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SUPREME COURT  
STATE OF WASHINGTON  
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NO. 95905-6

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**SUPREME COURT OF THE  
STATE OF WASHINGTON**

STATE OF WASHINGTON, PETITIONER

v.

LEONELL ROMERO OCHOA, RESPONDENT

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Appeal from the Superior Court of Pierce County  
The Honorable Stanley J. Rumbaugh

No. 14-1-02595-7

**TREATED AS A PETITION FOR REVIEW**

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**Motion for Discretionary Review**

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MARK LINDQUIST  
Prosecuting Attorney

By  
JAMES SCHACHT  
Deputy Prosecuting Attorney  
WSB # 17298

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

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A. IDENTITY OF PETITIONER.

Petitioner, State of Washington (respondent below) asks this court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this motion.

B. COURT OF APPEALS DECISION.

The state seeks review of the Unpublished Opinion of the Court of Appeals in this case that was filed on December 28, 2017, together with the Order Denying Motion for Reconsideration filed on May 2, 2018, under case number 48454-4-II. *See* Appendices A and B.

C. ISSUE PRESENTED FOR REVIEW.

1. DOES THE DECISION BELOW CONFLICT WITH DECISIONS OF THE UNITED STATES SUPREME COURT, THIS COURT, AND THE COURTS OF APPEALS CONCERNING THE HARMLESS ERROR STANDARD APPLIED TO AN EVIDENTIARY U-VISA RULING, WHERE THE DECISION ADDS A REQUIREMENT OF EYEWITNESS CORROBORATION TO THE UNTAINTED EVIDENCE TEST, AND WHERE BUT FOR THAT REQUIREMENT THE ERROR WAS SHOWN TO BE HARMLESS BEYOND A REASONABLE DOUBT?

D. STATEMENT OF THE CASE.

On October 29, 2015, respondent Leonel Romero Ochoa (the "defendant") was convicted by a jury of four counts of rape, one count of first degree burglary, one count of unlawful imprisonment, and one count of second degree assault. CP 120-128. All of the charges stemmed from a

July 4, 2014, home invasion, rape incident at the victim's home in Lakewood. CP 1-4.

The four rape convictions coincided with the first four charged counts. They included two first degree rapes predicated on forcible compulsion and unlawful entry into a building (Counts I and III [CP 120,122.]), and two lesser included second degree rapes predicated on forcible compulsion (Counts II and IV [CP 121,123.]). *See* CP 25-117, Instructions 12-29. It should be noted that the second degree rape convictions in Counts II and IV were for lesser included offenses and were based on forcible compulsion but without kidnapping. *Id.* The original charges included the kidnapping element.

The trial included testimony from twenty witnesses, including the victim, V.I., and the defendant. CP 239-40. The victim testified that she had no relationship with the defendant, although she had seen him in the trailer court where her home was located on a couple of occasions. 5 RP 140-41, 6 RP 9, 22, 35-37. She also testified that he had no relationship with her family, although he may have been known to her brother-in-law. *Id.* In short she knew who he was from having seen him before but that was all.

V.I. also testified in detail about the attack including the following details:

- (1) that this was a violent, home invasion rape by a stranger [5 RP 141, 6 RP 7-9.],
- (2) that it began with the defendant climbing through her bedroom window while she was asleep[Id.],
- (3) that the attack included multiple blows to her head and body and strangulation [6 RP 10-15.],
- (4) that she was briefly able to escape by running outside naked from the waist down [6 RP 15-18.],
- (5) that her escape was thwarted when the defendant caught her and dragged back into her trailer by the hair [Id.], and
- (6) that she was able to escape in the end only by running outside a second time, still naked from the waist down, where she was rescued by the police who came in response to 911 calls from her neighbors [6 RP 18-22.].

The foregoing details were corroborated by other witnesses. Three of V.I.'s neighbors testified. Two of them heard the attack and one saw her escape attempt when she ran outside naked from the waist down and also saw the defendant drag her back into the trailer by the hair. 5 RP 74, 101-04, 116-120. 6 RP 99-106. The first responder police patrol officers also saw V.I. flee from the trailer a second time, still naked from the waist down. 5 RP 58-59. None of the eye witnesses remotely supported the notion that the attack had the appearance of a consensual frolic between lovers.

The victim was also supported by medical evidence. She was rushed to the hospital after her rescue by the police. There she was treated in the emergency room for a number of injuries. 7 RP 13, *et.seq.* These included minor injuries consistent with a beating [7 RP 20-26], injuries

specific to strangulation [7 RP 21], and injuries specific to repeated, forcible sexual intercourse; namely “some bleeding within the vagina” and tenderness within “her vagina, as well as her uterus.” 7 RP 26-36. The medical description of the victim’s injuries was not contested and likewise belied any notion that this was a consensual event.

