NO.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner
v.
VLADIMIR NIKOLENKO, Appellant

FROM THE COURT OF APPEALS DIVISION II
CAUSE NO. 57541-8-II
CLARK COUNTY SUPERIOR COURT
CAUSE NO. 18-1-01096-9

PETITION FOR REVIEW

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INTRODUCTION

Evidence Rule 413, combined with the existence of the U visa program, cannot be interpreted in a manner that allows our courts to make it more difficult for immigrant victims to receive justice in Washington. Such a result is contrary to the reasons why this Court adopted ER 413. And yet, decisions like Court of Appeals's in *State v. Nikolenko* do that very thing by diminishing both the prejudice inherent in immigration evidence and the State's interest in limiting its admissibility, exaggerating the probative value of U visa evidence, and finding—contrary to this Court's decisions in *State v. Arndt*[1] and *State v. Jennings*[2]—a violation of a defendant's right to present a defense on the basis that relevant defense evidence was excluded from trial irrespective of how little probative value the contested evidence had. A violation of the right to

[1] 194 Wn.2d 784, 453 P.3d 696 (2019).

[2] 199 Wn.2d 53, 502 P.3d 1255 (2022).

present a defense should not be found where the defendant is still able to present evidence in support of their version of the events, even if some relevant evidence is excluded.

IDENTITY OF MOVING PARTY

The Moving Party is the State of Washington and the Respondent below.

DECISION

The Moving Party, the State of Washington, seeks review of the unpublished opinion of Division II of the Court of Appeals in *State v. Nikolenko*, No. 58865-0-II, which was filed on June 3, 2025, reversing the defendant's conviction for Indecent Liberties with Forcible Compulsion.[3] A copy of the opinion of the Court of Appeals is attached.

[3] Because the Court of Appeals reversed Nikolenko's conviction it did not address his other arguments including those raised in his consolidated personal restraint petition. *State v. Nikolenko*, ___ Wn. App. 2d ____, 2025 WL 1563545, *1 n.1 (2025).

ISSUES PRESENTED

I. **The Court of Appeals held that the trial court's ER 413 ruling that excluded evidence of the victim's U visa application from trial violated the defendant's right to present a defense. Does this decision amount to a significant question of law under the Constitution or involve an issue of substantial public interest that should be determined by this Court where the victim sought the U visa seven months after describing the same sexual assault to her counselor and the police, testified consistently with her prior disclosures, and where the defendant was still able to present his two primary defenses?**

II. **The Court of Appeals held that the trial court's ER 413 ruling that excluded evidence of the victim's U visa application from trial violated the defendant's right to present a defense. Does this decision conflict with this Court's recent decisions explaining that a violation of the right to present a defense should not be found where the defendant remains able to offer evidence in support of his or her version of the incident even if some relevant evidence is excluded, and that for a defendant to show a violation of his or her defense the excluded evidence must be of extremely high probative value?**

III. **Does the decision of the Court of Appeals finding that the violation of the defendant's right to present a defense was not harmless because the excluded evidence would have allowed the defendant "to argue that [the victim] was embellishing her story to secure her immigration**

status" conflict with this Court's decisions applying the constitutional harmless error standard since the victim did the opposite of embellishing her story—she declined to identify her attacker from the witness stand—and any invented embellishment would not have changed the nature the accusation, crime alleged to have been committed, or damaged the defendant's theory of the case? And does this decision and its bare-bones harmless error analysis involve an issue of substantial public interest that should be determined by this Court, since the decision is relevant to how our courts treat immigrant victims and their ability to receive justice if they put aside their fears to show up at trial to testify?

STATEMENT OF THE CASE

A. Factual Summary

In 2016, FT[4], a 42-year-old certified nursing assistant, worked for Olga Fisenko[5], the owner and operator of 5 Star Adult Family Home. RP 76-79; Ex. 108. The facility provided care for dementia patients. RP 79.

[4] FT is from Mexico but has lived in the United States since she was five. RP 77, 105.

[5] Fisenko is the sister of Vladimir Nikolenko, the defendant. RP 139-140.

