72503-3

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Court of Appeals
Division I
State of Washington

72503-3

NO. 72503-3-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

BERNARDO OCAMPO BASAVE,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Susan K. Cook, Judge

RESPONDENT'S BRIEF

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I. SUMMARY OF ARGUMENT

Bernardo Basave appeals from his conviction for Rape in the Second Degree of a physically helpless relative. Basave complains the trial court improperly limited his cross-examination of the relatives of the victim about the relative's knowledge of potential motives. He sought to question the victim's daughter about the reason the "parents" may have wanted to move into a different house and to question the victim's son about his knowledge about his mother's immigration status.

Regarding the house, there was a brief discussion at a side-bar conference which was not reduced to the record. And regarding the immigration status the son testified he did not know his mother's thoughts. Thus, the record does not support that the trial court abused its discretion in failing to allow the questions.

Furthermore, the claimed basis before this court of establishing a motive of the victim to lie was of minimal relevance, any error in exclusion of the question was harmless error.

II. ISSUES

1. Where a trial court is making a decision about the admission of evidence, is the correct standard on review the abuse of discretion standard?

2. Where the defense failed to establish the purpose of the proposed admission of evidence before the trial court, does the record support the defense claims?
3. Did the trial court abuse its discretion where it declined to admit questioning about potential motives of the victim which are not contained in the record?
4. Did the trial court abuse its discretion to decline questioning of the victim's daughter about her knowledge of the victim's intent to move into the suspect's house?
5. Did the trial court abuse its discretion to decline questioning of the victim's son about his knowledge of the victim's statements about her immigration status?
6. Where there was overwhelming evidence the defendant engaged in intercourse with his sister-in-law, when she was too intoxicated to consent, was any error pertaining to exclusion of unsupported claims of motives of the victim harmless?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On September 12, 2013, Bernardo Basave was charged with Rape in the Second Degree of a person incapable of consent and Rape in the Third Degree both alleged to have occurred on January 1, 2013. CP 1-2. The

charge was based on the claim of a 38 year-old woman that she believed her brother-in-law had sex with her when she was intoxicated. CP 4-5.

On August 4, 2014, the case proceeded to trial. 8/4/14 1RP 2, 8/4/14 2RP 5.[1]

On August 8, 2014, the jury returned verdicts finding Basave guilty of Rape in the Second Degree and Rape in the Third Degree. CP 39, 41, 8/8/14 RP 124.

On September 10, 2014, Basave was sentenced. 9/19/14 RP 132. Because Basave was convicted of both Rape in the Second Degree and Rape in the Third Degree for the same act, the trial court found sentencing on both offenses would violate double jeopardy and vacated Basave's conviction for Rape in the Third Degree. 9/19/14 RP 140. Basave was sentenced to seventy-eight months of confinement. CP 50, 58, 9/19/14 RP 144.

On September 22, 2014, Basave timely filed a notice of appeal. CP 61.

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[1] The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

8/4/14 1RP	Motions in Limine
8/4/14 2RP	Testimony Day 1 (with 8/5/14 RP)
8/5/14 RP	Testimony Day 2 (with 8/4/14 2RP)
8/6/14 RP	Testimony Day 3
8/7/14 RP	Testimony Day 4 with closing argument (with 8/8/14 RP, 9/18/14 RP & 9/19/14 RP)
8/8/14 RP	Verdict (in volume with 8/7/14 RP, 9/18/14 RP & 9/19/14 RP)
9/18/14 RP	Continuance (with 8/8/14 RP, 9/18/14 RP & 9/19/14 RP)
9/19/14 RP	Sentencing (with 8/7/14 RP, 8/8/14 RP & 9/19/14 RP).

2. Summary of Trial Testimony

S.O. testified through an interpreter. 8/4/14 2RP 5-6. S.O. was born in Mexico City and moved to Washington State in 1995. 8/4/14 2RP 6-8. She only completed the fifth grade and stopped going to school because she was working. 8/4/14 2RP 7. She married Gerardo S. and they had five children. 8/4/14 2RP 7. Her children are: daughter in Yesica S.[2] 1995; son A.S.in 1997; son Agustin S. in 1998; daughter J.S in 2004; son G.S in 2009. 8/4/14 2RP 9-10, 8/5/14 RP 163. They were still married at the time of trial. 8/4/14 2RP 7. She worked in the fields with her husband. 8/4/14 2RP 8.

