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NO. 95905-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

LEONEL ROMERO OCHOA,

Respondent.

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

The Honorable Stanley J. Rumbaugh, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT
LEONEL ROMERO OCHOA

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A. ISSUE

Where the trial court violated Ochoa's Sixth Amendment right to present a complete defense and to confront the primary witness against him by excluding evidence of the witness's bias, whether the most serious convictions must be reversed because the State cannot meet its burden of proving the constitutional error is harmless beyond a reasonable doubt?

B. STATEMENT OF THE CASE

a. Pre-trial ruling excluding evidence of the complaining witness's U-Visa application.

The State charged Ochoa with first degree rape (four counts), first degree burglary, first degree kidnapping and second degree assault (by strangulation) against Victoria Isidor. CP 11-14. Isidor submitted a U-Visa application to the prosecutor's office based on the charges, after having unsuccessfully submitted a previous application based on an unrelated matter. 3RP¹ 91; 4RP 74-76; Ex. 42. 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

¹ This brief cites to the verbatim report of proceedings as follows: 1RP-10/12/15; 2RP-10/13/15; 3RP-10/14/15; 4RP-10/15/15; 5RP-10/19/15; 6RP-10/20/15; 7RP-10/21/15; 8RP-10/22/15; 9RP-10/26/15; 10RP-10/27/15; 11RP-10/28/15; 12RP-10/29/15; 13RP-12/18/15.

enforcement authorities certify the person would be of assistance in an investigation or prosecution. Id. Once an individual has resided in the U.S. 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).

Ochoa wanted to impeach Isidor with evidence of the pending U-Visa application to show bias, i.e., she had a motive to fabricate the allegations to obtain the immigration benefit. 1RP 20; 4RP 77-78. The U-Visa application requires the prosecutor's office to certify the alleged victim cooperated, but the prosecutor's office refused to make this certification until the criminal proceedings ended. 3RP 91; 4RP 75. The court understood Isidor's pending U-Visa application provided a motive to falsify the allegations but excluded the evidence because its probative value was outweighed by its prejudicial effect. 4RP 76-77; 5RP 28-30, 32.

2. Trial evidence

Isidor lived in a Lakewood trailer park with her young daughter. 5RP 137. Ochoa's brother lived at the same trailer park; Ochoa previously lived there with his wife and children. 6RP 37, 53; 9RP 7.

According to Isidor, one night in July 2014 she woke at around 3 a.m. to find a man, who she later identified as Ochoa, standing next to her bed. 5RP 140; 6RP 8-9. She ran out of her bedroom and attempted to

open the front door, but Ochoa grabbed and choked her. 6RP 9-10, 13, 56-57. He forced Isidor onto a couch, removed her clothing, and vaginally raped her. 6RP 11-12. She cried and screamed for help. 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. She thought she might escape by offering him a beer. 6RP 13-14. Ochoa led her to the refrigerator while grabbing her hair. 6RP 14-15. When he released Isidor to take the beer from her, Isidor ran out of her trailer and screamed for help. 6RP 14-15. Ochoa ran after her, threw her down, grabbed her hair, hit her in the face, dragged her back inside, closed the door, and threw her on the couch. 6RP 16-18, 54-55. He again vaginally raped her. 6RP 19. He stopped when police knocked on the door, at which point she ran outside. 6RP 19-20. Police arrested Ochoa. 5RP 60.

Isidor told police that she woke up to find the man next to her bed, that he choked and raped her, and that he dragged her back inside when she ran out. 5RP 79-81. While speaking with police, Isidor realized that she had previously seen Ochoa around the trailer park and at a birthday party for her daughter. 5RP 82, 88; 6RP 22, 35-37. 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 testified she never saw Isidor with Ochoa and Isidor never disclosed a relationship with Ochoa. 9RP 75.

Three witnesses who lived at the trailer park also testified. 5RP 97-98, 110; 6RP 98-99. Elizabeth Guillen said she woke to the sounds of what sounded like a fight. 5RP 51-52, 99-102, 107. She called 911 after hearing a female scream for help. 5RP 103. Guillen's husband testified he looked out the window after hearing screams and saw Ochoa dragging Isidor by the hair back into her residence. 5RP 116-18. The manager also heard screaming and a request for help. 6RP 98-102, 109. He called 911, reporting a male and female arguing. 6RP 100, 109-10.