The defense was consent. The defendant testified that he was invited to climb into the victim’s trailer through the window and was thereupon seduced by her. 9 RP 18-20. He further claimed that she became angry with him only after he wanted to stop having relations with her that night. He said that, “She got dressed” and after that “She got angry. She said, ‘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.’” 9 RP 20. The defendant also denied that he had hit, slapped, punched or strangled the victim. 9 RP 21. And he further claimed that she left the trailer after but only after getting dressed, “And when she went out the door, I thought she just needed to get some air.” *Id.*

The defendant appealed his convictions. CP 180-200. The primary issue was related to a provisional pretrial ruling concerning an immigration U-Visa. The evidence was from trial exhibit 42 which was marked for identification. 5 RP 31-33. CP Trial Exhibit 42. That exhibit consists entirely of hearsay correspondence between an immigration

lawyer and a deputy prosecutor dating to late October 2014, more than three months after the rape. *Id.* According to the exhibit the prosecutor declined the lawyer's invitation to provide a certification necessary for a U-Visa. Included with the correspondence was a non-certified copy of a portion of an unsigned federal form I-918, Supplement B. *Id.* Attached to the copy were post-it notes that may or may not have been from the immigration lawyer.

In response to a pretrial motion the trial court excluded the U-Visa exhibit and testimony about it. The court made the ruling provisional and invited the defendant to revisit the issue if he was able to provide additional or admissible evidence. *See* 1 RP 19-22, 4 RP 70-80, 5 RP 27-33. During the remainder of the trial proceedings, the defendant never offered any witnesses concerning the U-Visa issue, to include federal immigration agents or officials or the immigration lawyer, any of whom could have provided testimony about whether the victim had actually submitted a U-Visa application. Furthermore, the defendant did not even provide a certified copy of an actual I-918 form filed and signed by the victim and her lawyer. The record is therefore far from clear as to whether the U-Visa was even applied for and what its status was as of the moment the victim took the stand in the trial.

The court below reversed all of the defendant's convictions except the lesser included unlawful imprisonment because of the U-Visa ruling. One of the state's arguments in the appeal was harmless error. In response to harmless error the court below reasoned that V.I.s testimony concerning the rapes, which were perpetrated inside her home, "was not corroborated by any other witness." *State v. Romero-Ochoa*, 1 Wn.App. 2d 1059, 2017 WL 6616736 (2017) (Slip Opinion, p. 8). Curiously however, the court held also that, "We affirm Ochoa's conviction of unlawful imprisonment because the State showed the error in excluding the evidence to be harmless beyond a reasonable doubt" because it was corroborated. *Id.* (Slip Opinion, p. 9). While the exact distinction drawn by the court below between the unlawful imprisonment and the rapes, burglary and assaults was not expressly stated, the only known evidentiary difference between those charges was the fortuity of eyewitnesses to the victim's two escape attempts.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

The decision of the court below conflicts with multiple decisions of this court, the United States Supreme Court and the courts of appeal, because of its insistence on eyewitness corroboration in support of harmless error. RAP 13.4(b)(1) and (2). Furthermore, the decision involves a significant question of constitutional law concerning harmless

error since the fortuity of eyewitnesses to a crime has never been a mandatory component of harmless error. RAP 13.4(b)(3). This court should accept review and reverse the decision of the court below as to its harmless error holding concerning the rape, assault and burglary charges.

1. THE DECISION OF THE COURT BELOW ADDS A MANDATORY REQUIREMENT OF EYEWITNESS CORROBORATION TO THE UNTAINTED EVIDENCE TEST FOR HARMLESS ERROR.

By drawing a distinction between the unlawful imprisonment charge and the rapes, burglary, and assaults, the court below adopted an eyewitness corroboration requirement for harmless error. Trial error submitted as constitutional error is generally reviewable on appeal for harmless error. *State v. Watt*, 160 Wn.2d 626, 633, 160 P.3d 640 (2007), citing *Washington v. Recuenco*, 548 U.S. 212 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) and *Arizona v. Fulminante*, 499 U.S. 279, 306–07, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). “Generally, these ‘trial errors’ are reviewable because their effect may be evaluated in the context of the other evidence presented to determine whether the error was harmless beyond a reasonable doubt.” *Id.* The review is not confined to only the evidence at issue; in “making a harmless error determination, we will review the entire record.” *State v. Wilcox*, 185 Wn.2d 324, 357, 373

P.3d 224 (2016), *cert. denied*, 137 S. Ct. 580 (2016), *citing United States v. Hastings*, 461 U.S. 499, 509, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983).

After reviewing the entire record, the harmless error standard provides that, “error of constitutional magnitude can be harmless if it is proved to be harmless beyond a reasonable doubt.” *State v. Jones*, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). “Error is harmless ‘if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error.’ ” *Id.*, quoting *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002), and *citing State v. Whelchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990). On review, harmless error is analyzed using the overwhelming untainted evidence test, which was adopted “because that test ‘allows the appellate court to avoid reversal on merely technical or academic grounds while insuring that a conviction will be reversed where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict.’ ” *State v. Watt*, 160 Wn.2d at 635–36, quoting *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). The overwhelming untainted evidence test requires an appellate court to look at the untainted evidence to determine “if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.” *State v. Guloy*, 104 Wn.2d 425-26, *citing Parker v. Randolph*, 442 U.S. 62, 70–71, 99 S. Ct. 2132, 2137–38, 60 L. Ed. 2d 713

(1979) and *Brown v. United States*, 411 U.S. 223, 231, 93 S. Ct. 1565, 1570, 36 L. Ed. 2d 208 (1973).

