of immigration status, it becomes a very slippery slope. And given the emotional reaction one way or another, which we saw during voir dire -- I can't remember the juror's number, No. 9 perhaps . . . was extremely

emotional when we started talking about the immigration policy in this country. I am just concerned about the inflammatory effect of that kind of evidence, and I'm going to exclude any evidence of the U visa or anything else about immigration of either parties, any of the witnesses. And that's my ruling." 5RP 28.

Defense counsel referred the court to State v. Valle, 255 Or. App. 805, 298 P.3d 1237 (Or. Ct. App. 2013). 5RP 29. The court said it was "convinced, not just sort of on a macro view of how people react to the immigration debate in this country, whether there should be amnesty or whether everybody that is not documented in some form or another needs to be packed up and shipped back where they came from, those are the sort of opposite poles of the debate. People fall in between." 5RP 29. The court continued: "But even in this venire on questioning -- and I let you question the venire extensively, Mr. McNeish, related to this -- there were emotional reactions of sufficient severity and intensity that I believe that bringing up immigration and going into status of any of the people that are going to be testifying in this case is going to inflame one way or another the jury so that their view of the case is going to be driven not by the evidence, but by their personal views about immigration and immigration policy and what should or shouldn't happen to those who are in this country without proper documentation. So that's it." 5RP 30. The

court believed probative value was overwhelmed by prejudicial effect, again citing Salas. 5RP 32.[2]

3. Trial evidence

Isidor lived in a Lakewood trailer park with her 5-year-old daughter. 5RP 137. Elizabeth Guillen and her husband lived in the trailer park in separate unit. 5RP 97-98, 110. Ms. Guillen woke up around 3 or 4 a.m. on July 4, 2014, when she heard what sounded like a fight ("thumping and stuff moving around") at her neighbor's residence. 5RP 51-52, 99-100, 107. This went on for two hours. 5RP 107-08. She heard a female scream and glass break. 5RP 100-02. The screaming sounded "Kind of like a cry for help, or "don't," or "I don't know how to explain it." 5RP 101. She got out of bed and saw a shadow in the dark by the trailer park manager's office. 5RP 102, 111. That's when she heard the scream for help. 5RP 102. By this time her husband, Rafael Guillen, had gotten up. 5RP 103. Mr. Guillen heard screams for help. 5RP 116-17, 122. He ran to the window, where he saw a man he identified as Ochoa in court pulling Isidor by the hair, dragging her through the gravel for 15 feet into her home. 5RP 117-18. She was crying, screaming for help. 5RP 117. She had a blouse on, nothing more. 5RP 118. Ochoa told her to be quiet.

---

[2] The court allowed defense counsel to file the U-visa-related paperwork as exhibit 42 for purposes of making it part of the record. 5RP 31-33.

5RP 119. Ms. Guillen called 911. 5RP 103. The police arrived 5 minutes later. 5RP 104.

Abel Sanchez Garcia, the manager, testified he heard screaming in the middle of the night, like someone was covering another's mouth. 6RP 98-99, 109. He heard a male voice. 6RP 99. He also heard a female voice saying "help me" behind his trailer. 6RP 99-100. He called 911, reporting he heard a male and female arguing. 6RP 100, 109-10. After looking for the source, he again heard screaming and "help me" near Isidor's house. 6RP 102. He heard a male's voice as well. 6RP 103.

Lakewood police officers were dispatched to the scene at around 4:30 a.m. 5RP 52, 71. Two tenants told them they heard arguing between a male and female, and identified residence A as the place to check out. 5RP 55. The officers went to the residence. 5RP 55. Upon hearing movement inside, they knocked on the door, but received no response. 5RP 56, 73. A few minutes later, while preparing to enter, the front door flew open and a female, later identified as Isidor, ran out and past the officers. 5RP 58-59, 65. She was partially clothed and appeared upset, crying with a look of frantic fear. 5RP 59, 74-75. Officers looked through the door and saw Ochoa standing there, with his pants near his feet, pulling them up. 5RP 59, 77. He appeared wobbly, with a "glazed-over" look in his eyes. 5RP 59, 76. His eyes were bloodshot and watery. 5RP

76. Ochoa put his pants on and slowly complied with the police order to come outside. 5RP 60, 76-77. Police handcuffed him and put him in a patrol car. 5RP 60. No injuries were observed on Ochoa. 7RP 134.

Ms. Guillen also saw Isidor run out of the house, frightened, half dressed, and yelling to get her daughter out.[3] 5RP 104. She was crying, shaking and scared. 5RP 105. She kept yelling "he came in through my window. He raped me." 5RP 105. When police brought Ochoa out, he said "my love, why are you doing this?" 5RP 105. He did not look "completely there," like he was intoxicated or on drugs. 5RP 112.

Officer Criss spoke with Isidor. 5RP 62-63, 79. She told Criss that she went to bed with her daughter and woke up sometime in the night. 5RP 79. When she woke up, a man was standing next to her bed. 5RP 80. She did not know who he was. 5RP 80. She yelled and told him to get out. 5RP 80. The man grabbed her by the hair and forced her into the living room, where he attempted to force himself on her. 5RP 80. She tried to get him to stop. 5RP 80. He then grabbed her around the neck and vaginally raped her. 5RP 80. He slapped her in the face and choked her. 5RP 80. He covered her mouth so she couldn't scream. 5RP 81. At one point she was able to free herself and ran outside, yelling for help. 5RP 81.

---

[3] Isidor's child was found asleep inside the residence. 5RP 60-61, 65, 77. She slept through the entire episode. 6RP 52.

The man pulled her back into the house by her hair. 5RP 81. She wasn't able to free herself until police arrived. 5RP 81. She initially said she had no idea if she knew Ochoa. 5RP 88. She then told Criss that she recognized the man from seeing him around the trailer park, but did not know his name. 5RP 82, 88.