Police officers responded to the scene, learned from the tenants that two people were arguing in Isidor's residence, and knocked on Isidor's door without response. 5RP 52, 55-56, 71, 73. A short time later Isidor ran out the door naked from the waist down, appearing upset and frightened. 5RP 58-59, 65, 74-75. Ms. Guillen heard her yelling "he came in through my window. He raped me." 5RP 105. Ochoa remained inside, pulling up his pants. 5RP 59, 77. He called out to Isidor, "my love, why are you doing this?" 5RP 105.

Medics 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 also spoke to a police officer at the hospital, recounting her version of events. 6RP 74-81. Hospital staff noted bruising and scratches on her face, bruising behind her ear, 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 reported neck pain and tenderness. 7RP 20, 23-24, 46, 60.

Dr. Delcampo examined Isidor. 7RP 18-19, 33, 43. There were no external abnormalities to the genitalia, such as bruising and lacerations, nor were there any areas of redness. 7RP 34, 49, 56-57. There was "some bleeding within the vagina" and "minimal blood from the cervix," which can have multiple different causes. 7RP 34, 49. The doctor made no finding as to the cause of the minimal bleeding in Isidor's case. 7RP 49. There were no lacerations or bruising within the vagina. 7RP 34.

The doctor put his fingers into Isidor's vagina and felt for areas of tenderness. 7RP 34. Isidor reported pain, "mild tenderness," during this part of the examination. 7RP 34, 50. There was no objective finding to suggest tenderness because the vagina appeared normal. 7RP 50. The doctor testified the absence of physical findings did not rule out the occurrence of assault. 7RP 57. On the other hand, "lack of findings can certainly support the presence of consensual sex." 7RP 57.

Ochoa testified in his own defense. According to Ochoa, he and Isidor began a secret sexual relationship in 2010, while both were still married to other people. 9RP 13-15, 38-41. Ochoa ended the relationship

in 2013 because he knew it was wrong, he did not want others to discover their affair, and he did not want to get further involved. 9RP 14-15, 40.

Ochoa visited his brother in the trailer park to have a barbeque dinner on the night in question. 9RP 16. He left around 2:30 a.m. and started walking to where a friend was to pick him up. 9RP 17, 32. As he passed by Isidor's residence, which is next to the entrance of the trailer park, Isidor called to him from her window. 9RP 18. She asked him to come in and he did. 9RP 18. They talked about how their prior relationship ended, and that they were both single now. 9RP 18. They ended up having consensual sexual intercourse on the couch. 9RP 19-20.

At some point, the two fell to the floor. 9RP 20, 53. Ochoa did not want to continue to have sex. 9RP 20. Isidor's emotional state suddenly changed after he declined to continue having sex with her. 9RP 20. She 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." 9RP 20. He asked her to be more understanding, and told her things needed to be done right and that not everything is about sex. 9RP 20-21. She became hysterical, mussed her hair and grabbed at her face. 9RP 21. After she threw a beer at him, she angrily ran out the door, screaming. 9RP 21-22. He hugged her and told her to come back inside. 9RP 22, 58-59. They went back inside; he denied forcing her to do so. 9RP 22, 58.

The two began kissing and Ochoa was taking off his pants when the police knocked. 9RP 23. "That's when she started acting up. She went out there running." 9RP 23. He denied striking or strangling Isidor. 9RP 21. He denied forcing her to have sex with him. 9RP 24. The jury found Ochoa guilty as charged, except that it found him guilty of unlawful imprisonment as a lesser offense to kidnapping. CP 121, 123, 126.

3. Appeal

On appeal, Ochoa argued the trial court violated his Sixth Amendment right to present a defense and to confront the witnesses against him by excluding evidence of the U-Visa to show Isidor's bias in testifying against him. The Court of Appeals agreed. State v. Romero-Ochoa, 1 Wn. App. 2d 1059, 2017 WL 6616736, at *1 (2017). Evidence of Isidor's pending U-Visa application was highly probative impeachment evidence. Romero-Ochoa, 2017 WL 6616736, at * 7. 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. Id. "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." Id. The prejudicial nature of Isidor's pending

U-Visa application did not outweigh its high probative value. Id. (citing Romero-Perez v. Commonwealth, 492 S.W.3d 902 (Ken. 2016)).

The Court of Appeals held the constitutional violations were harmless beyond a reasonable doubt only as they related to the unlawful imprisonment conviction. Id. at *8-9. The evidence supporting that conviction was overwhelming and would not have been significantly undermined by evidence attacking Isidor's credibility because Mr. Guillen saw Ochoa grab Isidor and drag her back inside the residence. Id. at *9. As for the other crimes, Isidor's testimony was critical because she was the only witness to Ochoa's conduct occurring inside her trailer. Id. at *8. Isidor's testimony about Ochoa's conduct inside her trailer was not cumulative to any other witness testimony and was not corroborated by any other witness. Id. The strength of the State's evidence in this regard depended on the jury finding Isidor's testimony credible. Id.