S.O. lived at 6611 Worline Road in Bow at the time of trial. 8/4/14 2RP 9. She moved there in February of 2013. 8/5/14 RP 47. Prior to that time, she lived in the house next door at 6679 Worline Road. 8/4/14 2RP 9.

Teodora Sanjuan is her husband's sister. 8/4/14 2RP 10. Ana Laura Sanjuan is her husband's other sister. 8/4/14 2RP 11. Ana Laura's husband is Bernardo Basave. 8/4/14 2RP 11. S.O. had known Bernardo for thirteen of fourteen years. 8/4/14 2RP 12. They lived together in the house at 6679 Worline Road for about eight years. 8/4/14 2RP 12. That house and the house at 6611 Worline Road were both owned by a man that S.O. and her husband work with. 8/4/14 2RP 12, 14.

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[2] The record refers to her by both Jessica and Yesica. 8/4/14 RP 10, 163-4. The State believes the correct spelling is Yesica and therefore uses that spelling herein.

When they lived at 6679 Worline, S.O. her husband and children lived upstairs and Bernardo and his family lived downstairs. 8/4/14 2RP 13.

Bernardo and his family moved into 6611 Worline after S.O. and her husband had been offered by their boss to move in, but S.O. and her husband declined leaving Bernardo and his family to move in. 8/4/14 2RP 13-4. After Bernardo and his family moved out of 6679 Worline, S.O.'s children got the upstairs bedrooms and S.O. and her husband got the downstairs bedrooms. 8/4/14 2RP 14.

S.O. had a good relationship with her sister in law Ana Laura and Bernardo. 8/4/14 2RP 15. There was never anything romantic between S.O. and Bernardo. 8/4/14 2RP 15.

On December 31, 2012, S.O. had a New Year's Eve party at her house at 6679 Worline. 8/4/14 2RP 16-7. There were about thirty family members present. 8/4/14 2RP 17. Ana Laura and Bernardo were there. 8/4/14 2RP 17. S.O., her husband and Bernardo were all drinking. 8/4/14 2RP 18. S.O recalled drinking for a while, and became intoxicated. 8/4/14 2RP 19. She next recalled being woken up in bed with someone pulling on her hair and pants. 8/4/14 2RP 19, 20. It was dark. 8/4/14 2RP 20. She then felt some hands on her stomach and pants. 8/4/14 2RP 20. S.O. had no idea who it might be. 8/4/14 2RP 20. S.O. wrote a statement in which she said she could feel someone on top of her. 8/5/14 RP 52. S.O. recalls an image of her

daughter's face, but did not remember fully waking up until the next morning and in the bed of her then seventeen year-old daughter, Y.S. 8/4/14 2RP 21.

Prior to becoming unconscious, S.O. was wearing a sweater, black blouse, underwear and jeans with no belt. 8/4/14 2RP 19. When she woke up, she was wearing a different pair of pants and no underwear. 8/4/14 2RP 23. She always wore underwear. 8/4/14 2RP 23.

S.O. went to shower, because she felt as if she had sexual relations with someone. 8/4/14 2RP 23. Her parts felt different to her than when she had sexual relations with her husband. 8/4/14 2RP 23-4. After her two older children woke up, they told her what they had seen. 8/4/14 2RP 24. She also talked to Ana Laura and Teodora who had come over and told them what had occurred. 8/4/14 2RP 24-5.

S.O. did not initially call police because she had not figured out what to do, because of concerns about her sister in law and her children, as well has her husband having outstanding warrants. 8/4/14 2RP 25-6. S.O. was also concerned because she had a lot to drink and felt guilty about what occurred. 8/4/14 2RP 26.