FT began working for Fisenko in May of 2016 and Fisenko fired her in January of 2017. RP 137-38. Ex. 108. Fisenko described FT as "both [a] good and bad" employee. RP 137, 198-99, 204-206. In particular, Fisenko claimed that she "had concerns" about FT's job performance and believed that FT had lied to her "on many occasions." RP 147-48. FT, on the other hand, reported that up until the incident with Nikolenko (discussed below) that she did not have any issues with Fisenko and enjoyed working at 5 Star Adult Family Home. RP 83, 120.

Fisenko lived at 5 Star Adult Family home, as did her (and Nikolenko's) father. RP 79, 135-36, 141, 206. Fisenko also took care of him. RP 207-08. On November 25, 2016, one day after Thanksgiving, Fisenko's (and Nikolenko's) father passed away. RP 141. Nikolenko lived in Seattle at that time. RP 141, 207. He bussed down to Portland on November 29, 2016, and Fisenko picked him up and brought him back to her home. RP 141-42, 206-08. Fisenko, her husband, and Nikolenko were scheduled to fly out of Portland to Denver,

Colorado on November 30, 2016, at 10:20 AM for her father's funeral. RP 142-43, 208.

Thus, Nikolenko was at the 5 Star Adult Family Home when FT arrived there for work at 7:05 AM on November 30, 2016. RP 80-82, 108-09, 142-44, 208-09. In fact, upon her arrival, FT noticed Nikolenko standing in a second-floor window looking outside. RP 80-83, 86-87. When FT entered the home, she said "good morning" to Nikolenko, but he did not react. RP 82-83.

FT began working. RP 84. She prepared one patient's medication and took another patient to the shower. RP 84-85. When FT left that bathroom to grab a towel, she felt someone behind her. RP 85-86. FT turned around and saw the same guy (Nikolenko) who had been in the window. RP 85-87. FT asked Nikolenko if he needed anything. RP 87. Nikolenko responded by using his finger to tell FT to "shh." RP 87. In his other hand, Nikolenko held a large, kitchen knife. RP 87, 116.

Nikolenko then grabbed FT's arm and pulled her all the way into the hallway bathroom. RP 88-89, 115. Nikolenko held the knife in one hand near FT's face, while with the other hand he went under FT's scrubs to pull down her bra and grab her breast. RP 88-91, 116. Nikolenko also tried to put his hand down FT's pants, but the tie in the front prevented him. RP 117. At some point, Nikolenko put the knife down so he could use both of his hands to "rub[]" FT's breasts. RP 118-19.

A very scared FT asked Nikolenko questions like "What do you want? Can I help you; [and] Can I go?" but Nikolenko never said anything. RP 91. FT unsuccessfully tried to pull away from Nikolenko who then brought the knife very close to her face. RP 91-92. FT thought if she screamed that Nikolenko would stab her. RP 92.

FT heard Fisenko's footsteps coming downstairs and called out her name, "Olga." RP 92-93, 119. Nikolenko lowered the knife, and FT poked her head out of the bathroom as Fisenko arrived. Fisenko asked FT what had happened. RP 93,

119. FT did not explain what had just occurred, instead she said something like "this guy is here," gesturing at Nikolenko. RP 93. Fisenko said, "Vladimir, what are you doing here," grabbed Nikolenko's hand, and led him down to the first floor. RP 94, 119. The whole incident happened within 20 minutes of FT's arrival at work. RP 91-92.

About 30 minutes after being sexually assaulted by Nikolenko, FT saw him sitting on the couch by the laundry room. RP 101. Nikolenko had his pants down a little bit, exposing his private parts, and he was touching himself. RP 102-03. Nikolenko did not look at FT. RP 103. Once again, Fisenko attended to Nikolenko. RP 103.

FT did not call the police because she was afraid that nobody would believe her and that she would then be forced to go back to Mexico. RP 97-98. FT did not even initially tell her husband about the incident. RP 126, 130, 174, 183. Instead, FT kept working at the 5 Star Adult Family Home. RP 98. But because FT kept feeling "so anxious about what had happened"

and "scared [that] he was going to come back," she decided to "ask[] for help" and go see a counselor. RP 97-98. FT's husband had noticed changes in FT's behavior at home, especially when it came to the couple being intimate. RP 98, 130-31, 174.

