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NO. 95905-6

SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON, PETITIONER

v.

LEONEL ROMERO OCHOA, RESPONDENT

Court of Appeals Cause No. 48454-4
Appeal from the Superior Court of Pierce County
The Honorable Stanley J. Rumbaugh

No. 14-1-02595-7

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUES PERTAINING TO PETITIONER’S ASSIGNMENTS OF ERROR.

1. Does the constitutional harmless error test require direct eyewitness corroboration, when the reviewing court should consider all the untainted evidence collectively, and when overwhelming circumstantial evidence can establish harmless beyond a reasonable doubt?
2. Was any error in excluding evidence of the victim’s U-Visa application harmless beyond a reasonable doubt, where the overwhelming untainted evidence, considered collectively, established defendant’s guilt as to all counts?

B. STATEMENT OF THE CASE.

A detailed account of the procedural history and substantive facts can be found in the State’s Motion for Discretionary Review previously filed with this Court.

C. ARGUMENT.

1. THE UNTAINTED EVIDENCE TEST FOR CONSTITUTIONAL HARMLESS ERROR DOES NOT REQUIRE EYEWITNESS CORROBORATION.

“[M]ost constitutional errors can be harmless.” *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 306, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)).¹ See also, *State v. Banks*, 149 Wn.2d 38, 43, 65 P.3d 1198

¹ Only a very limited class of cases – those involving structural error – require automatic reversal. See *Neder*, 527 U.S. at 7-8.

(2003) (“most constitutional errors are presumed to be subject to harmless error analysis.”). Both federal and state law recognize that violations of the confrontation clause, in particular, are subject to harmless error analysis. See *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (“[T]he constitutionally improper denial of a defendant’s opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to...harmless-error analysis.”); *State v. Hieb*, 107 Wn.2d 97, 109, 727 P.2d 239 (1986) (“We...reaffirm our decision that a violation of the confrontation clause...may constitute harmless error.”); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985) (“It is well established that constitutional errors, including violations of a defendant’s rights under the confrontation clause, may be so insignificant as to be harmless.”).

An error of constitutional magnitude is deemed harmless if the appellate court is able to say “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Accord *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007); *Guloy*, 104 Wn.2d at 425. Under the “overwhelming untainted evidence” test, as adopted by this Court in *Guloy*, the appellate court “looks only at the untainted evidence to determine if the untainted evidence is so

overwhelming that it necessarily leads to a finding of guilt.” *Guloy*, 104 Wn.2d at 426. The State bears the burden of proving harmless error. *Id.* at 425.

Where the trial error involves a confrontation clause violation that denies a defendant the opportunity to impeach a witness for bias, the reviewing court must ask whether, “assuming that the damaging potential of the cross-examination were fully realized,” the error was nonetheless harmless beyond a reasonable doubt. *Van Arsdall*, 475 U.S. at 684.

Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case.

Van Arsdall, 475 U.S. at 684. *Accord State v. Wilcoxon*, 185 Wn.2d 324, 335-36, 373 P.3d 224 (2016).

The harmless error doctrine recognizes that a defendant is not entitled to a perfect, error-free trial, for such a trial does not exist. *United States v. Hasting*, 461 U.S. 499, 508-09, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983). *See also, State v. Ruzicka*, 89 Wn.2d 217, 228, 570 P.2d 1208 (1977) (“A defendant is entitled to a fair trial but not a perfect one.”) (quoting *Lutwak v. United States*, 344 U.S. 604, 619, 73 S. Ct. 481, 97 L.

Ed. 593 (1953)). Thus, “it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations.” *Hasting*, 461 U.S. at 509. An otherwise valid conviction should not be set aside if, based on its review of the entire record, the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have found guilt absent the error. *Van Arsdall*, 475 U.S. at 681; *Guloy*, 104 Wn.2d at 425.

Eyewitness corroboration is not required for a trial error to be harmless beyond a reasonable doubt. But, if the untainted evidence includes eyewitness corroboration, then such evidence should be considered together with all other untainted evidence, including circumstantial evidence. The appellate court is to consider the entire record on review. *See Hieb*, 107 Wn.2d at 110 (citing *Hasting*, 461 U.S. at 509); *State v. Mayer*, 184 Wn.2d 548, 568, 362 P.3d 745 (2015) (reviewing court to consider the testimony of each witness and the evidence collectively, not in isolation).