S.O. decided to clean up the house. 8/4/14 2RP 26. In doing so, she found her jeans on the top corner of the bed and her underwear amidst the covers in her first floor bedroom. 8/4/14 2RP 27, 8/5/14 RP 32, 41. S.O. did

laundry including cleaning those clothes. 8/4/14 2RP 27-8. When she went to clean the clothes, she found Bernardo's jacket, T-shirt, cell phone, wallet and shoes on top of the washer. 8/4/14 2RP 28, 8/5/14 RP 40, 70, 74. Ana Laura took those items. 8/4/14 2RP 29.

S.O. did not go to work on January 2nd, because she felt bad about what had happened. 8/5/14 RP 43, 60. S.O. eventually decided to tell the police about what happened. 8/4/14 2RP 29. On January 3rd, she went to the police with her oldest daughter to interpret for her. 8/5/14 RP 43. The police had her go to the hospital, where she had an examination which included swabs of her vaginal area. 8/5/14 RP 44, 56. She had showered twice since the incident. 8/5/14 RP 44. She gave police the clothes she had been wearing and the blanket from the bed. 8/5/14 RP 45. She told police that she believed she was attacked around 4:00 a.m. in the morning based upon what her children had told her. 8/5/14 RP 73.

Before January 1st, S.O. had seen Basave constantly, more than once a week including sharing meals together. 8/5/14 RP 47. Afterwards, she never saw him and he did not telephone her or send her letters, all of which was unusual to her. 8/5/14 RP 48-9.

Agustin is S.O.'s son, born in 1999. 8/5/14 RP 77-8. He was at the party on December 31, 2012. 8/5/14 RP 79. There were fifteen people or more at the party. 8/5/14 RP 80. Adults were getting drunk and kids were

playing around. 8/5/14 RP 80. Agustin saw his sister taking his mother to her bedroom downstairs. 8/5/14 RP 82. S.O. appeared tipsy to Agustin 8/5/14 RP 82. People started leaving the party around two or three. 8/5/14 RP 82-3. Bernardo Basave and his wife had been at the party and both had been drinking. 8/5/14 RP 83.

Agustin was in his sister's room playing X-box while she was sleeping. 8/5/14 RP 84-5. His attention was drawn to knocking downstairs and went to the front door where he saw a relative, Noe, outside who asked for his keys. 8/5/14 RP 85. As Agustin went back upstairs, he heard a noise from his mother's room sounding like a thump of something falling. 8/5/14 RP 86. He opened the door, turned on the light and saw Bernardo completely naked in the room with his mother crying. 8/5/14 RP 87. Bernardo was bent over the bed with his feet on the floor and his hands on the bed. 8/5/14 RP 89. Agustin's mother was drunk, crying, not wearing any pants but had on her top. 8/5/14 RP 87, 90. She was not under the covers. 8/5/14 RP 90.

Agustin went to get his sister. 8/5/14 RP 87. They went downstairs to check on their mother and called their aunt Senorina over. 8/5/14 RP 92, 97. Agustin's father was sleeping on the couch and did not wake up. 8/5/14 RP 92.

Yesica is S.O.'s oldest daughter. 8/5/14 RP 163-4. She was at the New Year's Eve party on December 31, 2012. 8/5/14 RP 164. The house

was full of people who were eating and drinking. 8/5/14 RP 166. Her parents as well as Bernardo Basave were drinking. 8/5/14 RP 167-8. Prior to that time, Yesica had a lot of contact with Bernardo and their families were close. 8/5/14 RP 168. Bernardo's wife Ana Laura was also present and was drinking. 8/5/14 RP 168.

S.O. had too much to drink. 8/5/14 RP 169. Yesica could not understand what S.O. was saying, was acting unusually goofy and her eyes were droopy. 8/5/14 RP 170-1. Yesica had never seen S.O. that drunk before. 8/5/14 RP 171. Yesica assisted in putting her to bed. 8/5/14 RP 169. S.O. was having trouble walking so Yesica had S.O. put her hand over her shoulder and with the help of her cousin lifted S.O. to bed. 8/5/14 RP 169. S.O. was left in her jeans, took off her shoes and laid her on her side of the bed, partially covered. 8/5/14 RP 172.