Around January 18, 2017, FT told Fisenko about her plans to see a counselor and about what Nikolenko had done to her, which resulted in Fisenko[6] writing a letter to FT that essentially terminated her employment. RP 122-25, 220[7], 225; Ex. 108[8]. On January 25, 2017, FT attended her first session with her counselor. RP 170-71. FT's primary complaint was "symptoms associated with [a] reported assault that she'd

[6] Fisenko testified, consistent with portions of her letter, that her frustration with FT bubbled over when FT showed up for work while sick and with her sick child. RP 210-12, Ex. 108.

[7] Fisenko testified that "before she [(FT)] left, she said that my brother touched her or abused her. . . ."

[8] Among the topics discussed in this letter, Fisenko wrote, "[i]n your frustration you mentioned something about my brother and your family counselor." Ex. 108.

experienced" "at her place of work." RP 171-72. FT told her counselor about two incidents with "the brother of the owner of the care facility" at which she worked:

> The first was he came upon her suddenly, grabbed her arm, then touched her breast with one hand while holding a large knife in the other.

RP 172-73. FT named "Vladimir" as her attacker. RP 180-81. FT reported that in the aftermath of the assault that she felt nervous and hypervigilant, and that "she was having difficulty falling asleep and when she did sleep, she was having nightmares." RP 173-74.

FT's counselor encouraged FT to call the police and to also make a report to the Residential Care Services Complaint line. RP 174. FT called the police on January 27, 2017. RP 99, 153, 160. Following FT's visit, her counselor also made a report to the authorities. RP 174.

FT continued to see her counselor after that first visit. She also began seeing a psychiatrist, who prescribed her

medication. RP 178-79. FT met with her counselor on March 14, 2017, July 20, 2017, January 16, 2018, and one other time in 2018. RP 175, 179-182. At these follow-up appointments, FT usually indicated that she was doing better, but that she still suffered from persistent anxiety and nightmares related to the assault. RP 179-184.

Deputy Brett Anderson responded to FT's call to the police. RP 153. He spoke with FT in January of 2017. RP 153. He also spoke with her husband. RP 154. On February 2, 2017, Deputy Anderson met with Fisenko at 5 Star Adult Family home. RP 155. At that meeting, Deputy Anderson and Fisenko discussed only one time frame: the end of November 2016 when Nikolenko was present at her home. RP 156.

Fisenko told Deputy Anderson that there may have been an interaction between Nikolenko and FT in the living room. RP 156. Fisenko described Nikolenko as doing something with the waistband of his pants, and that she had said "Vladimir, what are you doing? Let's go downstairs." RP 157. According

to Deputy Anderson, Fisenko then explained that she escorted Nikolenko out of the living room and downstairs. RP 157.

Later, on March 7, 2017, Deputy Anderson met with Nikolenko at Fisenko's residence. RP 157. Nikolenko remembered seeing Fisenko's female employee and described FT. RP 162-63. He indicated that he did not speak with FT because he was instructed by Fisenko not to talk or interact with her. RP 162-64. Nikolenko denied that he ever touched FT, that an incident occurred in the bathroom, or that he had been walking around with a knife. RP 159, 161-62.

Nikolenko did not testify. *See* RP. Fisenko, on the other hand, retook the stand to testify for Nikolenko. She elaborated on the issues that she felt existed between her and FT, claimed that she never saw Nikolenko and FT together on November 30, 2016, and denied telling Deputy Anderson the statements attributed to her or explained that she was talking about a different day. RP 204-06, 210-14, 227-29.

Nikolenko's closing argument focused on the main points of his cross-examinations and case: (1) "that there wasn't enough time for these acts to take place" between Nikolenko's arrival at the home, FT's arrival at work, and Nikolenko's family's departure to the airport; and (2) that FT lacked credibility due her late disclosure and that she made the accusations on account of her unhappiness at work and for being fired by Fisenko. RP 268, 270, 272-73. The jury convicted Nikolenko as charged.