Medics arrived and transported Isidor to the hospital. 6RP 30. She told hospital staff that she was punched in the face, choked and raped. 7RP 16, 18; 8RP 28. She was tearful and anxious. 8RP 26. Hospital staff noted bruising and scratches on her face, some red marks/bruising on her neck, mild swelling on her wrist, scratches on her knees and knuckles, and bruising on her leg, thigh, arm and hand. 7RP 20-25, 38, 41, 46, 81; 8RP 28. Photos show some of the injuries. 6RP 85-86, 92-93.

Isidor spoke to an officer at the hospital, recounting her version of events. 6RP 74-81. She told him she was punched and slapped in the face. 6RP 87. She said she was dragged on the ground without clothes on, but she did not claim any injury to the bottom half of her body. 6RP 88-89.

Subsequent DNA extraction from Ochoa's penile swab showed the major component was from Isidor and a minor profile was consistent with Ochoa's DNA. 7RP 111-123. DNA testing on Isidor's perineal (area between genitalia and anus) swab showed a mixture of two males; the major profile matched Ochoa. 7RP 120, 129.

In court, Isidor identified Ochoa as the man who harmed her. 5RP 140. She testified that she went to sleep with her daughter at about 11:40 p.m. 5RP 143. The window to her bedroom was closed but not locked. 6RP 8. She woke up at 3 a.m. 6RP 8. She heard a noise and saw a man standing next to her. 6RP 8-9. She asked who he was and what he wanted. 6RP 9. He told her to be quiet. 6RP 9. She ran out of the bedroom and to the front door. 6RP 9. Before she could open the door, he grabbed her by the hair, took her over to a couch, and put one hand on her neck and the other hand over her mouth. 6RP 9-10, 13, 56-57. "He didn't want me to speak." 6RP 10. She told him not to hurt her and to get out of the house. 6RP 10. He got on top of her, started to take off his pants, and removed her clothing. 6RP 11. She told him to leave her alone and not hurt her. 6RP 11. He kissed her for a few minutes on the neck and legs. 6RP 12. He then raped her vaginally with his penis for 20 minutes. 6RP 12. She was crying and screaming for help while he raped her. 6RP 12. He hit her in the face, told her to be quiet, and covered her mouth. 6RP 13. He was drunk, smelling strongly of alcohol. 6RP 13.

The man was drunk, smelling strongly of alcohol. 6RP 13. She thought of a way to escape, and offered him a beer from the refrigerator. 6RP 13-14. He grabbed her by the hair and the two went over to the refrigerator, where she got the beer and handed it to him. 6RP 14-15.

When he grabbed the beer, he let her go, and she ran outside. 6RP 14. On the way out, she snatched a throw blanket from the couch and took it with her. 6RP 15. She screamed for help. 6RP 15. The man ran after her, grabbed her hair, hit her twice in the face, dragged her back to her residence, closed the door, and threw her on the couch. 6RP 16-18, 54-55. He hit her, told her to be quiet, and vaginally raped her with his penis for 20 to 25 minutes. 6RP 19. He stopped when someone knocked on the door. 6RP 19. While he was putting on his pants, he held her by the hand. 6RP 20. She got away, opened the door and went outside. 6RP 20.

Isidor told police she did not know his name but recognized him. 6RP 22. She had seen him before at her daughter's birthday party in 2011. 6RP 22, 35-37. Ochoa's brother lived in the trailer park. 6RP 37. Ochoa's wife and children used to live in the same complex. 6RP 53. She also saw him at the store and when he was driving his vehicle. 6RP 37. Isidor denied having a relationship with Ochoa, inviting him into her home, or consenting to have sex with him. 6RP 37-38.

Isidor's sister Deici testified she never saw her sister with Ochoa. 9RP 75. She specifically claimed she never saw Ochoa at a party at her sister's house. 9RP 74. Isidor never told her she had a relationship with Ochoa. 9RP 75. Deici talked about relationships with her sister "but she doesn't tell me she might have a boyfriend or anything like that." 9RP 74.

Ochoa testified in his own defense. He used to live in the trailer park with his wife and children. 9RP 7. His brother also lived there. 9RP 7. He and his wife later split up and he moved out of the trailer park. 9RP 8. According to Ochoa, he first met Isidor in 2008 at her family's restaurant. 9RP 13-14.[4] He began to have a sexual relationship with her starting in 2009 or 2010. 9RP 14, 41. They were both married at the time. 9RP 13-14. They got together at motels between 9 and 11 at night twice a month or so. 9RP 14-15. Isidor's child was with her sister Deici when they were at a motel. 9RP 46. Isidor's siblings did not know about their relationship. 9RP 38-39. In 2012 or 2013, he broke off the relationship because he was worried others would find out, his wife was starting to suspect he was cheating on her, and he didn't want get further involved when she told him of problems with her husband. 9RP 14-15, 40.

According to Ochoa, he went to visit his brother in the trailer park to have a barbeque dinner with him and his family on the night of July 3,

---

[4] Ochoa testified he met Isidor's family through his brother. 9RP 8. He knew her siblings by name (Leonel, Maria, Deici, Gil). 9RP 8. He'd spent time with Isidor's family at social occasions. 9RP 12-13. Ochoa's wife used to babysit Isidor's child. 9RP 37. He worked for Isidor's brother Leonel at El Compadre restaurant in 2008. 9RP 9, 38. He did some work on Deici's home. 9RP 11. He'd been to Maria's house before for a Christmas party. 9RP 12. He worked at Maria's restaurant (Sabroso). 9RP 13. Deici denied Ochoa's wife ever babysat Isidor's daughter and that she (Deici) ever babysat Isidor's daughter between 10 p.m. and 2 a.m. 9RP 73, 75. She denied Ochoa ever worked on her home. 9RP 72.

2014. 9RP 16. He had three beers while there. 9RP 27. He left his brother's house around 2:30 in the morning and started walking out of the trailer park to a nearby gas station where a friend was to pick him up. 9RP 17, 32. As he passed by Isidor's house, which is next to the entrance of the trailer park, Isidor was at her window and called him over. 9RP 18. She asked him to come in and he did. 9RP 18. They talked in the living room about how their prior relationship had ended, and that she was now alone and he was single. 9RP 18. They ended up having consensual sexual intercourse on the couch. 9RP 19-20.