People were starting to leave the party around that time. 8/5/14 RP 172. Yesica picked up a little before going upstairs where the other children were going to bed. 8/5/14 RP 173-4. Yesica did check on her mother one time before going upstairs to bed, possibly between 2:30 and 3:30 a.m. 8/5/14 RP 190. Agustin was in one room playing video games. 8/5/14 RP 174. Yesica's her father was downstairs on the couch passed out. 8/5/14 RP 174.

Yesica woke up to her brother, Agustin asking for help because there was an emergency because Agustin had seen Bernardo come out of their mother's room with no bottoms on. 8/5/14 RP 174-5. Yesica went to the room and found her mother in bed crying. 8/5/14 RP 175. S.O. was wearing sweat pants that she had not been wearing when Yesica put S.O. to bed. 8/5/14 RP 176. Yesica said her mother said someone was trying to do something to her and she said no. 8/5/14 RP 175.

Yesica took S.O. upstairs and she was crying the whole way up. 8/5/14 RP 176. S.O. also said she had said no and the person was hitting her. 8/5/14 RP 176. Yesica could tell that S.O. was still intoxicated when taken upstairs to bed, because she would alternately cry, then doze off and was not making sense. 8/5/14 RP 177.

Yesica went back downstairs later and her father was exactly where they had left him asleep. 8/5/14 RP 179. Yesica's father did not wake up. 8/5/14 RP 178. Yesica went to sleep in bed with her mother. 8/5/14 RP 178. Yesica woke up after about an hour and S.O. was just getting out of the shower. 8/5/14 RP 179-80. S.O. said something had happened to her because when you are a woman, you know when something happens and her body was really sore. 8/5/14 RP 180. Yesica told S.O. what Agustin had told her. 8/5/14 RP 180.

Yesica testified that Ana Laura and Teodora came over later in the morning and S.O. told them what had happened. 8/5/14 RP 180-1. Yesica helped clean up the house and saw a leather jacket, shoes and a cell phone that Ana Laura took. 8/5/14 RP 181.

Nurse Leanne Dillaway conducted a sexual assault examination of S.O. two days after the incident on January 3, 2013. 8/5/14 RP 111-2, 117. S.O. complained of painful hips and that there had been vaginal penetration. 8/5/14 RP 124. S.O. was on her menstrual cycle and indicated her last voluntary intercourse had been with her husband a month before. 8/5/14 RP 132. Dillaway collected perineal vulvar, vagina and anal swabs which were provided to law enforcement. 8/5/14 RP 127-30

Forensic Scientist Lisa Yoshida was the DNA analyst on the case. 8/6/14 RP 15. The underwear sent for testing was examined, but no bodily fluids were located. 8/6/14 RP 38. A blanket which was submitted was not tested. 8/6/14 RP 38. Yoshida analyzed the swabs which had been collected by Nurse Dillaway. 8/6/14 RP 15, 34, 39-40. In the testing kit were perineal vulvar, vaginal, anal and a reference blood sample. 8/6/14 RP 39-40.

Yoshida located a spermatozoon in both the perineal and vaginal samples. 8/6/14 RP 40, 42. The antigen P-30 present in semen was also located in the vaginal sample and indicated, but not confirmed, in the

perineal vulvar sample. 8/6/14 RP 41. After extraction, quantification revealed male DNA present in each sample. 8/6/14 RP 42-3.

The perineal vulvar swabs showed a mixed DNA profile of at least two individuals with male and female DNA. 8/6/14 RP 44. The female DNA matched the profile for S.O. 8/6/14 RP 45. Yoshida processed reference samples from Bernardo Basave and obtained a DNA profile for him. 8/6/14 RP 10, 14, 8/6/14 RP 49-51. His profile was excluded as a contributor to the second profile in the perineal vulvar swab. 8/6/14 RP 51. Yoshida also received a reference sample from Gerardo and created a DNA profile for him. 8/5/14 RP 154, 8/6/14 RP 52, 57. The profile for Gerardo matched that of the second profile in the perineal vulvar swab. 8/6/14 RP 57.