In *Hieb*, this Court affirmed its adherence to the “overwhelming untainted evidence” test and found any confrontation clause violation in that case to be harmless given the overwhelming circumstantial evidence presented at trial. 107 Wn.2d at 109-12. The defendant, Hieb, was convicted of second degree murder after beating his girlfriend’s 20-month-

old daughter to death. *Id.* at 98-103. Even after excluding the potentially tainted evidence – statements made by the murder victim’s three-year-old sister² – the untainted evidence included the following: testimony from medical doctors that the severity of the child’s injuries were indicative of child abuse and could not have been self-inflicted; testimony regarding the presence of dents and blood on the apartment walls, and the corresponding presence of bruises on the child’s head; the neighbor’s testimony that four days before the girl’s death, when the child was alone with the defendant, the neighbor heard what sounded like doors slamming for 45 minutes in the defendant’s apartment; and testimony from other witnesses regarding the “occurrence and continuation of physical abuse to the children” after they moved in with the defendant. *Id.* at 101-02, 110-11.

This evidence refuted the defendant’s farfetched explanation that the child victim caused some of the injuries herself and that the dents in the walls were caused by bouncing a rubber ball. *See Hieb*, 107 Wn.2d at 110-11. Thus, “*overwhelming circumstantial evidence*” established the defendant’s guilt, and this Court affirmed his conviction. *Id.* at 111-12 (emphasis added).

² One such statement included the three-year-old’s response when asked if she was watching when her sister was killed: “Yes, but I shutted my eyes so [the defendant] wouldn’t see me.” *Hieb*, 107 Wn.2d at 110.

In *State v. Scanlan*, 2 Wn. App.2d 715, 720-22, 732-33, 413 P.3d 82 (2018), an elder abuse case in which the victim did not testify at trial, the Court of Appeals considered whether the confrontation clause violation in that case constituted harmless error and answered in the affirmative. Not only was the improper testimony from two officers cumulative, but overwhelming circumstantial evidence established that the defendant assaulted the elderly victim. *Id.* at 733. The defendant was the only other person with the victim when he was found severely beaten, police found the defendant hiding in a car, and the defendant made a “tacit admission of guilt” at the scene. *Id.* at 733. Thus, any constitutional error was harmless. *Id.*

In *State v. Neslund*, 50 Wn. App. 531, 534-35, 749, P.2d 725 (1988), *review denied*, 110 Wn.2d 1025 (1988), the defendant was convicted of murdering her husband. His body was never found. *Id.* at 543-44. Regarding the defendant’s claim of prosecutorial misconduct, the Court of Appeals found that even if the constitutional harmless error test applied, any error was harmless beyond a reasonable doubt. *Id.* at 563. The court specifically noted the “circumstantial evidence, physical evidence, expert testimony and particularly the defendant’s confessions and admissions provided overwhelming evidence of [the defendant’s] guilt.” *Id.*

Other courts have also considered circumstantial evidence of guilt in finding a constitutional violation harmless beyond a reasonable doubt. *See, e.g., Hastings*, 461 U.S. at 510-12 (court considers both direct and circumstantial evidence to find “overwhelming evidence of guilt” and harmless error); *Hopkins v. Cockrell*, 325 F.3d 579, 585 (5th Cir. 2003) (“In light of the overwhelming amount of circumstantial evidence present in this case, we hold that any error in admitting Hopkins’ confession was harmless.”); *State v. Hurtado*, 173 Wn. App. 592, 595, 607-08, 294 P.3d 838 (2013), *review denied*, 177 Wn.2d 1021 (2013) (admission of victim’s testimonial statements in violation of the defendant’s right of confrontation held harmless in light of overwhelming untainted evidence, to include circumstantial evidence of guilt); and *State v. We*, 138 Wn. App. 716, 720, 726-27, 158 P.3d 1238 (2007), *review denied*, 163 Wn.2d 1008 (2008) (any error in admitting fire investigator’s testimony that defendant’s motive for setting fire was insurance fraud was harmless in light of overwhelming circumstantial evidence of the defendant’s guilt).