Nowhere in the foregoing authorities is there a mandatory requirement that the “untainted evidence” consist of eyewitness testimony. Such a requirement is inconsistent with multiple harmless error cases. *State v. Neslund*, 50 Wn. App. 531, 563, 749 P.2d 725 (1988). In *Neslund*, in the context of prosecutorial misconduct, Division One of the Court of Appeals determined that the prosecution’s admittedly improper closing argument was harmless error because, “The circumstantial evidence, physical evidence, expert testimony and particularly the defendant’s confessions and admissions provided overwhelming evidence of her guilt.” *Id.*, citing *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986), and *State v. Traweck*, 43 Wn. App. 99, 108, 715 P.2d 1148, *review denied*, 106 Wn.2d 1007 (1986). *See also State v. Watt*, 160 Wn.2d 626, 640–41, 160 P.3d 640, 647 (2007) (“A retrial of this case would focus again not on whether methamphetamine was manufactured on the property or whether children lived there, but on whether [the defendant] knew about the methamphetamine lab and participated in it. Thus, we hold that the admission of the statements, though error, was harmless and affirm the Court of Appeals.”). Of course *Neslund* was

infamous because it was a no body homicide that relied heavily on circumstantial evidence and did not include any eyewitness testimony.

The court below in this case determined that harmless error could not be satisfied without an eyewitness to what happened inside the trailer.

The rationale for this was as follows:

As the alleged crime victim and the only witness to Ochoa's conduct occurring inside her trailer, [V.I.'s] testimony was critical to the State securing its convictions against Ochoa. [V.I.'s] testimony with regard to Ochoa's conduct inside her trailer was not cumulative to any other witness testimony and was not corroborated by any other witness. Although the State's evidence against Ochoa was strong, its strength depended entirely on the jury finding [V.I.'s] testimony credible.

*State v. Romero-Ochoa*, 1 Wn. App. 2d 1059, 2017 WL 6616736 (2017) (Slip Opinion, p. 8). Had such reasoning prevailed in *Neslund*, harmless error might not have prevailed.

*Neslund* is not the only case where there were no eye witnesses to support a harmless error analysis. Both Divisions One and Three have recently expressly found harmless error in the absence of eye witnesses and based on circumstantial or supporting evidence. For example, Division One found harmless error in an elder abuse case in which the victim was unable to testify at trial. *State v. Scanlan*, 2 Wn. App. 715, 732-33, 413 P.3d 82 (2018). The court in *Scanlan* reasoned that, "Here, any error was harmless. The improper testimony from Officer Giger and

Detective Purcella was cumulative of other evidence of assault.

Circumstantial evidence that Scanlan assaulted Bagnell was overwhelming. Scanlan was the only other person with Bagnell when he was found severely injured on November 6.” *Id.* See also *State v. Hurtado*, 173 Wn. App. 592, 608, 294 P.3d 838 (2013) (In a domestic violence case where neither the victim nor any eye witnesses testified, the error was harmless based on the victim’s injuries, blood on the defendant’s sleeve and blood at the residence where the assaults occurred.)

The analysis in *Scanlan*, an elder abuse case, and *Hurtado*, a domestic violence case, is consistent with Division Three’s analysis in an arson case. In *State v. We*, 138 Wn. App. 716, 727, 158 P.3d 1238 (2007), Division Three reasonably concluded that:

The fire here was clearly the result of arson. And Ms. We does not argue otherwise. Ms. We was running short of money. In fact, her lawyer elicited testimony from the State’s forensic expert that her outgo exceeded her income by about \$600 per month. Her tenancy was due to end nine days after the fire started. She had purchased renter’s insurance only six months before the fire started. She made claims far in excess of the original values she ascribed to her property when she bought the renter’s insurance. The other occupant of the duplex was out of town. And Ms. We knew he was out of town. She was at her apartment at about the time the fire started. There was no other credible culprit. All of this evidence is untainted by the opinion of Captain Zambryski, and it is overwhelming evidence of her

guilt. Any error, even assuming error, would have been harmless.

*Id.*

In this case, considering the breadth of corroborating evidence from (1) V.I.'s three neighbors, (2) the police officers, and (3) the medical providers, this case cannot be reconciled with cases such as *Neslund*, *Scanlan*, *Hurtado* and *We*. In harmless error analysis the type of "untainted evidence" in the record has heretofore not been as consequential as its strength. And for good reason. Many cases, particularly domestic violence, arson, murder and sexual assaults, typically do not take place in front of eyewitnesses. They take place one on one in secret. It would be anomalous that such cases might be excluded from harmless error analysis merely because the only eye witness was the victim. Such a result would entirely disregard the persuasive power of circumstantial evidence such as fingerprints, DNA, or trace evidence, all of which are circumstantial and none of which are eye witnesses. The medical evidence in this case is the type of highly probative evidence that can support harmless error analysis under the untainted evidence test.

Alleged improper denial of a defendant's opportunity to impeach a witness for bias is without question subject to harmless error analysis.

*Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 1438, 89 L. Ed. 2d 674 (1986). “The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.” *Id.* The proper standard of review for harmless error in the admission or exclusion of evidence is “the lesser standard for nonconstitutional error.” *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207, 219 (2012), citing *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). Thus, the state bears the burden of proof beyond a reasonable doubt of showing that “ ‘within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.’ ” *Id.*, quoting *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980), *State v. Franklin*, 180 Wn.2d 371, 382, 325 P.3d 159 (2014). Under this standard, the untainted evidence in this case was more than sufficient to constitute harmless error.