At some point they both fell off the couch. 9RP 20, 53. She hit herself on the carpeting, but he did not know if she hurt herself. 9RP 20. He did not feel like doing it anymore. 9RP 20. She got angry, saying "Don't you love or like me anymore? Because you're different, you don't want to be with me. I feel you're different." 9RP 20. He told her things needed to be done right, and not everything is about sex. 9RP 20-21. She got hysterical. 9RP 21. She mussed her hair and grabbed at her face. 9RP 21. He asked her for a beer to calm down. 9RP 21. She got the beer and threw it at him. 9RP 21. She was very angry and ran out the door. 9RP 21. She started screaming that he did not love her anymore. 9RP 22. He hugged her and told her to come back inside. 9RP 22, 58-59. He denied forcing her back inside. 9RP 58.

They went back inside her house and she sat on the couch. 9RP 22. She asked why everything is so bad. 9RP 22. She calmed down and they started talking. 9RP 22. Then they started kissing. 9RP 23. Someone knocked on the door. 9RP 23. By that point he was taking off his pants. 9RP 23. He heard it was the police. 9RP 23. He asked if she called the cops; she said she didn't. 9RP 23. She told him she would open the door because they'd knock it open if she didn't. 9RP 23. "That's when she started acting up. She went out there running." 9RP 23. He denied hitting, slapping, punching or strangling Isidor. 9RP 21. He denied forcing her to have sex with him. 9RP 24.

C. ARGUMENT

1. THE COURT VIOLATED OCHOA'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND TO CONFRONT THE WITNESSES AGAINST HIM WHEN IT BARRED HIM FROM CROSS-EXAMINING THE STATE'S CHIEF WITNESS ON HER MOTIVE TO FABRICATE THE ALLEGATIONS AGAINST HIM.

Exclusion of evidence that the State's complaining witness had a pending U-Visa application violated Ochoa's constitutional right to present a defense.[5] It also violated Ochoa's right to confront the witnesses against him through cross-examination. The evidence was relevant to show Isidor

[5] Ochoa does not challenge the trial court conditional exclusion of Isidor's *previous* U-Visa application because the premise of exclusion was that Isidor would not deny knowing of the U-Visa process. 4RP 74.

had a motive to falsify her allegations and testimony. Accusing Ochoa and helping him get convicted provided a gateway to securing legal status in the country through the U-Visa program. No compelling interest justified exclusion of the evidence. Reversal of the convictions is required because the State cannot prove this constitutional error is harmless beyond a reasonable doubt.

a. The right to present a defense and the right to confront adverse witnesses through cross-examination are fundamental to the integrity of the criminal justice system.

The Sixth Amendment and due process require an accused be given a meaningful opportunity to present a complete defense. State v. Cayetano-Jaimes, 190 Wn. App. 286, 295-98, 359 P.3d 919 (2015); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. V, VI, XIV; Wash. Const. art. 1, § 3, 22. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Defendants have the right to present evidence that might influence the determination of guilt before a jury. Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

In conjunction with the right to present a defense, defendants have the constitutional right to confront the witnesses against them. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983); U.S. Const. amend. VI; Wash. Const. art. 1, § 22. Defense counsel exercises the right to confrontation primarily through the cross-examination of the State's witnesses, "the principle means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). An important function of the constitutional right to cross-examination is to expose a witness's motivation for testifying. Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). Absent a valid justification, excluding relevant defense evidence denies the right to present a defense because it "deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." Crane, 476 U.S. at 689-690.

A trial court's decision to exclude evidence is generally reviewed for abuse of discretion. State v. Gunderson, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014). But constitutional issues, such as claimed violation of a defendant's Sixth Amendment right to present a defense and confront witnesses, are reviewed de novo. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010); State v. Dobbs, 180 Wn.2d 1, 10, 320 P.3d 705 (2014).

b. The constitutional right to present a defense and to confront witnesses required that Ochoa be allowed to cross-examine Isidor about her pending U-Visa application, and the trial court's ruling prohibiting him from doing so was unjustified in light of the rights at stake.

Under federal immigration regulations, an undocumented immigrant who is the victim of certain crimes, including sexual assault, felonious assault, and kidnapping, can apply for a U-Visa. 8 C.F.R. § 214.14 (2013). The U-Visa provides temporary relief from deportation and allows for acquisition of temporary nonimmigrant status if local law enforcement authorities certify the alien would be of assistance in an investigation or prosecution. 8 C.F.R. § 214.14 (2013). Once an individual has resided continuously in the United States for three years following the receipt of a U-Visa, she is eligible to apply for lawful permanent residency and is authorized for employment. 8 U.S.C. § 1255(m) (2012); 8 C.F.R. § 214.14(f)(7)(2013). "In short, the U-Visa creates a pathway whereby an illegal immigrant may be able to obtain lawful permanent residency within three years." Romero-Perez v. Commonwealth, __S.W.3d__, 2016 WL 3462241 at *4 (Ky. Ct. App., filed June 24, 2016).[6]

---

[6] When the decision in Romero-Perez v. Commonwealth came out, it was designated "to be published." See http://opinions.kycourts.net/coa/2014-CA-002006.pdf. KY ST RCP Rule 76.28(4)(a) suspends publication

To obtain a U-Visa, the applicant must: (1) "possess specific facts regarding the criminal activity leading a certifying official to determine that the petitioner has, is, or is likely to provide assistance to the investigation or prosecution of the qualifying criminal activity" and (2) demonstrate that she is "being helpful, or is likely to be helpful to a certifying agency in the investigation or prosecution of the qualifying criminal activity upon which his or her petition is based, and since the initiation of cooperation, has not refused or failed to provide information and assistance reasonably requested." 8 C.F.R. § 214.14(b)(3).