This is not to say that circumstantial evidence of guilt, on its own, will always be sufficiently overwhelming to support a finding of harmless error. *See, e.g., Chapman v. California*, 386 U.S. 18, 24-26, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (constitutional error not harmless where, although the case involved “a reasonably strong ‘circumstantial web of evidence’

against petitioners,” State failed to prove that prosecutor’s argument and trial court’s instruction to jury, which continuously and repeatedly impressed that petitioners’ failure to testify at trial created the inference of guilt, did not contribute to guilty verdicts obtained); *State v. Coles*, 28 Wn. App. 563, 564-69, 625 P.2d 713 (1981) (improper admission of defendant’s custodial inculpatory statements not harmless where the State’s case consisted “solely of circumstantial evidence” from witnesses linking the defendant and victim during the period up to the murder). Certainly, strong eyewitness testimony is more convincing of harmless error than weak or fragmented circumstantial evidence. *See, e.g., Harrington v. California*, 395 U.S. 250, 254, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969) (constitutional error held harmless where the case against the defendant “was not woven from circumstantial evidence” but rather consisted of defendant’s admissions and eyewitness testimony). But, where circumstantial evidence is “so overwhelming that it necessarily leads to a finding of guilt,” *Guloy*, 104 Wn.2d at 426, the reviewing court should find any constitutional trial error harmless.

For purposes of determining guilt beyond a reasonable doubt at trial, jurors are routinely instructed,

The evidence that has been presented to you may be either direct or circumstantial. The term “direct evidence” refers to evidence that is given by a witness who has directly

perceived something at issue in this case. The term “circumstantial evidence” refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 5.01, at 181 (4th ed. 2016) (WPIC) (emphasis added).³ If the law does not distinguish between direct and circumstantial evidence for purposes of finding guilt beyond a reasonable doubt at trial, then certainly the law should not distinguish between the two for purposes of determining whether an error that occurred during trial was harmless beyond a reasonable doubt. *See Hieb*, 107 Wn.2d at 111 (citing WPIC 5.01).

The “untainted evidence” test does not require eyewitness testimony. If such testimony were required, then cases involving crimes perpetrated in secret and behind closed doors (e.g., many domestic violence, murder, and sexual assaults) could never be affirmed for harmless error and would always require reversal for a new trial.

As the above cases demonstrate, the reviewing court can and should consider all of the evidence collectively, including both direct and

³ The jury was similarly instructed regarding direct and circumstantial evidence in this case. CP 25-117 (Instruction No. 2).

circumstantial evidence, to determine whether the constitutional error complained of was harmless beyond a reasonable doubt. While not required, defendant's case here does involve eyewitness testimony, and that testimony, when viewed collectively with all other untainted evidence, is so overwhelming as to defendant's guilt that the jury necessarily would have reached the same conclusion even in the absence of the trial error. *See Mayer*, 184 Wn.2d at 568.

As discussed in the following section, any confrontation clause violation in defendant's case was harmless beyond a reasonable doubt, where the overwhelming untainted evidence established that defendant unlawfully entered V.I.'s home in the middle of the night, strangled her, repeatedly raped her, and dragged her back inside her home by the hair when she tried to escape.

2. THE OVERWHELMING UNTAINTED EVIDENCE, WHEN CONSIDERED COLLECTIVELY, NECESSARILY LEADS TO A FINDING OF GUILT AS TO ALL COUNTS.⁴

The untainted evidence in this case consists of the following:
During the early morning hours of July 4, 2014, V.I.'s neighbors woke to the sound of a woman screaming. 5 RP 100-02, 116-17; 6 RP 98-100. The screaming was "kind of like when someone is trying to get away or if

⁴ See 12 RP 3-6; CP 120, 122, 124-130.

someone is hitting somebody, that kind of scream” and sounded “[k]ind of like a cry for help, or ‘don’t.’” 5 RP 100-01. The woman cried out for help in both English and Spanish. 5 RP 101-02, 117; 6 RP 98-100, 102.

Neighbors determined the screaming appeared to be coming from V.I.’s home and heard what sounded like “a really bad domestic violence situation.” 5 RP 103-04, 107; 6 RP 102-03.