In addition to there being no requirement of eye witness corroboration, the court below also may have misapprehended the scope of the untainted evidence supporting the rape, assault and burglary charges. The three neighbors and the police were eyewitnesses to the burglary and the assaults as much as they were to the unlawful imprisonment. After all they saw firsthand the defendant entering into the

victim's residence and assaulting her when they saw him drag her back into the trailer by her hair. 6 RP 15-18. There is no logical reason to distinguish the burglary and assault charges versus the unlawful imprisonment in light of this unimpeached evidence.

Nor is there any reason to distinguish the rapes. The eyewitnesses and police saw the victim fleeing in terror from the trailer naked from the waist down. How can it be reasonably suggested that such evidence constitutes harmless error as to unlawful imprisonment, but not sexual assault? Plus, the rapes were further supported by medical evidence whereas the unlawful imprisonment was not. The medical evidence supports harmless error as to the assaults and rapes but not necessarily the unlawful imprisonment. Viewed in this light, the evidence was stronger on the rape charges and the assaults than on the unlawful imprisonment.

Medical evidence is just as powerful in a rape case as DNA or fingerprint evidence might be in a different type of case. The sexual injuries here were consistent with repeated forcible sexual intercourse. Surely such unimpeached medical testimony should support harmless error.

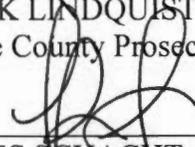
F. CONCLUSION.

For the foregoing reasons, the court should grant review to correct the error in the unpublished opinion of the court below as to harmless

error. The harmless error decision in this case departs from proper analysis of harmless error by adding an eye witness corroboration requirement.

DATED: Thursday, May 31, 2018.

MARK LINDQUIST  
Pierce County Prosecuting Attorney

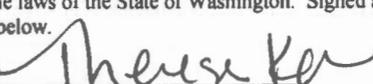


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JAMES SCHACHT  
Deputy Prosecuting Attorney  
WSB # 17298

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.

5-31-18   
Date Signature

## **APPENDIX "A"**

APPELLATE DIVISION  
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PIERCE COUNTY  
PROSECUTING ATTORNEY

Filed  
Washington State  
Court of Appeals  
Division Two

December 28, 2017

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

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

LEONEL ROMERO-OCHOA,

Appellant.

No. 48454-4-II

UNPUBLISHED OPINION

BJORGEN, C.J. — Leonel Romero-Ochoa appeals from his convictions of two counts of first degree rape and one count each of first degree burglary, unlawful imprisonment, and second degree assault. He asserts that the trial court's ruling excluding evidence of the victim's pending U-visa application<sup>1</sup> violated his right to present a defense and his right to confront witnesses. Ochoa also appeals from his sentence, asserting that the trial court erred by failing to treat his first degree rape and second degree assault convictions as the same criminal conduct when calculating his offender score.

We hold that the trial court's ruling excluding evidence of the victim's pending U-visa application violated Ochoa's Sixth Amendment rights to present a defense and confront witnesses. We also hold that these violations were harmless beyond a reasonable doubt only as they related to his unlawful imprisonment conviction. Therefore, we affirm Ochoa's unlawful

<sup>1</sup> A U-visa permits victims of certain crimes to lawfully reside in the United States for four years, which may be extended upon certification that the victim's continued presence is required to assist in the investigation or prosecution of criminal activity. See 8 U.S.C. §§ 1101(a)(15)(U)(iii), 1184(p)(6).

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imprisonment conviction and reverse and remand for a new trial on his remaining convictions.

With this, we need not examine his claim of sentencing error.

#### FACTS

In July 2014, Victoria Isidor Cordero lived with her five-year-old daughter in a mobile home park in Lakewood. Ochoa's brother also lived at the same Lakewood mobile home park; Ochoa previously lived there. On July 3, Isidor came home from work and went to sleep at around 11:40 p.m. The window in Isidor's bedroom did not have a functioning latch.

According to Isidor, she awoke to a noise at around 3 a.m. and saw a man she did not recognize standing next to her bed. Isidor later identified the man as Ochoa. Ochoa told Isidor, "Just be quiet. Don't say anything." Report of Proceedings (RP) (Oct. 20, 2015) at 9. Isidor ran out of her bedroom and attempted to open her front door, but Ochoa grabbed and choked her before she could escape. Ochoa forced Isidor onto a couch, removed her clothing, and vaginally raped her. During this time, Isidor screamed for help while Ochoa told her to be quiet, repeatedly slapped her in the face, and covered her mouth.

Isidor stated that she could smell alcohol on the Ochoa's breath and thought that she might be able to escape by offering him a beer. Ochoa accepted Isidor's offer and led her to the refrigerator while grabbing on to her hair. When Ochoa released Isidor to take the beer from her, Isidor ran out of her home and screamed for help. Ochoa grabbed Isidor by her hair, hit her twice in the face, dragged her back into her home, and raped her a second time.

Police eventually arrived and arrested Ochoa. While speaking with police, Isidor realized that she had previously seen Ochoa around the mobile home park and at a birthday party for her daughter. Isidor denied having any previous relationship with Ochoa.