Isidor had a pending U-visa application that was based on the criminal conduct alleged to have been perpetrated on her by Ochoa. This evidence was admissible to impeach her testimony. Defense evidence need only be relevant to be admissible. State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). Relevant evidence is "evidence having 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. "All facts tending to establish a theory of a party, or to qualify or disprove

---

pending any review sought in the Kentucky Supreme Court. As of the filing of this brief, the Westlaw citation has not been updated to show the published status of the decision. But the case history available from the Kentucky Court of Appeals website shows no motion for discretionary review was filed, the decision became final on August 18, 2016, and a publication letter was issued on that date. See http://apps.courts.ky.gov/Appeals/ COA_Dockets.shtm

the testimony of his adversary, are relevant." State v. Perez-Valdez, 172 Wn.2d 808, 824-25, 265 P.3d 853 (2011) (quoting Fenimore v. Donald M. Drake Constr. Co., 87 Wn.2d 85, 89, 549 P.2d 483 (1976)). The defense theory was that Isidor fabricated her allegations against Ochoa. As her credibility was central to the State's case, any evidence impeaching her version of events was highly relevant.

There was no dispute below that evidence of Isidor's current U-Visa application was relevant to the issues at trial. This evidence was relevant to impeach Isidor because it showed she had a particular personal interest in the outcome of the case. Isidor had applied for an opportunity to stay in the country on the ground that Ochoa had committed criminal conduct against her. Based on that fact, a jury could reasonably infer that she had a personal interest in testifying in a manner consistent with her application for that opportunity. Although no Washington case has addressed this precise issue, decisions from other jurisdictions recognize a complaining witness's U-visa is relevant in a criminal case for this reason.[7]

---

[7] See, e.g., State v. Valle, 255 Or. App. 805, 814-15, 298 P.3d 1237 (Or. Ct. App. 2013) (trial court erred in excluding evidence that complaining witness applied for a U-visa, as it was relevant impeachment evidence: the witness "had applied for an opportunity to stay in the country on the ground that she had been abused; based on that fact, a jury could reasonably infer that she had a personal interest in testifying in a manner consistent with her application for that opportunity"); State v. Hernandez, 269 Or. App. 327, 328, 332, 344 P.3d 538 (Or. Ct. App. 2015) (trial court

Romero-Perez v. Commonwealth is particularly instructive, and Ochoa cites it for its persuasive value. In that case, the appellate court held the trial court erred in prohibiting questioning concerning the alleged victim's U-Visa application. Romero-Perez, 2016 WL 3462241 at *1. "The success of the victim's application depended on a certification that she provided 'helpful' assistance to the prosecution. The fact that the victim's U-Visa application was pending before the trial court was sufficient to support an inference that she might believe that it was in her best interests to testify in the Commonwealth's favor." Id.

The nature of the U-visa program "can provide a motive for illegal immigrants to make unfounded or exaggerated allegations." Id. at *4 (citing cases). "One can readily see how the U-Visa program's requirement of 'helpfulness' and 'assistance' by the victim to the prosecution could create an incentive to victims hoping to have their U-Visa's granted. Even if the victim did not outright fabricate the allegations

---

erred in prohibiting cross-examination on whether complaining witness alleging sexual abuse intended to apply for a U-visa; the evidence was relevant and admissible to impeach the witness because it showed she had a particular personal interest in the outcome of the case); State v. Del Real-Galvez, 270 Or. App. 224, 225, 230-31, 346 P.3d 1289 (Or. Ct. App. 2015) (trial court erred in excluding evidence that mother of alleged child abuse victim had applied for U-visa, where the child knew about her mother's immigration status and knew that alleging sexual abuse could help her mother obtain a U visa; from this a jury could reasonably infer the child had a personal interest in testifying in a manner that would help her mother obtain a U visa).

against the defendant, the structure of the program could cause a victim to embellish her testimony in the hopes of being as 'helpful' as possible to the prosecution." Id. at *4 (citing Michael Kagan, Immigrant Victims, Immigrant Accusers, 48 U. Mich. J.L. Reform 915, 945 (2015) ("The U visa . . . gives witnesses a potentially powerful motive to make false or exaggerated reports.").

Again, the trial court did not bar Ochoa from cross-examining Isidor about her U-Visa application on relevancy grounds. There is no question the evidence is relevant. Rather, the trial court in Ochoa's case believed evidence of immigration status was too prejudicial to be admitted under ER 403.[8] 5RP 28, 30, 32.

But the decision to exclude relevant defense evidence by prohibiting cross-examination on a crucial witness's motive to testify falsely is no run-of-the-mill evidentiary decision. A defendant's right to impeach a prosecution witness with evidence of bias is guaranteed by the constitutional right to confront witnesses. State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). Defendants in a criminal case are given extra latitude in cross-examination to show credibility, especially when the

[8] ER 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

particular prosecution witness is essential to the State's case. State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1980). "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, 415 U.S. at 316.

In light of these considerations, "ER 403 does not extend to the exclusion of crucial evidence relevant to the central contention of a valid defense." State v. Young, 48 Wn. App. 406, 413, 739 P.2d 1170 (1987) (citing Karl B. Tegland, Washington Practice, Evidence § 105 (2d ed.1982); United States v. Wasman, 641 F.2d 326, 329 (5th Cir. 1981)). The U-Visa evidence was crucial to Ochoa's defense. It was the only way to meaningfully attack Isidor's credibility. The defense was skewered the moment the trial court barred Ochoa from cross-examining Isidor on her motive to fabricate. When courts weigh evidence under ER 403, the balance must be struck in favor of admitting defense evidence. Young, 48 Wn. App. at 413 (citing United States v. Dennis, 625 F.2d 782, 797 (8th Cir. 1980)). The trial court struck the wrong balance in excluding evidence of Isidor's pending U-Visa application.

The Kentucky court's decision is instructive on this issue as well: "While some prejudice might result from allowing examination into the U-Visa application, we believe a criminal defendant's constitutional right to confront his accuser must prevail in this instance." Romero-Perez, 2016

WL 3462241 at *4. It recognized "a witness' immigration status could trigger negative sentiments in the minds of some jurors." Id. But any prejudice that might result from the jury knowing the victim's immigration status must be weighed against the defendant's right to effective cross-examination. Id.