Yoshida did DNA typing on the vaginal sample. 8/6/14 RP 57. She determined there was a mixed DNA profile with two peaks present at several different areas. 8/6/14 RP 57. There were at least three contributors to the profile. 8/6/14 RP 58. In comparing the three known profiles in the case, she came to the conclusion that mixture from the vaginal swab contained profiles of S.O., Gerardo and Bernardo Basave. 8/6/14 RP 58-9. It was 14,000 times more likely that the mixture contained the S.O., Gerardo and Bernardo Basave, than just S.O. and Gerardo. 8/6/14 RP 59.

The defendant called Teodora Almaraz. 8/6/14 RP 120-1. Teodora is the sister-in-law to S.O. and sister of Ana Laura. 8/6/14 RP 121. She was at

the New Year's Eve party on December 31, 2012. 8/6/14 RP 121-2. Teodora was drinking Tequila and got drunk. 8/6/14 RP 122. She left at the same time as her sister Ana Laura and her children. 8/6/14 RP 123. She thought Bernardo went with them. 8/6/14 RP 123. Teodora believed Bernardo stayed in the living room when they returned to the house. 8/6/14 RP 123. When she woke up in the morning, Teodora saw Bernardo asleep on the sofa. 8/6/14 RP 124.

Teodora went over to S.O.'s house where S.O. told Teodora what had happened to her. 8/6/14 RP 124-5. S.O told Teodora that somebody grabbed her by the hair and she thought it was Teodora's brother. 8/6/14 RP 125. S.O. said she was thrown on the bed, told the person no, the person got on top of her and she kicked him and fell on the chest of drawers. 8/6/14 RP 125. She recalled being forced to have sex. 8/6/14 RP 136.

On cross-examination, Teodora testified that Bernardo's relationship with S.O. was fine up until the New Year's Eve party. 8/6/14 RP 130. Teodora acknowledged that she remembered well what happened at the party but that when she went outside afterwards, "everything was erased." 8/6/14 RP 132. It was hard for her to remember a lot of what happened at the party. 8/6/14 RP 132. Teodora also said she did not recall Bernardo lying down on the couch in the living room. 8/6/14 RP 134. That night, she last

recalled him being upstairs in the room with her sister Ana Laura. 8/6/14 RP 134. The next morning, she did recall him being on the sofa. 8/6/14 RP 134.

The defendant also called George Chan. 8/7/14 RP 7. Chan was a former DNA analyst with the Washington State Patrol Crime Laboratory. 8/7/14 RP 8. Chan retired in 2006, but still did private consulting. 8/7/14 RP 12. Chan had review the case file from the crime lab. 8/7/14 RP 13. Chan contended only one of the allele calls in the mixture from the vaginal swab gave an indication of a three person mixture. 8/7/14 RP 23-4. Chan acknowledged on direct examination that Yoshida's calculation of the fact of inclusion was fourteen thousand times more likely was correct. 8/7/14 RP 31. When Chan was asked if he was able to say "hundred percent, without a doubt, the mixture under this sample from the three people is from [S.O.], [Gerardo] and Mr. Besave?" Chan said he "would not use a hundred percent, but however, that it was one of the scenario that could happen." 8/7/14 RP 33.

On cross-examination, Chan indicated that he could see that the alleles shown could come from a three person mixture. 8/7/14 RP 56, 58. Reviewing the analyst's work, Chan did not see any indication of contamination and reviewing her whole file, had no problem with what she did. 8/7/14 RP 59-60. Chan agreed that the profile was indicative of three people but "felt uncomfortable to be a hundred percent sure." 8/7/14 RP 60.

He agreed the analyst had not said she was one hundred percent sure. 8/7/14 RP 61. The likelihood ratio that the analyst used was not something that Chan had used while he worked at the lab. 8/7/14 RP 63.

The defendant did not testify. 8/7/14 RP 74.

IV. ARGUMENT

1. The trial court did not abuse its discretion in denying questioning of the victim's son and daughter about speculative motives unsupported in the record.

i. The proper standard of review is abuse of discretion.

> Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to confront and cross-examine adverse witnesses. *State v. McDaniel*, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996). Although this right is of constitutional magnitude, it is subject to the following limits: (1) the evidence sought to be admitted must be relevant and (2) the defendant's right to introduce relevant evidence must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. *McDaniel*, 83 Wn. App. at 185.
>
> The trial court has discretion to determine the scope of cross-examination. *McDaniel*, 83 Wn. App. at 184-85. We will not reverse a trial court's rulings on the scope of cross-examination absent a manifest abuse of discretion—when its decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. *McDaniel*, 83 Wn. App. at 185. Extent of cross-examination is largely discretionary with the trial court. *State v. De Gaston*, 5 Wn.2d 73, 78, 104 P.2d 756 (1940).

State v. Perez, 139 Wn. App. 522, 527-30, 161 P.3d 461 (2007).

> While a defendant has a right to present a defense and cross-examine witnesses, these rights are not unfettered. If the trial court determines that cross-examination would have only limited usefulness, it does not err in excluding it. And the right to present a defense is limited to relevant admissible evidence. In determining whether evidence is admissible, the trial court must balance the defendant's interest in offering the evidence and the State's interest in avoiding evidence so prejudicial as to render the trial unfair.

State v. O'Cain, 144 Wn. App. 772, 776, 184 P.3d 1262 (2008).

The limitations were on questioning the children of the victim regarding her motives, despite not questioning the victim about her motives directly. Here both instances limiting cross examination were within the discretion of the trial court.

Basave relies significantly on the case of *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010), to support his contention that the error was of constitutional magnitude. In *Jones*, the defendant sought to testify that the sexual intercourse occurring in the second degree rape charge occurred at a drug-fueled sex party at which the victim danced for money and engaged in consensual intercourse with three men. *Jones*, 168 Wn.2d at 717. The trial court excluded references to the sex party, reasoning that such evidence was barred by the rape shield statute. *Jones*, 168 Wn.2d at 717-18. The Supreme Court reversed, concluding that the party evidence was highly probative because it supported Jones's testimony that the victim consented to sex and

that the rape shield statute did not apply because it was not past sexual conduct. *Jones*, 168 Wn.2d at 721-2.

In contrast to the complete denial of a defense as in *Jones*, here Basave can claim that at most speculative motives of the victim were not admitted. But as the discussion below shows, the record does not support that there was such an exclusion of relevant evidence.

ii. The limitation on questioning regarding the houses was within the trial court's discretion given the speculative evidence that was sought from the daughter of the victim.

The questions and objections regarding the living situation were as follows.

Q. Now, the house that you live - - or I'm sorry, excuse me. The house that you lived in at the time, the 7679[3] *[sic]*, that was a small house; is that right?
A. Yeah.
Q. Smaller than the 6611 Worline house; is that true?
A. Yes.
Q. Is that why your parents wanted to move into the 6611 Worline Road house"
MS. KAHOLOKULA: Objection. Speculation.
THE COURT: Sustained.
Q. (BY MS. NEAL) Did you know who currently lives at the 7679 Worline House"
A. Yes
Q. Who is that?
MS. KAHOLOKULA: Objection. Irrelevant.
THE COURT: Approach.

[3] Defense counsel apparently mistakenly gave the incorrect house number which was 6679. 8/4/14 2RP 9.

(BENCH CONFERENCE OFF THE RECORD)
THE COURT: Objection sustained.

8/5/14 RP 194-5.

The first question objected was based upon speculation.[4] There was no evidence that had been presented that Yesica's parents had wanted to move from the house they had been residing because of the size of the house either by asking another witness or by asking Yesica. Thus, asking Yesica to comment on what the parents were thinking would have her speculating on their thoughts since there was no evidence in the record that they even had such thoughts much less that Yesica was even aware of their thoughts. ER 602. Without her knowledge of the motive of the mother, the evidence was not relevant. ER 401.