No. 48454-4-II

According to Ochoa, he and Isidor began a secret sexual relationship in 2010, while both were still married to other people. Ochoa stated that he had ended the relationship in 2013 because he knew it was wrong and because he did not want others to discover their affair. On July 3, Ochoa visited his brother at the Lakewood mobile home park. Ochoa stated that he left his brother's home at around 2:15 a.m. and started walking to a nearby gas station. As he was walking, he heard Isidor calling to him from her bedroom window. Isidor asked him to come in through the window and not to open the front door. They then went to Isidor's living room and began talking about their previous relationship. Ochoa and Isidor began to have consensual sexual intercourse on the couch and, at some point, the two fell to the floor. Ochoa said that he did not want to continue to have sex after they fell on the floor.

Ochoa stated that Isidor's emotional state suddenly changed after he declined to continue having sex with her. Isidor became angry and said, "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." RP (Oct. 26, 2015) at 20. Ochoa asked Isidor to be "more understanding" and told her that "not everything is [about] sex." RP (Oct. 26, 2015) at 20-21. Isidor then became "hysterical," mussed up her hair, and started grabbing at her own face. RP (Oct. 26, 2015) at 21. Ochoa asked Isidor for a beer. Isidor grabbed a beer, threw it at Ochoa, and ran out the door. Isidor began screaming that Ochoa did not love her anymore, after which Ochoa grabbed her and convinced her to come back inside. The two again began kissing and Ochoa was taking his pants off when the police arrived and knocked on the door. Isidor told Ochoa, "Let me go get the door because it's the police, and if I don't open, they'll knock open the door." RP (Oct. 26, 2015) at 23. Isidor then "started again acting up" and ran out the door. RP (Oct. 26, 2015) at 23.

No. 48454-4-II

The State charged Ochoa with four counts of first degree rape, first degree burglary, first degree kidnapping, and second degree assault. The matter proceeded to a jury trial.

Before trial, the State moved to exclude evidence of Isidor's immigration status. In regard to the State's motion, Ochoa's counsel stated at a pretrial hearing:

The alleged victim in this case is not a legal immigrant in the United States, and as a result of, I believe, this case, has filed a petition to be granted, let's say, a hardship permission to remain in the country and to get a protected status so she will not be deported.

And so, Your Honor, our position is that that is one of the bases for her to make up this allegation. My client's position is that this was a consensual thing, that he had had a consensual relationship with her in the past, so she is doing this to protect her from being thrown out of the country and is raising this as a way to remain in the country.

RP (Oct. 12, 2015) at 20. The trial court indicated that it would take the matter under advisement.

The parties again discussed the State's motion to exclude at subsequent pretrial hearings. Defense counsel stated that Ochoa sought to elicit evidence that Isidor (1) had previously applied for a U-visa as an alleged crime victim in a separate matter and (2) was in the process of applying for a U-visa with respect to this matter. Defense counsel stated that Isidor had submitted U-visa application paperwork to the prosecutor's office, but "the prosecutor's office says they won't sign off on the paperwork until the proceedings are completed." RP (Oct. 14, 2015) at 91. The trial court ruled that evidence of Isidor's prior attempt to receive a U-visa was not admissible at trial.<sup>2</sup> The trial court reserved ruling on the admissibility of Isidor's pending U-visa application.

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<sup>2</sup> Ochoa does not appear to challenge the trial court's ruling excluding evidence of Isidor's prior U-visa application.

After the jury was selected, the trial court ruled that evidence of Isidor's pending U-visa application was not admissible, stating:

I think once you start bringing in the issue of immigration status, it becomes a very slippery slope. And given the emotional reactions one way or another, which we saw during voir dire—I can't remember the juror's number, No. 9 perhaps—the guy sitting in the front clear to my left was extremely emotional when we started talking about the immigration policy in this country.

I just am 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.

....

There is certainly—there are two sides to this debate, but I am 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.

But even in this venire on questioning—and I let you question the venire quite extensively, [defense counsel], relate to this—there were emotional reactions of sufficient severity and intensity that I believe that bringing up immigration and going into the 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.

RP (Oct. 19, 2015) at 28-30.

At trial, Isidor and Ochoa testified consistently with the facts as stated above. Several witnesses who lived at the Lakewood mobile home park also testified at trial. Elizabeth Guillen testified that she had awakened to the sounds of a female voice screaming at around 3 or 4 a.m. Guillen stated that she called 911 after hearing the female screaming for help in both English and Spanish. After police arrived, Guillen heard Ochoa call out to Isidor, “[M]y love, why are you doing this?” RP (Oct. 19, 2015) at 105. Guillen's husband, Rafael Guillen-Gonzalez, testified that he had looked out the window after hearing screaming and saw Ochoa dragging Isidor by the

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hair for about 15 feet and then into her house. The mobile home park manager testified that he had called the police after hearing a female voice screaming for help.

Lakewood Police Officer Ryan Moody testified that he responded to the scene and knocked on Isidor's door but did not receive a response. Moody stated that a short time later Isidor ran out the door naked from the waist down and that she appeared upset and frightened. Moody said that he saw Ochoa standing inside the residence and "noticed that he didn't have any pants on. He just kind of appeared shaky, wasn't very sturdy on his feet, [and] kind of had a glazed-over look in his eyes." RP (Oct. 19, 2015) at 59.