C. **ARGUMENT**

THE STATE CANNOT PROVE THE CONSTITUTIONAL ERROR, WHICH DEPRIVED OCHOA OF HIS RIGHT TO CONFRONT THE CHIEF WITNESS AGAINST HIM WITH EVIDENCE OF BIAS, WAS HARMLESS BEYOND A REASONABLE DOUBT.

Violation of the right to present a defense and to confront witnesses is constitutional error. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010); State v. Guloy, 104 Wn.2d 412, 423, 705 P.2d 1182

(1985), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986). The Court of Appeals held the trial court's ruling excluding evidence of Isidor's pending U-Visa application violated these rights. The State did not challenge this holding in its petition for review. Rather, the State only sought review of whether the constitutional error was harmless.

Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) set forth the standard for assessing constitutional harmless error. The Chapman standard represents the "constitutional minimum protection for the rights of accused persons." State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). Under this standard, "constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." State v. Franklin, 180 Wn.2d 371, 382, 325 P.3d 159 (2014) (quoting State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007)). "A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." State v. Burke, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

The State claims a mere evidentiary ruling is at issue and at one point suggests a nonconstitutional error standard is appropriate: "within reasonable probabilities, had the error not occurred, the outcome of the

trial would have been materially affected." Motion for Discretionary Review (MDR) at 13 (quoting State v. Gresham, 173 Wn.2d 405, 433, 269 P.3d 207 (2012) (ER 404(b) error required reversal in absence of eyewitnesses to the alleged incidents of molestation)). That is not the test to be applied in Ochoa's case: "An erroneous evidentiary ruling that violates the defendant's constitutional rights . . . is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt." Franklin, 180 Wn.2d at 377 n.2.

Confrontation clause violations are subject to constitutional harmless error analysis. State v. Davis, 154 Wn.2d 291, 304, 111 P.3d 844 (2005), aff'd, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (citing Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 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." Van Arsdall, 475 U.S. at 684² (emphasis added). Deciding whether the error is harmless depends on a host of factors, including "the importance of the witness' testimony in the prosecution's

² In Van Arsdall, the trial court violated the defendant's right to confrontation by improperly restricting defense counsel's cross-examination designed to show bias on the part of a prosecution witness. Van Arsdall, 475 U.S. at 674.

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." State v. Wilcoxon, 185 Wn.2d 324, 336, 373 P.3d 224 (2016), cert. denied, 137 S. Ct. 580, 196 L. Ed. 2d 455 (2016) (quoting Van Arsdall, 475 U.S. at 684).

The State cannot overcome the presumption of prejudice and meet its burden of proving the constitutional error was harmless beyond a reasonable doubt. 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. The harmless error analysis assumes the "damaging potential" of Ochoa's proffered cross-examination would have been "fully realized." Van Arsdall, 475 U.S. at 684. The damaging potential is that the jury would have learned that Isidor had reason to fabricate or exaggerate what happened in the trailer that night. The full realization of this damaging potential means the jury would have discounted as unworthy of belief Isidor's testimony and her out-of-court statements about what Ochoa did to her inside the trailer.

Isidor's claims formed the heart of the State's case. As the victim and sole eyewitness to the alleged strangling and rape, Isidor provided the only direct evidence that Ochoa perpetrated these crimes. With Isidor's credibility as a witness in doubt, the jury might also have questioned the believability of the statements she made to police and medical personnel. See Ortiz v. Yates, 704 F.3d 1026, 1039 (9th Cir. 2012) (where confrontation right violated in excluding evidence of bias, recognizing damaged credibility could have spill-over effect on witness's out-of-court statements to police officer). Isidor's in-court testimony and her out-of-court statements are all tainted by the constitutional error.

The State complains the Court of Appeals erroneously added an eyewitness corroboration requirement to the untainted evidence test. The Court of Appeals did no such thing. In assessing whether a constitutional error is harmless, courts consider whether untainted evidence corroborated the tainted evidence, i.e., whether the tainted evidence was merely cumulative of properly admitted untainted evidence. See, e.g., State v. Lui, 179 Wn.2d 457, 496-97, 315 P.3d 493, cert. denied, 134 S. Ct. 2842, 189 L. Ed. 2d 810 (2014) (confrontation clause violation in the admission of statements taken from an autopsy was harmless because they were largely corroborated by properly admitted evidence); State v. Flores, 164 Wn.2d 1, 19, 186 P.3d 1038 (2008) (confrontation clause error involving admission

of informant's out-of-court statements was harmless where State presented overwhelming evidence corroborating the informant's testimony, establishing the tainted evidence was merely cumulative of overwhelming untainted evidence.) Indeed, the corroboration factor is baked into the test for assessing prejudice in confrontation clause cases. Wilcoxon, 185 Wn.2d at 336 ("the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points").