The value of permanent resident status "for those living in immigration limbo cannot be overstated. The ability to transform oneself from illegal immigrant, to legal visa holder, to permanent legal resident in a relatively short amount of time without ever having to the leave the United States, *could* provide a strong motive for fabrication or embellishment." Id. Given the nature of the U-Visa program, the court concluded "a criminal defendant's right to effectively probe into a matter directly bearing on witness credibility and bias must trump any prejudice that would result from the jury's knowledge of the victim's immigration status. The probative value of disclosing the immigration status and knowledge of the U-Visa program outweighs any prejudice to the witness stemming from such disclosure." Id. at *5.

The same holds true in Ochoa's case. Ochoa had the constitutional right to confront Isidor, his accuser, through cross-examination. Any prejudice that might result from knowing her undocumented status must be weighed against Ochoa's right to effective cross-examination. The trial

court failed to do this. The State's interest in excluding prejudicial evidence must "'be balanced against the defendant's need for the information sought,' and relevant information can be withheld only 'if the State's interest outweighs the defendant's need.'" Jones, 168 Wn.2d at 720 (quoting Darden, 145 Wn.2d at 622). "We must remember that 'the integrity of the truthfinding process and [a] defendant's right to a fair trial' are important considerations." Jones, 168 Wn.2d at 720 (quoting Hudlow, 99 Wn.2d at 14). Isidor's U-Visa application remained pending in the prosecutor's office while that same office prosecuted Ochoa for the charged crimes. Through effective cross-examination, the defense would have been able to show the U-Visa application provided a strong motive for Isidor to falsify or embellish her account of what happened. By providing helpful evidence to the prosecutor's office, she increased the likelihood that the prosecutor's office would sign off on her U-Visa, clearing the way for it to ultimately be granted by the federal authorities. Ochoa had the right to put that impeachment evidence before the jury.

The trial court relied on Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 230 P.3d 583 (2010) to prevent Ochoa from cross-examining Isidor about her U-Visa application. 5RP 28. Salas is easily distinguishable and does not support the trial court's ruling.

In that case, the plaintiff Salas was injured when he slipped from a ladder erected by Hi-Tech while working at a construction site. He sued Hi-Tech alleging negligence. At trial, evidence was admitted that Salas was an undocumented immigrant. Salas, 168 Wn.2d at 666. The trial court reasoned Salas' immigration status was relevant to a determination of lost future wages because it called into question whether Salas' labor would be valued in United States dollars or some other currency should he be deported. Id. at 669. The Supreme Court noted the risk of Salas being deported was exceptionally low, but acknowledged his immigrant status was "minimally relevant" to the issue of lost future earnings. Id. at 669-70.

The Court also recognized immigration is a politically sensitive issue, and that "[i]ssues involving immigration can inspire passionate responses that carry a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation." Id. at 672. This is the crux of the Supreme Court's holding: "*In light of the low probative value* of immigration status with regard to lost future earnings, the risk of unfair prejudice brought about by the admission of a plaintiff's immigration status is too great. Consequently, we are convinced that the probative value of a plaintiff's undocumented status, *by itself*, is substantially outweighed by the danger of unfair prejudice." Id. (emphasis added).

Salas is a civil case. As such, it is immediately distinguishable from Ochoa's case. The Sixth Amendment right to confrontation applies in criminal prosecutions. There is no such right in civil cases. State v. Abd-Rahmaan, 154 Wn.2d 280, 288, 111 P.3d 1157 (2005); In re Detention of Stout, 159 Wn.2d 357, 369, n.12, 150 P.3d 86 (2007). The constitutional mandate of confrontation through cross-examination played no role in Salas. Nor was the Sixth Amendment right to present a defense implicated in Salas because that right only applies to criminal cases. Allied Fin. Servs., Inc. v. Mangum, 72 Wn. App. 164, 168 n.2, 864 P.2d 1, 871 P.2d 1075 (1993) ("The Sixth Amendment expressly applies to criminal cases, and we reject the argument advanced by counsel at oral argument that the 'penumbra' of the Sixth Amendment extends to civil cases."). Ochoa's case is not a civil case involving lost future wages. His freedom is on the line. His liberty interest triggers constitutional scrutiny of a decision to withhold evidence relevant to his defense.

Further, unlike in Salas, the excluded evidence in Ochoa's case is more than minimally relevant. Isidor's pending U-Visa application was highly relevant to a central issue of the case: Isidor's credibility. The trial court failed to accord proper weight to Ochoa's Sixth Amendment right to present a defense and "to be confronted with the witnesses against him." Courts must safeguard the right to present a defense "with meticulous

care." State v. Maupin, 128 Wn. 2d 918, 924, 913 P.2d 808 (1996) (quoting State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976)). But the trial court's ruling shows no such care. In ruling evidence of immigration status was to be categorically excluded from trial, the court did not even mention Ochoa's right to confront the witnesses against him, treating the matter as an ordinary evidentiary decision. 5RP 28, 30, 32.

In an earlier discussion on the issue, when defense counsel protested his client had the right to confrontation through cross-examination, the court grudgingly described this constitutional right as "a factor" among others to be considered. 4RP 77-78. It never addressed the constitutional dimensions of the issue again. The constitutional rights at issue are more than a "factor" to be considered. These rights drive the analysis. The trial court misapplied the law in excluding the U-Visa evidence because it failed to consider the question of admissibility in light of the constitutional rights at stake.

If evidence is relevant, the burden is on the State to show the evidence is so prejudicial or inflammatory that its admission would disrupt the fairness of the fact-finding process at trial. Hudlow, 99 Wn.2d at 15-16. That is, the State must demonstrate a compelling state interest to exclude a defendant's relevant evidence. Id.; Darden, 145 Wn.2d at 621. Even so, "[e]vidence relevant to the defense of an accused will seldom be

excluded, even in the face of a compelling state interest." State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000). "[F]or evidence of *high* probative value 'it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22.'" Jones, 168 Wn.2d at 720 (quoting Hudlow, 99 Wn.2d at 16).

Neither the State nor the trial court identified a compelling interest in keeping the jury from hearing about Isidor's motive to lie. Something more than simple resort to ER 403 must be shown in such circumstances. Young, 48 Wn. App. at 413. The impeachment evidence was relevant to the defense and was of high probative value in relation to the complaining witness's credibility. Not even a compelling interest could keep it out. Jones, 168 Wn.2d at 720.