One neighbor, Rafael Guillen-Gonzalez, looked out his window and observed defendant aggressively pulling V.I. by her hair and dragging her into her home while she was “crying, screaming, crying out for help.” 5 RP 115-18. V.I. was naked from the waist down. 5 RP 118. Defendant, wearing only a T-shirt and boxer shorts, repeatedly told V.I. to “be quiet” and dragged V.I.’s body approximately 15 feet along the gravel. 5 RP 118-19.

Multiple witnesses called the police, who arrived a short time later. 5 RP 103-04, 118-19; 6 RP 98-99. Police observed an open window on the side of V.I.’s home and knocked on her front door to make contact, when “all of the sudden the front door...flew open” and V.I. came running out with the “the look of frantic fear.” 5 RP 55-59. *See also*, 5 RP 72-74, 104; 6 RP 104. She was naked from the waist down. 5 RP 59, 74, 104, 120; 6 RP 104. Police observed defendant inside V.I.’s residence; he was also naked from the waist down. 5 RP 59-60, 76.

Multiple witnesses observed V.I.'s demeanor immediately following the incident and described her as "very upset," "crying," "shaking," "frantic," "emotional," and "physically trembling." 5 RP 59, 62-63, 75, 79, 104-05, 120. Defendant, on the other hand, appeared to be under the influence of something, had bloodshot watery eyes, appeared unstable on his feet, wobbled back and forth, and "just didn't look like he was completely there." 5 RP 59, 76-77, 112.

When taken to the hospital, V.I. still appeared "extremely tearful," "very upset," "somewhat frantic," "anxious," and had "rapid speech." 7 RP 16, 27, 94; 8 RP 26. The first nurse to contact V.I. observed bruising and red marks around V.I.'s neck. 8 RP 27. Those marks developed into bruising. 8 RP 28. Another emergency room nurse noted the following during the head-to-toe assessment: bruising behind V.I.'s ear, "multiple scratches to her face and neck area," bruises on her upper left arm and right hand, a "six-inch linear bruise to her left inner thigh," "multiple blue bruises to her lower legs," and "scratch marks to her knees and knuckles." 7 RP 81. *See also*, 7 RP 29 (redness and swelling to V.I.'s hand).

The emergency room physician, Dr. Delcampo, observed that V.I. exhibited tachycardia, or a "very fast heart rate," which can sometimes be caused by a heightened emotional state. 7 RP 16-17, 23. He also observed that V.I. had bruising to her face, particularly along her jaw; mild swelling

to her wrist; and bruising along her left shin and inner thigh. 7 RP 20, 23, 25, 38. During the course of the evaluation V.I. developed more physical signs of bruising along her neck, which concerned Dr. Delcampo and led to a CT scan. 7 RP 21-22, 40. Lab tests indicated V.I. had leukocytosis, an abnormally high white cell count, likely due to an acute stress reaction. 7 RP 26-27. And, during the sexual assault examination, Dr. Delcampo noted that V.I. had “some bleeding within the vagina” and pain associated with her vagina and uterus. 7 RP 30-34.

Medical personnel obtained anal, perineal, and vaginal swabs from V.I. during the sexual assault examination. 7 RP 30-34, 74. DNA testing detected the presence of semen from the perineal swab.⁵ 7 RP 109-10. Defendant’s DNA matched the non-sperm sample also taken from the perineal swab, and V.I.’s DNA matched the sample taken from defendant’s penile swab. 7 RP 109-13, 119-23, 126-27.

Defendant admitted to sexual intercourse at trial and also admitted that he entered V.I.’s home in the middle of the night through the bedroom window. 9 RP 17-19. Neither V.I.’s neighbors nor her sister had previously seen defendant and V.I. together. 5 RP 106, 116; 9 RP 75.

⁵ A low level of male DNA was recovered, and the sample was not further tested. 7 RP 110.

The above untainted evidence, when considered collectively, overwhelmingly establishes defendant's guilt. Mr. Guillen-Gonzalez was an eyewitness to the unlawful imprisonment as he observed defendant pull V.I. by the hair and forcefully drag her half-naked body into her home while she was screaming for help. 5 RP 117-18. Defendant undoubtedly knowingly restrained V.I.'s movements by physical force and without her consent. *See* RCW 9A.40.040 (unlawful imprisonment); CP 25-117 (Instruction No. 47).