The second question objected to was who was the current resident of 6679 Worline, improperly referred as 7679 Worline in the record. 8/5/14 RP 195. If the motive assigned to S.O. was to move into the larger house, and the evidence had already been admitted at trial that S.O. and her family resided in the larger house, the fact of who was residing in the smaller house

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[4] Speculation is generally a term used in conjunction with the term conjecture when evaluating expert witnesses. 5B Karl B. Tegland, Wash. Pract., *Evidence* § 702.21 5th Ed. 2007. But it connotes in issue which is beyond the knowledge of the witness. The State contends as used here by the prosecutor it connoted a lack of personal knowledge of the witness, the daughter of the alleged victim. ER 602, see *Bellevue Plaza v. City of Bellvue*, 121 Wn.2d 397, 411, 851 P.2d 662 (1993) (appraiser using fact "beyond the knowledge or reasonable certainty, becomes pure speculation).

at 6679 Worline at the time of trial was not relevant to any motive of S.O. 8/4/14 2 RP 9, 12-4, 8/5/14 RP 194. It did not "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.

On appeal Basave, tries to draw the inference before this Court that there was a motivation of the parents to make the complaint in order to move into the larger house. There is nothing in the record that indicates that this "motive to lie" was provided to the trial court as the basis for the admission of the evidence. Brief of Appellant at page11.

> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> ...
>
> (2) Offer of proof. In case the ruling is one excluding evidence, **the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.**

ER 103 (bold emphasis added). There was no offer of proof here made as to what the witness would have said, or what the basis for admission of evidence was before the trial court. Rather than acknowledge a failure on the part of counsel to make a record, Basave seeks to assign blame to the trial court for failure to make findings. But in the absence of being called on to make a record, the trial court should not be faulted.

In the absence of such record, this Court should decline to review a ruling for which an incomplete record was made before the trial court. RAP 2.5(a) (The appellate court may refuse to review any claim of error which was not raised in the trial court).

> At least one Washington appellate court has reasoned that "[j]ust as an appellate lawyer is not considered ineffective for failing to raise every conceivable nonfrivolous claim of error, a trial lawyer cannot be faulted for failing to make a record of every such allegation." *City of Tacoma v. Durham*, 95 Wn. App. 876, 882, 978 P.2d 514 (1999). Thus, Cross's trial lawyers did not fall below the standard of reasonableness by failing to make a record of the sidebar conference.

In re Pers. Restraint of Cross, 180 Wn.2d 664, 714, 327 P.3d 660 (2014).

iii. The limitation on question regarding the immigration motivation was within the trial court's discretion given the hearsay when sought from the son and the son's denial of knowledge.

Q. Did your mom ever talk to you about being a citizen of the United States?
A. Not really.
Q. So do you recall me asking you that question at our interview in April?
MS. KAHOLOKULA: Your Honor, I'm going to object and actually move to strike. I think that's hearsay, what his mother talked to him about in that regard.
THE COURT: Sustained.
MS. KAHOLOKULA: And ask to strike.
THE COURT: The question and answer are stricken, ladies and gentlemen. You are instructed to disregard.
Q. (BY MS. NEAL) Are you aware of any plan for your mom to become a citizen of the United States?
A. No.

Q. Do you think she wanted to be a citizen?
MS. KAHOLOKULA: Objection. Speculation.
THE COURT: Sustained.
Q. (BY MS. NEAL) Do you know if she wanted to be a citizen?
MS. KAHOLOKULA: He would only know based on hearsay.
THE COURT: That objection is sustained.
MS. NEAL: I have nothing further.

8/4/14 2RP 101-2.

Although Basave seems to suggest that this exchange resulted in the exclusion of evidence, reviewing the answers of Agustin shows he did not know his mother's thoughts regarding becoming a citizen. He said they never really talked about it and he did not know her plans. 8/4/14 2RP 101-2. Thus, there was no relevant evidence that was excluded.

On appeal, Basave suggests this other motive to lie to gain citizenship existed and was excluded. He contends "Counsel for Mr. Basave asked Agustin, Ms. S's teenage son, whether his mother was attempting to gain citizenship by reporting this domestic violence rape allegation." Brief of Appellant at page 11-2. The question as phrased on appeal was not posed to Agustin. Although that was the inference that Basave would have wanted the jury to draw, it was not asked. And the record supports that Agustin did not have knowledge of the mother's motives to answer that question.