B. U Visa Evidence

Just prior to opening statements, the State noticed that Nikolenko had marked FT's U visa application materials as proposed exhibits. RP 69-70. The State moved to prohibit the admission of the evidence because Nikolenko had failed to follow the procedural requirements of ER 413. RP 69. That rule provides that "evidence of a . . . witness's immigration status shall not be admissible unless immigration status is an essential fact to prove an element of, or a defense to, the criminal offense

with which the defendant is charged, or to show bias or prejudice of a witness pursuant to ER 607." ER 413(a).

The State also contended that the evidence was not relevant because FT did not apply for the U visa until "some seven months after she reported [the sexual assault] to the police" and nine months after the assault itself. RP 71-72. The trial court agreed with the State and noted that Nikolenko had not "complied with what you need to do" under ER 413 to admit the evidence, but also remarked that "given the timing" the court did "not see[] how this would do anything but confuse the jury." RP 72.

On appeal, Nikolenko argued that this ruling violated his right to present a defense. Despite this claim, however, Nikolenko failed to make FT's U visa application and the associated documentation part of the direct appeal record. *See* CP. Apparently this material consisted of three separate exhibits

that had been marked as proposed exhibit numbers 104[9], 105[10], and 106[11]. Consequently, Nikolenko provided the Court of Appeals with very little insight into the substance of these documents and the manner in which the content within would have been admissible. Instead, on this record, we have only the fact of the documents and the parties' brief characterizations of them. RP 69-72, 108-112.

ARGUMENT WHY MOTION SHOULD BE GRANTED

Rule of Appellant Procedure 13.4(b) provides the considerations governing acceptance of review. Review may be granted:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

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[9] "Application for Advance Permission to Enter as a Nonimmigrant." CP 68.

[10] "Petition for U Nonimmigrant Status." CP 68

[11] "Supplement B, U Nonimmigrant Status Certification." CP 68.

> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The State asserts that review is appropriate under RAP 13.4(b)(1), (3), and (4).

I. The decision of the Court of Appeals that the trial court's ER 413 ruling, which excluded evidence of the victim's U visa application, violated the defendant's constitutional right to present a defense is a significant question of law under the Constitution, involves an issue of substantial public interest that should be determined by this Court, and conflicts with this Court's recent decisions explaining that a violation of the right to present a defense should not be found where the defendant remains able to offer evidence in support of his or her version of the incident even if some relevant evidence is excluded, and that for a defendant to show a violation of his or her defense the excluded evidence must be of extremely high probative value or the entirety of the defense.

A. The right to present a defense

Defendants have a constitutional right to present a defense. *State v. Darden*, 145 Wn.2d 612, 620-21, 41 P.3d 1189 (2002). One of the core components of this right is "the right to conduct a meaningful cross-examination. . . ." *Darden*, 145 Wn.2d at 620. But courts may also "impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, . . . or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed. 2d 674 (1986). Similarly, this Court has held that even relevant evidence may be excluded where it "is repetitive . . . , only marginally relevant or poses an undue risk of harassment, prejudice, [or] confusion of the issues." *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983); *Jennings*, 199 Wn.2d at 63.

Generally, reviewing courts "must weigh the defendant's right to produce [the] relevant evidence against the State's interest in limiting the prejudicial effects of that evidence to

determine if excluding the evidence violates the defendant's constitutional rights." *State v. Ritchie*, 24 Wn. App. 2d 618, 628-634, 520 P.3d 1105 (2022). In assessing the State's interest in limiting the prejudicial effect of the evidence, courts should look to the relevant law being applied and not just the evidence itself devoid of context. *Hudlow*, 99 Wn.2d at 16.