The defendant must be allowed to conduct reasonable cross-examination on a subject relevant to the witness's motive to lie, even if the subject matter is potentially inflammatory to the jury. Olden v. Kentucky, 488 U.S. 227, 232, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988). In Olden, for example, the trial court committed constitutional error in prohibiting the defense from cross-examining the complaining witness regarding her interracial relationship with her boyfriend to show she lied about being raped to avoid jeopardizing that relationship. Olden, 488 U.S. at 229-32. Speculation as to the effect of jurors' racial biases did not justify exclusion

of cross-examination with such strong potential to demonstrate the falsity of the witness's testimony. Id. at 232.

Cases such as Olden teach the notion of "inflammatory" evidence cannot be relied on as a talisman to exclude relevant defense evidence. If the evidence is an important part of the defense case, the rights of the accused must be honored. Cross-examination is designed to expose a witness's motivation in testifying and thereby "expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." Id. at 231 (quoting Davis, 415 U.S. at 316-17).

The trial court, acting as evidentiary gatekeeper, deprived the jury of fairly judging the credibility of Isidor's testimony. The State did not have a compelling reason to prevent admission of evidence relevant to Ochoa's defense. On the contrary, the purpose of cross-examination is to test the credibility of witnesses. Darden, 145 Wn.2d at 620. Confrontation helps assure the accuracy of the fact-finding process; thus, whenever the right to confront is denied, the ultimate integrity of the fact-finding process is called into question. Id. The court erred in excluding probative defense evidence without a compelling interest.

The trial court believed jurors could not try the case fairly and impartially if they knew about Isidor's immigration status. It pointed to remarks made by prospective jurors during voir dire to justify exclusion of

the U-Visa evidence. 5RP 30. The trial court's exclusion of defense evidence based on what was said in voir dire is unjustified.

First, contrary to the trial court's description, no prospective juror said undocumented immigrants should have no rights in this country. 4RP 55-62, 92-94; 5RP 30. In terms of disparate rights, several jurors expressed a belief that undocumented immigrants should not be able to obtain the same government benefits than those who are here legally. 4RP 57, 60-61. Speaking in general terms, one juror said undocumented immigrants do not get the same rights as those here legally, and another followed up on that by referencing the right to vote and some civil rights. 4RP 59-60. Significantly, no one endorsed the idea that undocumented immigrants should not be treated fairly and impartially in connection with criminal trial proceedings. 4RP 92-94. No one so much as suggested that an alleged victim with undocumented status in a criminal case was to be treated differently that a documented immigrant or someone who is not an immigrant. The trial court's description of what happened in voir dire is exaggerated.

Further, the trial court's exclusion of the U-Visa evidence based on what jurors said in voir dire betrays a curious attitude toward the process of selecting a fair and impartial jury. The purpose of voir dire 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. CrR 6.4(b); State v. Tharp, 42 Wn.2d 494, 499, 256 P.2d 482 (1953). The jurors selected to try Ochoa's case were not challenged for cause. These jurors were sworn in. 4RP 125; see CrR 6.6 ("The jury shall be sworn or affirmed well and truly to try the issue between the State and the defendant, according to the evidence and instructions by the court.").

"The juror's oath is the basis for several presumptions regarding juror qualifications and conduct. The law presumes, for example, that each juror sworn in a case is impartial and qualified to sit on a particular case or the juror would have been challenged for cause." 4A Wash. Prac., Rules Practice CrR 6.6 (7th ed.) (citing State v. Persinger, 62 Wn.2d 362, 366, 382 P.2d 497 (1963); State v. Latham, 30 Wn. App. 776, 781, 638 P.2d 592 (1981), aff'd, 100 Wn.2d 59, 667 P.2d 56 (1983)). The jurors who tried Ochoa's case were acceptable to both the State and the defense. The trial court exclusion of impeachment evidence rests on the untenable presumption that jurors would violate their oath if they heard what the court described as "inflammatory" evidence of immigration status. The voir dire process is designed to weed out prospective jurors who would be unfairly swayed by such evidence. And sworn jurors must be presumed to follow their oath to try the case impartially.

The trial court's decision to exclude the U-visa evidence and restrict cross-examination stems from an assumption that jurors will violate the court's instructions. Before deliberations, the jury was instructed: "As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts provided to you and on the law given to you, not on sympathy, prejudice or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict." CP 28 (Instruction 1). The court gave the same instruction orally before opening statements were given. 5RP 42.

The trial court, in precluding Ochoa from cross-examining Isidor on her pending U-Visa application, turned the requisite presumption on its head, presuming the jury would *not* follow its instructions if the U-Visa evidence was admitted. That is not the law. "Jurors are presumed to follow instructions." State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982). "[W]e must indulge some presumptions in favor of the integrity of the jury. It is a branch of the judiciary, and if we assume that jurors are so quickly forgetful of the duties of citizenship as to stand continually ready to violate their oath on the slightest provocation, we must inevitably conclude that a trial by jury is a farce and our government a failure."

Grisby, 97 Wn.2d at 509 (quoting State v. Pepoon, 62 Wn. 635, 644, 114 P. 449 (1911)).

c. Reversal is required because this constitutional error is not harmless beyond a reasonable doubt.

Violation of the right to present a defense and to confront witnesses is constitutional error. Jones, 168 Wn.2d at 724; State v. McDaniel, 83 Wn. App. 179, 187, 920 P.2d 1218 (1996), review denied, 131 Wn.2d 1011, 932 P.2d 1255 (1997). "[A]ny error in excluding evidence is presumed prejudicial and requires reversal unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place." Johnson, 90 Wn. App. at 69. For confrontation errors, the reviewing court must assess whether the error is harmless beyond a reasonable doubt by "assuming the damaging potential of the cross-examination were fully realized." Van Arsdall, 475 U.S. at 684. The State bears the burden of overcoming the presumption of prejudice and proving harmlessness beyond a reasonable doubt. Maupin, 128 Wn.2d at 928-29; Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

The State cannot meet its burden here. The case hinged on Isidor's credibility. She was the only one besides Ochoa to testify as to what happened in her trailer. Evidence of her pending U-Visa application

would have showed a motive to testify falsely against Ochoa. Such evidence would have provided a basis for a rational juror to question her account of what happened. Assuming as we must that "the damaging potential of the cross-examination" regarding the U-Visa were "fully realized," the result is that Isidor's credibility is undermined along with the State's case. Van Arsdall, 475 U.S. at 684.