Dr. Jaime Delcampo testified that he had treated Isidor in the emergency room. Delcampo stated that Isidor had visible bruising on her face, along her jaw, and on her neck, swelling on her left wrist, and tenderness and bleeding within her vagina. Mandy Graham, an emergency room nurse, testified that Isidor had bruising behind her left ear, multiple scratches to her face and neck, scratch marks on her knees and knuckles, and bruises on her upper left arm, right hand, left inner thigh, and lower legs.

After Ochoa testified for the defense, Isidor's sister, Deici Isidor, testified in rebuttal. Deici testified that she had never seen Isidor with Ochoa and that Isidor never mentioned being in any relationship with Ochoa.

The jury returned verdicts finding Ochoa guilty of two counts of first degree rape, two counts of second degree rape as inferior degree crimes to two of the first degree rape charges, first degree burglary, unlawful imprisonment as a lesser-included crime to the second degree kidnapping charge, and second degree assault.<sup>3</sup>

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<sup>3</sup> The jury also returned several special verdicts that are not at issue in this appeal.

At sentencing, the trial court accepted the State's concession that Ochoa's second degree rape convictions merged with his first degree rape convictions. The trial court also found that Ochoa's unlawful imprisonment conviction constituted the same criminal conduct for sentencing purposes as his first degree rape convictions. The trial court, however, rejected Ochoa's argument that his second degree assault conviction constituted the same criminal conduct as his rape convictions, reasoning:

[T]he Assault in the Second Degree conviction wasn't necessary to prove the element of Rape in the First Degree. That was proven by the unlawful entry, not based on causing serious bodily harm to the victim. In fact, there was evidence that after the forensic examination following the assault that there were marks on the victim's neck and it seemed that a strangulation did take place as a separate crime, and it was not necessary to prove strangulation in support of the Rape First Degree conviction.

....

I distinguish this from the unlawful imprisonment, which basically is the restraint of liberty or a holding of the victim down for the purpose of accomplishing a rape, which is sort of part and parcel of the whole thing.

Strangulation is not necessary to accomplish unlawful imprisonment or 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. So I don't think it is the same criminal conduct, and the offenses don't merge. So that one will be sentenced separately.

RP (Dec. 18, 2015) at 18, 20-21. Ochoa appeals from his convictions and resulting sentence.

## ANALYSIS

### SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE AND CONFRONT WITNESSES

Ochoa contends that the trial court's ruling excluding evidence of Isidor's pending U-visa application violated his Sixth Amendment rights to present a defense and to confront witnesses. We agree, reverse Ochoa's convictions other than that of unlawful imprisonment, and remand for a new trial.

#### A. Legal Principles and Standard of Review

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A defendant in a criminal trial has a constitutional right to present a defense. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). “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).

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

*Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). “The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions.” *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002).

We review a claim under the Sixth Amendment involving the right to present a defense or to confront witnesses through a three-step test. First, the evidence that a defendant desires to introduce “must be of at least minimal relevance.” *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting *Darden*, 145 Wn.2d at 622). A defendant only has a right to present evidence that is relevant. *Id.*; ER 401. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401.

Second, if the defendant establishes the minimal relevance of the evidence sought to be presented, the burden shifts to the State “to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Jones*, 168 Wn.2d at 720 (quoting *Darden*, 145

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Wn.2d at 622). Third, 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. *Id.* Where a defendant seeks to present 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[itution] Art[icle] 1 § 22.'" *Jones*, 168 Wn.2d at 720 (quoting *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)). With regard to the right to confront and cross-examine witnesses, "the more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters." *Darden*, 145 Wn.2d at 619.

We review constitutional issues de novo. *State v. Armstrong*, 188 Wn.2d 333, 339, 394 P.3d 373 (2017). Consistently with that principle, our Supreme Court has held that we review de novo a defendant's claim that his Sixth Amendment right to present a defense was violated. *Jones*, 168 Wn.2d at 719.

On the other hand, we generally review a trial court's evidentiary rulings for an abuse of discretion. *State v. Strizheus*, 163 Wn. App. 820, 829, 262 P.3d 100 (2011); *see also State v. Lee*, 188 Wn.2d 473, 488-489, 396 P.3d 316, 323-24 (2017); *Darden*, 145 Wn.2d at 619. A court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). Such is the case when the superior court relies on unsupported facts, takes a view that no reasonable person would take, applies an incorrect legal standard, or bases its ruling on an erroneous legal view. *Id.* at 284.

We need not attempt to sort out how these two standards of review are applied where the defendant alleges a violation of the rights to present a defense and to confront witnesses based on the exclusion of evidence. For the following reasons, the exclusion of the U-visa was erroneous under either standard of review.

B. Evidence of Isidor's Pending U-visa Application Was Relevant

The trial court assumed that evidence of Isidor's pending U-visa application met the threshold of relevance under ER 401 but excluded the evidence on the basis of its prejudicial effect. The State does not appear to contest the relevance of this evidence on appeal.<sup>4</sup>

Nonetheless, we briefly discuss the nature of the U-visa program and how Isidor's pending U-visa application was relevant under the facts of the case.