Mr. Guillen-Gonzalez's firsthand observations also corroborated defendant's rape, assault, and burglary convictions. He witnessed defendant physically assaulting V.I. while entering her home. *See State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009) (common law definition of assault); WPIC 35.50; CP 25-117 (Instruction No. 35). Defendant did not reemerge until police arrived and made contact. The only reason to drag a half-naked, screaming woman by her hair into her home would be to perpetuate a crime against her (here, assault and rape).⁶ Thus, Mr. Guillen-Gonzalez was also an eyewitness to the first degree burglary charge, which was further corroborated by witness testimony regarding V.I.'s screams and cries for help, the concerning noises emanating from

⁶ Defendant's actions were clearly sexually motivated, as evidenced by V.I.'s state of undress and defendant's half-naked appearance when contacted by police.

her home (which sounded like a “really bad domestic violence situation”), V.I.’s extensive bruises and other noted injuries, and V.I.’s demeanor immediately following the incident. *See* RCW 9A.52.020 (burglary in the first degree); CP 25-117 (Instruction No. 38).

Overwhelming evidence establishes defendant repeatedly raped and assaulted V.I. inside her home. *See* RCW 9A.36.021(1)(g) (assault in the second degree); RCW 9A.44.040(1)(d) (rape in the first degree); CP 25-117 (Instruction Nos. 12, 22, 51). As to defendant’s conviction for second degree assault by strangulation, witness testimony established V.I. had significant red marks and bruising on her neck which caused the emergency room physician enough concern to order a CT scan. 7 RP 20-22; 8 RP 27-28. Mr. Guillen-Gonzalez observed defendant’s aggressive, assaultive behavior towards V.I. firsthand. The fact defendant assaulted V.I. outside of her home corroborates that he also assaulted her inside her home. Witnesses heard the screaming start and stop, and one neighbor heard what sounded like an effort to stifle the screams. 5 RP 100-02; 6 RP 98-103. This corroborates defendant strangling V.I. (i.e., defendant’s actions affected V.I.’s ability to breathe and cry out). After the screams fell silent, a “thumping” sound emanated from V.I.’s home, and it sounded as if those inside were fighting. 5 RP 100-02, 107. Again, this corroborates defendant’s assaultive, sexually motivated behavior and destroys any

theory that defendant and V.I. were engaged in a consensual midnight frolic. The overwhelming untainted evidence establishes defendant assaulted V.I. by strangulation.

Without question defendant had sexual intercourse with V.I. He admitted the same during trial, and DNA evidence corroborates his admission. 7 RP 108-13, 119-20; 9 RP 19. The fact the sexual intercourse was by forcible compulsion is overwhelmingly established by witness testimony regarding: again, V.I.'s screams and cries for help and "don't"; the concerning sounds emanating from V.I.'s home; the extensive bruising to V.I.'s body, including her face, neck, arm, hand, inner thigh, and lower legs; V.I. fleeing her home – and defendant – naked from the waist down; defendant forcibly dragging a half-naked V.I. back inside; observed bleeding within V.I.'s vagina; and V.I.'s fearful and emotional demeanor. All of this evidence, when considered collectively, overwhelmingly demonstrates the sexual intercourse was not consensual but rather occurred by way of physical force, and defendant feloniously entered V.I.'s home to accomplish the rapes.

The evidence also overwhelmingly establishes defendant committed two separate acts of rape. Again, defendant admitted to the first act of sexual intercourse that occurred before V.I. ran outside. *See* 9 RP 19-22. When V.I. fled she was naked from the waist down and defendant was in

boxer shorts. 5 RP 118. Defendant dragged the half-naked V.I. back inside to commit another sexual assault. Defendant admitted that once back inside he prepared to be intimate again and took off his pants. 9 RP 22-23, 59. When V.I. fled the second time, after police arrived, she was again naked from the waist down, as was defendant, which corroborates that defendant raped V.I. a second time. 5 RP 59-60, 74, 76, 120; 6 RP 104.