Eyewitness testimony to the alleged crime is a particular form of corroboration. In assessing whether untainted evidence necessarily shows guilt, courts properly consider whether independent witnesses established the defendant's guilt. See, e.g., State v. Mayer, 184 Wn.2d 548, 567, 362 P.3d 745 (2015) (key aspects of accomplice testimony that defendant was the robber "were corroborated by the testimony of other witnesses. Those other witnesses also provided additional, independent, and compelling evidence of Mayer's guilt."). Even non-constitutional errors can be rendered prejudicial due to lack of eyewitness corroboration. See State v. Gower, 179 Wn.2d 851, 858, 321 P.3d 1178 (2014) (reversing sex offense conviction due to evidentiary error where there was no eyewitness to the alleged molestation and case was essentially a credibility contest).

Only two people know what happened in the trailer: Isidor and Ochoa. They gave diverging accounts and Isidor's account is tainted by

the constitutional error. No other witness saw what happened in the trailer. To avoid reversal, the untainted evidence need not necessarily be a third-party eyewitness, depending on the facts of the case, but the untainted evidence, whatever its source, must be so overwhelming that it necessarily leads to a finding of guilt. Ochoa does not challenge the Court of Appeals determination that the error did not affect the unlawful imprisonment conviction because one neighbor saw Ochoa dragging Isidor back inside the trailer. 5RP 117-18. But the other convictions must fall under the rigorous harmless error standard triggered here.

The State relies heavily on the medical evidence to support its claim that untainted evidence corroborates Isidor's rape claim, arguing it shows repeated forcible sexual intercourse. MDR at 4, 14. The State's description of the record is incomplete. There was no evidence of bruising, lacerations or any injury to Isidor's external or internal genitalia. 7RP 34, 49, 56. There was "some bleeding within the vagina" and "minimal blood from the cervix," which can have multiple different causes. 7RP 34, 49. The examining doctor did not identify the cause of Isidor's bleeding. 7RP 49. Isidor reported "mild tenderness" when the doctor put his fingers into Isidor's vagina. 7RP 34, 50. There was no objective finding to suggest tenderness because the vagina was normal in appearance. 7RP 50. The doctor testified the lack of vaginal injury, while not ruling out sexual

assault, can also support consensual sex. 7RP 57. The untainted evidence does not necessarily show Ochoa raped Isidor.

There was bruising on Isidor's neck, which was not extensive. 7RP 21-22, 46. The doctor did not identify the cause of the bruising. The nurse only said the marks on her neck looked like signs of a struggle. 6RP 91-92. The CT scan performed at the hospital did not identify any traumatic injuries to the neck. 7RP 41, 65-66. There were no definitive signs of strangulation, such as petechial hemorrhaging or finger marks on her throat. 6RP 88; 7RP 44. Isidor's voice was unaffected. 7RP 47. The doctor agreed there was no objective finding that would substantiate any kind of pain complaint. 7RP 41. The untainted evidence does not necessarily show Ochoa strangled her.

Trailer park residents heard Isidor scream for help. But Ochoa testified Isidor was angry at him and hysterical. Were the screams for help genuine responses to Ochoa committing the charged crimes against her? Or were they the screams of a hysterical person who wanted to retaliate against Ochoa for rebuffing her? Evidence in the record supports both inferences. Resolution of the conflicting testimony and competing inferences was for the jury to decide. The State cannot show beyond a reasonable doubt that the exclusion of evidence impeaching Isidor's credibility would have had no effect on how the jury assessed the evidence.

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. This evidence supports an inference that Ochoa caused at least some of these injuries. The question, though, is what precisely did he do and when did he do it? Those injuries do not necessarily show rape or strangulation occurred. Nor do they necessarily show that Ochoa assaulted her inside the trailer.