A U-visa permits victims of certain crimes, including sexual assault, to lawfully reside in the United States for a period of four years, which period may be extended upon certification that the victim's continued "presence in the United States is required to assist in the investigation or prosecution of such criminal activity." *See* 8 U.S.C. §§ 1101(a)(15)(U)(iii), 1184(p)(6). If the crime victim is physically present in the United States for three years following the receipt of a U-visa, her status may be adjusted to that of a lawful permanent resident. *See* 8 U.S.C. § 1255(m). To meet the qualifications for a U-visa,

an applicant must demonstrate that she (i) has suffered substantial physical or mental abuse as the result of having been the victim of qualifying criminal activity; (ii) possesses information concerning the qualifying criminal activity; and (iii) has been helpful, is being helpful or is likely to be helpful in investigating or prosecuting the qualifying criminal activity.

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<sup>4</sup> Although the State does not expressly concede on appeal that evidence of Isidor's pending U-Visa application was relevant, it presents no argument on the matter.

*Romero-Hernandez v. District of Columbia*, 141 F.Supp.3d 29 (D.C. Cir 2015) (citing 8 U.S.C. § 1101(a)(15)(U)(i)(I)-(III)); *see also* 8 C.F.R. § 214.14(b).

The trial court was presented with documentation that Isidor was in the process of applying for a U-visa in relation to this matter and had requested the prosecutor's office to certify that she had been cooperative in its investigation for purposes of obtaining a U-visa. The prosecutor's office refused to make this certification until these proceedings were concluded. *See* RP (Oct. 15, 2015) at 75. In *State v. Lubers*, 81 Wn. App. 614, 623, 915 P.2d 1157 (1996), we held that "[e]vidence of bias and interest is relevant to a witness's credibility." Thus, this evidence was clearly relevant to challenge Isidor's credibility, as it tended to show her potential bias and supplied a motive to fabricate the allegations against Ochoa.<sup>5</sup> Thus, evidence of Isidor's pending U-visa application was at least minimally relevant.

C. The State Failed to Show That the U-visa Evidence Was Unduly Prejudicial

We turn next to the second and third prongs of the three-step test described above: whether the State met its burden to show that the excluded evidence was "so prejudicial as to disrupt the fairness of the fact-finding process at trial," and whether the State's interest in excluding the evidence outweighed the defendant's need for it.

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<sup>5</sup> In *State v. Streepy*, 199 Wn. App. 487, 400 P.3d 339, *review denied*, \_\_\_ P.3d \_\_\_ (2017), Division One of this court held that the trial court did not err in excluding evidence of the victim's immigration status, concluding that the evidence was not relevant. *Streepy*, 199 Wn. App. at 500. There, the alleged crime victim was unaware of the U-visa program until after the defendant's arrest, and she had decided against pursuing the U-visa program. *Streepy*, 199 Wn. App. at 499. The facts here are clearly distinguishable, since the defense had made an offer of proof tending to show that Isidor was aware of the U-visa program prior to making her allegations against Ochoa and was in the process of applying for a U-visa during the prosecution.

Contrary to the State's argument on appeal, evidence of Isidor's pending U-visa application was highly probative impeachment evidence. Ochoa did not deny that he had entered Isidor's home and that he engaged in sexual intercourse with her. Instead, he asserted a defense of consent, which required the jury to weigh his credibility against that of Isidor. Therefore, evidence tending to show Isidor's bias, attacking her credibility, and supplying a motive to fabricate the allegations against Ochoa was crucial to his defense. Isidor's pending U-visa application constituted such evidence. A jury could infer that the requirements of receiving a U-visa, particularly the requirement of providing helpful assistance in a criminal investigation, and the value of receiving permanent legal resident status through the U-visa program supplied a motive for Isidor to fabricate or embellish the allegations against Ochoa.

We further hold that the prejudicial nature of Isidor's pending U-visa application did not outweigh its high probative value. In reaching this determination, we find persuasive the reasoning in *Romero-Perez v. Commonwealth of Kentucky*, 492 S.W.3d 902 (2016). There, the Kentucky Court of Appeals stated:

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.

....

It is true that a witness' immigration status could trigger negative sentiments in the minds of some jurors. In this case, 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.

....

The value of [qualifying U-visa] 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 leave the United States, *could* provide a strong motive for fabrication or embellishment.

Given the nature of the U-Visa program, we must conclude that 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.

*Romero-Perez*, 492 S.W.3d at 906-07.

In reaching this conclusion, we do not accept the State's suggestion that discussions about immigration during jury selection justified the trial court's exclusion of this evidence. While some potential jurors expressed differing and sometimes strong opinions regarding immigration in this country, none of the comments were inflammatory or suggested that potential jurors could not fairly apply the law to the facts in light of the defendant's or a witness's immigration status. In addition, one purpose of the jury selection process is to identify potential jurors who "cannot try the issue impartially and without prejudice" and thus would be subject to for-cause dismissal. RCW 4.44.170(2); CrR 6.4(b), (c). The failure to challenge sworn jury members for cause based on an inability to set aside any prejudices with regard to immigration matters suggests that any prejudice to Isidore due to her immigration status was not significant.