Defendant's acts of rape, assault, burglary, and unlawful imprisonment all occurred over a short time period, at the same location, and against the same victim. Mr. Guillen-Gonzalez's eyewitness testimony cannot be viewed in isolation but rather must be considered together with all of the other [untainted] witness testimony and evidence. *See Mayer*, 184 Wn.2d at 568. In this light, his testimony establishes that defendant forcibly dragged a screaming, half-naked V.I. back inside her home to rape her a second time, and to perpetuate his acts of rape defendant resorted to physical violence to include strangulation.

Additionally, the above evidence overwhelmingly establishes defendant's guilt when compared to defendant's version of events, which may only be described as self-serving and defying all common sense. *See Hieb*, 107 Wn.2d at 110-11 (reviewing the defendant's version of events); *State v. Coristine*, 177 Wn.2d 370, 397-98, 300 P.3d 400 (2013) (González, J., dissenting) (defendant's version of events implausible and

self-serving). Defendant's account would remain unbelievable, even if he were allowed to cross-examine V.I. regarding the U-Visa application.

Defendant could not recall the name of V.I.'s daughter despite his claim that he and V.I. were secret lovers for years. 9 RP 40-41. He could not recall the names of the hotels he and V.I. allegedly frequented together. 9 RP 41-42. He did not have V.I.'s phone number. 9 RP 42. He had no photos of the two of them together. 9 RP 46. Defendant admitted he had no evidence that he and V.I. were ever in a relationship with one another. 9 RP 46. The holes in defendant's testimony confirms he and V.I. were never in a romantic relationship.

Defendant claimed V.I. just happened to be at her bedroom window when he walked past at 2:00 in the morning, and she instructed him to climb through her window and into her room where her young daughter was sleeping (instead of simply asking him to enter through the front door and not risk waking her daughter). *See* 9 RP 17-18. The only purpose of this farfetched explanation was to account for him entering V.I.'s home through the window (which had to be explained given police observations of the open window immediately following the incident).

Defendant denied V.I. ever screaming for help, despite witness testimony to the contrary. *Compare* 9 RP 52-53, 55, 57; 5 RP 100-02, 115-18; 6 RP 98-100, 102. Defendant denied grabbing V.I. by the hair and

forcing her into her home despite eyewitness testimony to the contrary. *Compare* 9 RP 58-59 (defendant claims he only embraced V.I. outside); 5 RP 115-19. Defendant denied ever hitting, slapping, punching, or strangling V.I. despite eyewitness testimony of his aggressive, assaultive behavior and evidence of V.I.'s physical injuries. *See* 9 RP 21.

Defendant's version of events that they fell off the couch laughing, and that V.I. grabbed and scratched her own face, does not account for the bruising to V.I.'s neck and the six-inch linear bruise to her inner thigh, and it does comport with the sounds of a "really bad domestic violence situation" that emanated from V.I.'s home. *See* 5 RP 100-01, 107; 9 RP 19-21, 53-54. Defendant's account that once back inside V.I.'s home she was "loving and affectionate" towards him and took off her pants cannot be reconciled with Mr. Guillen-Gonzalez's eyewitness testimony that immediately before that defendant was dragging a screaming, half-naked V.I. by her hair. *Compare* 9 RP 21-23, 57-59; 5 RP 117-19. Defendant's explanation of events fails in light of the other witness testimony and his story's complete lack of reasonableness.

The only conclusion from the evidence is that defendant committed unlawful imprisonment, second degree assault by strangulation, first degree burglary, and two counts of first degree rape. Viewed collectively, the overwhelming untainted evidence necessarily

leads to a finding of guilt as to all counts. See *Guloy*, 104 Wn.2d at 426.

Accordingly, this Court should find any error harmless beyond a reasonable doubt and affirm defendant's convictions.

D. CONCLUSION.

The State respectfully requests this Court find the Court of Appeals erred in only finding harmless error as to defendant's conviction for unlawful imprisonment. For the above stated reasons, this Court should affirm defendant's convictions for first degree burglary, unlawful imprisonment, second degree assault, and both counts of first degree rape. Any confrontation clause error was harmless beyond a reasonable doubt given the collective, overwhelming untainted evidence.

DATED: October 15, 2018

MARK LINDQUIST
Pierce County Prosecuting Attorney



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WSB # 44108

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10.15.18 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

October 15, 2018 - 3:35 PM

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