A neighbor testified he saw Ochoa pulling her hair and dragging her 15 feet. 5RP 118. Isidor testified they struggled outside the trailer, where Ochoa grabbed her hair, threw her to the ground, hit her twice in the face and dragged her along the ground to the door while her bottom half was unclothed. 6RP 16-18, 55. It is possible, then, that the injuries occurred outside the trailer. If so, that would not be rape, assault by strangulation, or first degree burglary. The jury is not required to accept the testimony of a witness in toto or reject it all; it can accept part and reject part. State v. Carothers, 84 Wn.2d 256, 261, 525 P.2d 731 (1974), disapproved on other grounds by State v. Harris, 102 Wn.2d 148, 685 P.2d 584 (1984); State v. Henry, 143 Wash. 39, 43, 254 P. 460 (1927). The jury, in resolving conflicts in the evidence, could believe Isidor's account of what happened outside the trailer. At the same time, the jury could

conclude the State did not prove the crimes alleged to have occurred inside the trailer based on the U-Visa impeachment evidence.

The constitutional harmless error standard is "stringent." State v. Barry, 183 Wn.2d 297, 303, 352 P.3d 161 (2015). The test is not whether the untainted evidence *could* lead to a finding of guilty. The untainted evidence must be so overwhelming that it "necessarily" leads to a finding of guilt. Guloy, 104 Wn.2d at 426. In other words, conviction must be deemed inevitable regardless of the error.

The basic flaw in the State's harmless error argument is that it takes evidence susceptible to differing interpretations and draws the interpretation in the light most favorable to the State, as if this were an exercise in assessing the sufficiency of evidence. See State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (describing sufficiency of evidence standard). Minimal bleeding and tenderness in the vaginal area without any bruising or lacerations? That must mean forced intercourse, not consensual, vigorous intercourse. Bruising on the neck? That must mean strangulation, not caused by some other action, perhaps when Ochoa grabbed her outside. Isidor ran out of the trailer naked, screaming and upset? That must mean rape and strangulation rather than a hysterical person upset and angry with Ochoa for other reasons. The inferences the State wishes to draw are not necessary inferences. Rather, there are

competing inferences, and those are for the jury to decide based on a full understanding that Isidor had a motive to embellish.

Further, evidence controverting the State's case and presenting a viable defense theory cuts against finding an error harmless. Watt, 160 Wn.2d at 639. Ochoa provided an exculpatory version of events. He denied raping and strangling her. 9RP 21, 24. He disputed material facts before the jury. According to Ochoa, the two were in a previous sexual relationship, the sex was consensual, and the argument and screaming were the result of Isidor being hysterical and upset with Ochoa about not returning her affection as she wished. 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." State v. Maupin, 128 Wn.2d 918, 929, 913 P.2d 808 (1996). "Credibility determinations 'cannot be duplicated by a review of the written record, at least in cases where the defendant's exculpating story is not facially unbelievable.'" State v. Holmes, 122 Wn. App. 438, 447, 93 P.3d 212 (2004) (quoting State v. Gutierrez, 50 Wn. App. 583, 591, 749 P.2d 213 (1988)). The reviewing court will not presume the State's witnesses are credible and the defense witnesses are not in assessing whether a constitutional error is harmless beyond a reasonable doubt.

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. See State v. Ortuno-Perez, 196 Wn. App. 771, 801, 385 P.3d 218 (2016) (reversing murder conviction where constitutional errors "may well have altered the jury's view of the evidence.").

Harmless error analysis is a delicate task filled with tension. On the one hand, it is axiomatic that "appellate courts do not weigh evidence and do not find facts." State v. Bennett, 180 Wn. App. 484, 489, 322 P.3d 815 (2014). On the other hand, not every error is deserving of reversal and it is the appellate court's job to determine when that is. In determining whether the State has overcome the presumption of prejudice, courts must be careful not to usurp the role of the jury as trier of fact, which involves weighing the persuasiveness of evidence, resolving conflicting evidence, and making credibility determinations. State v. Williams, 96 Wn.2d 215, 222, 634 P.2d 868 (1981); Dennis J. Sweeney, An Analysis of Harmless Error in Washington: A Principled Process, 31 Gonz. L. Rev. 277, 290 (1996) (criticizing constitutional harmless error test for casting appellate court in role of fact-finder, which invades province of jury). Such concerns exist with special force here, where the constitutional error, in

preventing the jury from hearing evidence of the chief witness's bias, strikes at the heart of the jury's assessment of that witness's credibility.

"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 Isidor's claims. Davis v. Alaska, 415 U.S. 308, 317, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). The denial of Ochoa's constitutional rights to present a defense and confront the witness against him with evidence of bias corrupted and distorted the fact-finding process. Reversal of the rape, second degree assault, and first degree burglary convictions is the remedy.

D. CONCLUSION

For the reasons stated, Ochoa requests that this Court affirm the Court of Appeals and remand for a new trial on the reversed counts.

DATED this 15th day of October 2018

Respectfully Submitted,

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