Accordingly, we conclude (1) that the State failed to show that disclosure of Isidor's pending U-visa application was "so prejudicial as to disrupt the fairness of the fact-finding process at trial," and (2) that the defendant's need for this evidence outweighed the State's interest in its exclusion. Thus, under either standard of review the trial court's ruling excluding evidence of Isidor's pending U-visa application violated Ochoa's Sixth Amendment rights to present a defense and to confront witnesses.<sup>6</sup>

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<sup>6</sup> We note the pending new rule, ER 413, on immigration status, and the Supreme Court's

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D. Constitutional Harmless Error Analysis

Errors of constitutional magnitude, including violations of a criminal defendant's Sixth Amendment rights to present a defense and to confront witnesses, may be deemed harmless beyond a reasonable doubt. *Jones*, 168 Wn.2d at 724 (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). "[E]ven a constitutional error does not require reversal if, beyond a reasonable doubt, the untainted evidence is so overwhelming that a reasonable jury would have reached the same result in the absence of the error." *State v. Saunders*, 120 Wn. App. 800, 813, 86 P.3d 232 (2004). We presume constitutional errors to be prejudicial, and the State bears the burden of proving such errors to be harmless beyond a reasonable doubt. *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013).

In determining whether a constitutional error limiting the cross-examination of a witness for potential bias was harmless beyond a reasonable doubt, we consider several factors, which 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.

*Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

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recognition in *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 672, 230 P.3d 583 (2010), that "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." Taking each into consideration, we remain of the view that the trial court erred in excluding evidence of the U-visa for the reasons given.

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With respect to all but Ochoa's unlawful imprisonment conviction, we hold that these factors weigh against a determination that the trial court's error was harmless beyond a reasonable doubt. As the alleged crime victim and the only witness to Ochoa's conduct occurring inside her trailer, Isidor's testimony was critical to the State securing its convictions against Ochoa. Isidor's testimony with regard to Ochoa's conduct inside her trailer was not cumulative to any other witness testimony and was not corroborated by any other witness. Although the State's evidence against Ochoa was strong, its strength depended entirely on the jury finding Isidor's testimony credible.

The State argues that the error in excluding evidence of the victim's pending U-visa application was harmless beyond a reasonable doubt because the viability of Ochoa's consent defense would have been weakened by evidence supporting a theory that the victim made up or embellished allegations to receive favorable immigration treatment. We fail to discern how Ochoa's consent defense would have been undermined by evidence supporting a theory that Isidor fabricated or embellished the criminal allegations. Absent evidence attacking Isidor's credibility, the jury was still left with competing versions of events from which it had to weigh Isidor's and Ochoa's credibility.

We agree with the State, however, that the trial court's error in excluding evidence of Isidor's pending U-visa application was harmless beyond a reasonable doubt with respect to Ochoa's unlawful imprisonment conviction. Isidor's testimony that, once outside her trailer,

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Ochoa grabbed her by the hair and dragged her back inside was corroborated by Guillen-Gonzalez. Accordingly, the evidence supporting Ochoa's unlawful imprisonment conviction was overwhelming and would not have been significantly undermined by evidence attacking Isidor's credibility.

In summary, with respect to Ochoa's unlawful imprisonment conviction, the State has demonstrated that the trial court's error in excluding the U-visa evidence was harmless beyond a reasonable doubt. With respect to Ochoa's other convictions, the State has not demonstrated that this error was harmless beyond a reasonable doubt.

#### CONCLUSION

We reverse Ochoa's convictions of two counts of first degree rape, one count of first degree burglary, and one count of second degree assault and remand for a new trial on those charges.<sup>7</sup> We affirm Ochoa's conviction of unlawful imprisonment because the State showed the error in excluding the evidence to be harmless beyond a reasonable doubt. Because we reverse Ochoa's

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<sup>7</sup> Our holding does not suggest that the trial court on remand may not limit the scope or extent of evidence concerning Isidor's pending U-visa application or the cross-examination of such matters to reduce possible prejudice. However, consistent with Ochoa's Sixth Amendment rights, the trial court may not exclude from the jury's consideration evidence that Isidor had sought U-visa status in connection with the State's charges, the requirement that she provide helpful assistance in a criminal investigation, and the benefits of applying for a U-visa, including the possibility of receiving permanent legal resident status.

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first degree rape and second degree assault convictions, we need not address his claimed sentencing error with regard to those convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

*Bjorge, C.J.*  
Bjorge, C.J.

We concur:

*Melnick, J.*  
Melnick, J.

*Sutton, J.*  
Sutton, J.

## **APPENDIX "B"**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

May 2, 2018

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

LEONEL ROMERO-OCHOA,

Appellant.

No. 48454-4-II

ORDER DENYING MOTION  
FOR RECONSIDERATION  
APPELLATE DIVISION  
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PIERCE COUNTY  
PROSECUTING ATTORNEY

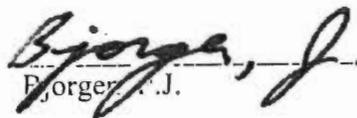
The opinion in this matter was filed on December 28, 2017. The appellant has filed a motion for reconsideration. After review, it is hereby

ORDERED that the motion for reconsideration of the opinion filed on December 28, 2017 is denied.

IT IS SO ORDERED.

Jjs.: Bjorgen, Melnick, Sutton

FOR THE COURT:

  
Bjorgen, J.

**PIERCE COUNTY PROSECUTING ATTORNEY**

**May 31, 2018 - 4:23 PM**

**Filing Motion for Discretionary Review of Court of Appeals**

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