The evidence is not so overwhelming as to necessarily lead to a finding of guilt on the charged crimes. Trailer park residents heard Isidor scream for help, which supports an inference that Ochoa was doing *something* bad to her. The question, though, is what precisely was he doing? Based on the screams for help, he may have simply been striking her, not forcibly raping and strangling her.

Evidence shows Isidor was injured, with marks and bruises to her face, neck, leg, arm and hand. 6RP 85-86, 92-93; 7RP 20-25, 38, 41, 46, 81; 8RP 28. Significantly, however, there was no evidence of injury to her external or internal genitalia. 7RP 34, 49, 56. To the extent her documented injuries are corroborative that some sort of assault happened, they do not corroborate that forcible rape happened. A rational trier of fact, considering Isidor's motive to fabricate or at least embellish her testimony, could conclude the State had not proved Ochoa raped her

beyond a reasonable doubt. The rape counts rose and fell on the believability of Isidor's testimony.

The same goes for the assault by strangulation conviction. There were marks and bruising on Isidor's neck, but that injury does not necessarily show it was caused strangulation, as opposed to some other conduct that was not charged. The bruising was not extensive. 7RP 46. There were no definitive signs of strangulation, such as petichial hemorrhaging or finger marks on her throat. 6RP 88; 7RP 44. She did not report a loss of consciousness, which is another sign of strangulation. 7RP 43. Her voice was not even hoarse afterwards. 7RP 47.

Ochoa testified in his own defense and provided an exculpatory version of events. He denied raping and strangling her. 9RP 21, 24. According to Ochoa, the two were in a previous sexual relationship, the sex on the morning of July 4 was consensual, the argument and screaming were the result of Isidor being upset with Ochoa about not returning her affection as she wished, and he did not force her back into the trailer. 9RP 14-15, 19-22, 58-59. Although minds can differ about the believability of his testimony, "[a]n appellate court ordinarily does not make credibility determinations" in assessing whether an error affected the verdict. Maupin, 128 Wn.2d at 929. This means the reviewing court will not presume one side's witnesses are credible and the other side's witnesses are

not. The credibility and weight to be attached to the testimony of a witness is for the trier of the fact. Id. at 929-30 (citing Zillah Feed Yards, Inc. v. Carlisle, 72 Wn.2d 240, 244, 432 P.2d 650 (1967)). The trial court's exclusion of evidence from which a jury could have inferred that Isidor had a personal interest in testifying against Ochoa was harmful because the jury was not informed of a matter relevant to an assessment of her credibility, which was essential to the State's case.

"The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence." Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). As sole judges of witness credibility, jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment regarding the believability of the complaining witness's testimony. Davis, 415 U.S. at 317. Instead of constricting the scope of Ochoa's cross-examination, the trial court should have allowed the wide latitude mandated by due process and the right to confrontation. The denial of these constitutional rights corrupted and distorted the fact-finding process. Reversal of the convictions is required.

2. THE COURT ERRED IN FAILING TO COUNT OFFENSES AS THE SAME CRIMINAL CONDUCT IN COMPUTING THE OFFENDER SCORE.

Defense counsel argued the rape and assault convictions constituted the same criminal conduct. 13RP 17-19.[9] Ochoa establishes the assault by strangulation is the same criminal conduct as the rape offense under count 1 because they occurred at the same time and place, involved the same victim, and share the same objective intent. The court misapplied the law or abused its discretion in ruling otherwise. Remand is required to resentence Ochoa with a lower offender score.

The offender score establishes the standard range term of confinement for a felony offense. RCW 9.94A.525; RCW 9.94A.530(1). The sentencing court calculates an offender score by adding current offenses and prior convictions. RCW 9.94A.589(1)(a). Offenses that encompass "the same criminal conduct" are counted as one crime for sentencing purposes. RCW 9.94A.589(1)(a). Appellate courts review determinations of same criminal conduct for abuse of discretion or misapplication of law. State v. Graciano, 176 Wn.2d 531, 535-36, 295 P.3d 219 (2013).

---

[9] Counsel also made a variety of other same criminal conduct arguments related to other counts. 13RP 4-17.

"Same criminal conduct" is defined as two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). The test is an objective one that "takes into consideration how intimately related the crimes committed are, and whether, between the crimes charged, there was any substantial change in the nature of the criminal objective." State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

The offenses at issue in this appeal — the rape and assault — involved the same time (morning of July 4), the same place (Isidor's residence) and the same victim (Isidor). None of this was disputed below.

The dispute centered on whether the crimes involved the same criminal intent, and the trial court's ruling turned on intent. 13RP 17-21. According to the trial court, these offenses are not the same criminal conduct because "[s]trangulation is not necessary to accomplish . . . forcible rape and is a separate and distinct act that was found by the jury to have occurred, and that's what supported the Assault in the Second Degree conviction." 13RP 21.

The assault conviction was based on the act of strangulation, as found by the jury. CP 78, 130. The State elected the act of rape that occurred before she ran out of the house the first time as the basis for count 1. 11RP 55-56. According to Isidor's testimony, Ochoa grabbed her

when she tried to run out the door, brought her over to the couch, choked her and raped her there. 6RP 9-12, 13, 56-57. She told police that when she resisted Ochoa's attempt to force himself on her, he grabbed her around the neck, choked her and raped her. 5RP 80. She told hospital staff that she tried to fight him off and he grabbed her around the neck while on the couch. 6RP 79. Consistent with this testimony, the State argued to the jury that the physical force that overcame resistance to the rape was "a continuous course of violence." 11RP 56. The physical force was used to have sexual intercourse with Isidor. 11RP 56. "He's pressing down on her neck in order to subdue her." 11RP 69. The evidence allows for only one conclusion: the rape and assault form a fluid course of conduct and are intimately connected.