Basave also contends that "defense counsel had a good faith basis for asking these citizenship questions." Brief of Appellant at page 12. But despite having interviewed Agustin, Basave did not make a record that Agustin answered differently in the interview or that she had expected him to say she had immigration motives as a result of reporting.[5]

There was simply no evidence through the son or any other source establishing that S.O. knew her immigration status at the time of the incident or that her immigration status could have benefitted from pursuit of a criminal case. Thus, the trial court if called on the record to rule, would have properly ruled that evidence about her status and whether she had an immigration-related motive to fabricate the claims was not relevant to her credibility as a witness.

2. Any exclusion of evidence was harmless error.

Although the State strongly believes the argument above supports that the trial court properly ruled on the objections, the State would be remiss in failing to also note that if there was any error it was harmless.

> Where an error violates an evidentiary rule rather than a constitutional mandate, the error is not prejudicial unless it is reasonably likely that the outcome of the trial would have been materially affected had the error not occurred. *State v.*

[5] The Supreme Court has found "the risk of prejudice inherent in admitting immigration status to be great." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010).

> *Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). The improper admission of evidence is harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. *Thomas*, 150 Wn.2d at 871, 83 P.3d 970.

State v. Price, 126 Wn. App. 617, 638, 109 P.3d 27 (2005).

Basave already had the information that the address at 6611 was a smaller house and that after Ana Laura moved out, that S.O. and her family moved in. 8/4/14 2RP 9, 12-4. Defense could have argued to the jury the very theory they suggest was foreclosed by the limitation of evidence by the trial court. And this Court does not know how the daughter would have answered because the defense did not offer how she would have answered.

In the context of the exchange regarding the immigration status of S.O., Agustin testified his mother did not really ever talk about being a United States citizen and that he did not know if she had a plan to become a citizen. Thus, there was no evidence in the record by which Basave could have constructed the argument.

Against these claimed motives of the victim, was overwhelming evidence that Basave committed the offense. S.O. was intoxicated and passed out on her bed after the New Year's Eve party. 8/5/14 169-171. She was left clothed on the bed. 8/5/14 RP 172. Basave was seen in the room naked by Agustin and when Yesica came downstairs moments later, S.O. was wearing sweatpants that she had not been wearing. 8/5/14 RP 176. S.O.

could tell someone had intercourse with her. 8/4/14 2RP 23. Her husband Gerardo had been passed out on his bed the entire night. 8/5/14 RP 178-9. Finally, the DNA profile from the swab obtained from the vagina of S.O. included a mixture that was 14,000 times more likely to contain DNA of Bernardo Basave along with S.O. and Gerardo, than just S.O. and Gerardo.

Any evidentiary error was of minor significance in reference to the overall, overwhelming evidence.[6]

V. CONCLUSION

For the foregoing reasons, the conviction of Bernardo Basave for Rape in the Second Degree must be affirmed.

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[6] The State contends above, the claimed error was evidentiary error. Should this Court determine the error was of a constitutional right, there remains a constitutional harmless error standard.

> The appellate court determines whether the State has overcome the presumption from an examination of the record, from which it must affirmatively appear the error is harmless beyond a reasonable doubt. See *State v. Belmarez*, 101 Wn.2d 212, 676 P.2d 492 (1984) (error in instruction on deadly weapon was of constitutional magnitude and not harmless). The rule is occasionally stated in its approximate converse, i.e., that the error is harmless if the evidence against the defendant is so overwhelming that no rational conclusion other than guilt can be reached. *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985).

State v. Finch, 137 Wn.2d 792, 859, 975 P.2d 967 (1999).

The State believes the evidence also supports the higher standard that any error was harmless beyond a reasonable doubt.

DATED this 12th day of June, 2015.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: _____

ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [X]United States Postal Service; [ ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Jan Trasen, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA, 98101. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 12th day of June, 2015.

_____

KAREN R. WALLACE, DECLARANT