Multiple factors inform the objective intent determination, including: (1) how intimately related the crimes are; (2) whether the criminal objective substantially changed between the crimes; (3) whether one crime furthered another; and (4) whether both crimes were part of the same scheme or plan. Burns, 114 Wn.2d at 318-19; State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005, 914 P.2d 65 (1996). Crimes may involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted

criminal episode. State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998).

Viewed objectively, the assault by strangulation furthered the count 1 rape and was a part of a single, uninterrupted criminal episode. Ochoa strangled her in the course of raping her on the couch, before she was able to escape and run off the first time. He did so to keep her quiet and subdue her so that he could accomplish the rape. See State v. Taylor, 90 Wn. App. 312, 321-22, 950 P.2d 526 (1998) (simultaneous kidnapping and second degree assault shared same objective intent because assault furthered the kidnapping). The rape and assault therefore involved the same criminal intent under a same criminal conduct analysis. "[I]f one crime furthered another, and if the time and place of the crimes remained the same, then the defendant's criminal purpose or intent did not change and the offenses encompass the same criminal conduct." State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

Alternatively, the two offenses are properly viewed as part of the same scheme or plan. A single intent includes more than one offense "committed as part of a scheme or plan, with no substantial change in the nature of the criminal objective." State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990). The overarching criminal objective was to rape Isidor. The assault by strangulation occurred in the midst of the rape. The

restraint occurred for the purpose of effectuating the rape. The jury found Ochoa committed the assault with sexual motivation. CP 129.[10]

State v. Kloepper, 179 Wn. App. 343, 317 P.3d 1088, review denied, 180 Wn.2d 1017, 327 P.3d 55 (2014) is distinguishable. In Kloepper, the trial court soundly exercised its discretion in not treating the rape and assault as the same criminal conduct because the evidence allowed the court "to view the rape as a crime of opportunity that presented itself after the assault rather than as the object of the attack." Kloepper, 179 Wn. App. at 358. As outlined above, the evidence in Ochoa's case is not susceptible to that interpretation. The evidence definitively shows the rape was the object of the assault. The assault overcame resistance to the rape, the assault furthered the rape or alternatively was part of the overarching plan to rape.

Contrary to the trial court's reasoning, whether strangulation was "necessary" to accomplish the rape is not the correct standard for determining same criminal conduct. 13RP 20. The question is whether the objective intent is the same. Burns, 114 Wn.2d at 318-19. The court said the jury found the assault was a separate and distinct act from the rape,

---

[10] The State argued to the jury "the whole point, the whole reason the Defendant was doing this was for the purpose of his sexual gratification." 11RP 70. The State further argued "This is a situation where the 180-pound construction worker is trying to subdue a smaller woman so he can rape her." 11RP 94.

which is true for purposes of double jeopardy. 13RP 20-21. But "it is well established that a double jeopardy violation claim 'is distinct from a 'same criminal conduct' claim and requires a separate analysis.'" State v. Thompson, 192 Wn. App. 733, 736 n.1, 370 P.3d 586, review denied, 185 Wn.2d 1041, 377 P.3d 766 (2016) (quoting State v. French, 157 Wn.2d 593, 611, 141 P.3d 54 (2006)). As argued, the court misapplied the law or otherwise abused its discretion in failing to treat the assault offense as the same criminal conduct as the rape in count 1. Resentencing is required based on a lower offender score.

3. IN THE EVENT THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, ANY REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.

The Court of Appeals has discretion to deny a cost bill even where the State is the substantially prevailing party. State v. Sinclair, 192 Wn. App. 380, 386, 388, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016); RCW 10.73.160(1) (the "court of appeals . . . *may* require an adult . . . to pay appellate costs."). The imposition of costs against indigent defendants raises serious concerns well documented in State v. Blazina: "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." State v. Blazina, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). The concerns expressed in Blazina are applicable to appellate

costs and it is appropriate for appellate courts to be mindful of them in exercising discretion. Sinclair, 192 Wn. App. at 391.

Ochoa had assigned counsel for trial. CP 205. The trial court waived all discretionary costs at sentencing. 13RP 32; CP 138-39. Ochoa qualified for indigent defense services on appeal. CP 201-02. There is a presumption of continued indigency throughout the review process. Sinclair, 192 Wn. App. at 393; RAP 15.2(f). He has no money or assets, and is already $70,000 in debt to a hospital. CP 226-28; see Blazina, 182 Wn.2d at 838 (defendant's other debts factor into ability to pay). He has four dependent children. CP 228. There is no finding that he will have the ability to pay in the future. Sinclair, 192 Wn. App. at 393. He is serving a minimum 30 years in prison, with the potential for life imprisonment, during which time his legal financial obligations are subject to a 12 percent annual interest rate. CP 140-41; Blazina, 182 Wn.2d at 836.

Considering the circumstances, Ochoa asks this Court to soundly exercise its discretion by denying any request for appellate costs. See State v. Cardenas-Flores, 194 Wn. App. 496, 521-22, 374 P.3d 1217 (2016) (waiving appellate costs in light of defendant's indigent status, and presumption under RAP 15.2(f) that she remains indigent "throughout the review" unless the trial court finds that her financial condition has

improved); State v. Hart, __Wn. App.__, __P.3d__, 2016 WL 4366948, at *6 (slip op. filed Aug. 16, 2016) (same).

D. CONCLUSION

For the reasons stated, Ochoa requests reversal of the convictions.

DATED this 20th day of September 2016

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC

September 20, 2016 - 2:16 PM

Transmittal Letter

Document Uploaded: 1-484544-Appellant's Brief.pdf

Case Name: Leonel Ochoa
Court of Appeals Case Number: 48454-4

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

copy sent to : Leonel Ochoa 386703 Airway Heights Corrections Center PO Box 2049
Airway Heights, WA 99001

Sender Name: John P Sloane - Email: sloanej@nwattorney.net

A copy of this document has been emailed to the following addresses:

PCpatcecf@co.pierce.wa.us
grannisc@nwattorney.net