At the same time, it is not the case that the exclusion of any relevant evidence, regardless of the prejudicial effect of the same, always amounts to violation of a defendant's right to present a defense. *Arndt*, 194 Wn.2d at 812-14, *Jennings*, 199 Wn.2d at 66-67; *State v. Case*, 13 Wn. App. 2d 657, 669-670, 466 P.3d 799 (2020). This conclusion follows from this Court's identification that "[a]t its core, the constitutional right to present a defense ensures the defendant has an opportunity to defend against the State's accusations." *Jennings*, 199 Wn.2d at 66.

Thus, there is a distinction between probative evidence that "merely bolsters" or diminishes "credibility and evidence

that is necessary to present a defense." *Id.* at 66-67. The former can be excluded without violating a defendant's right to present a defense and the latter cannot. *Id.* In other words, even where some relevant evidence is excluded (properly or improperly), there is no violation of a defendant's right to present a defense when the "defendant had the opportunity to present his version of the incident." *Id.* at 66; *Arndt*, 194 Wn.2d at 812-14 (holding that defendant's "proffered evidence was not excluded entirely," that the defendant "was able to advance her defense theory," and that, therefore, the trial court's evidentiary rulings excluding defense evidence did not amount to a violation of the right to present a defense); *Case*, 13 Wn. App. 23 at 670 (recognizing that *State v.* "*Jones*[, 168 Wn.2d 713, 230 P.3d 576 (2010)] and *Arndt* make clear that it is not enough that the excluded evidence simply be relevant, . . . [t]o show a Sixth Amendment violation, the excluded evidence must be of extremely high probative value"); *Ritchie*, 24 Wn. App. 2d at 638 (noting that the "evidence excluded was not highly

probative evidence, the exclusion of which *could* give rise to a constitutional violation) (emphasis added).

Here, trial court's ruling did not violate Nikolenko's constitutional right to present his defense because the evidence of FT's U visa application did not have a "high probative value," was not "necessary to present a defense," nor did the prohibition of the admission of the evidence prevent Nikolenko from presenting his "version[] of the incident." *Jennings*, 199 Wn.2d at 66-67; *Arndt*, 194 Wn.2d at 812-14. The U visa evidence did not have a high probative value because there is no record evidence that FT was motivated to alter her immigration status or was aware of the availability of U visas for victims of crimes prior to reporting Nikolenko's sexual assault to the police, to her counselor, or to Fisenko. FT applied for a U visa 7 months after disclosing the incident, and therefore, every disclosure that FT made in which she described Nikolenko's sexual assault occurred before applying for the U visa. Instead, FT feared and delayed reporting herself as a

victim to the police for two months because she thought that reporting a crime could have negative immigration consequences. RP 97-98, 126.

In concluding that FT's application for a U visa "was clearly relevant impeachment evidence," the Court of Appeals failed to consider the timing of FT's U visa application and the fact that every disclosure that FT made in which she described Nikolenko's sexual assault occurred before applying for the U visa. *Nikolenko*, 2025 WL 1563545 at *6. Accordingly, the Court of Appeals exaggerated the relevance of the U visa evidence when it stated that "the U visa program *could have* incentivized FT to *embellish* her testimony, and evidence about the program would have allowed Nikolenko to address the differences between FT's trial testimony and statements she made before she applied for the U visa" *Id.* (emphasis added).

But FT did the opposite of embellish her testimony; she declined to point out Nikolenko as her attacker in court and was criticized by Nikolenko for frequently answering questions

with, “I don’t remember.” RP 99-100, 271-72. Nikolenko had every opportunity impeach FT’s trial testimony with the statements she made about the sexual assault before she applied for the U visa (all save for a defense interview) or argue that her trial testimony amounted to an embellishment, but he never once attempted to impeach her trial testimony with statements she made about the sexual assault to the police or to her counselor. RP 106-126. In fact, the only impeachment that occurred concerning the details of the sexual assault involved FT testifying that Nikolenko grabbed her breast with one hand while he held the knife in his other. RP 87-92. Nikolenko’s counsel reminded FT that in a defense interview prior to trial that she said at some point Nikolenko put the knife down and “use[d] both hands to touch your breasts.” RP 117-19. Even assuming this constituted impeachment, the difference between Nikolenko’s actions “was not plausibly a matter of embellishment” since they amount to the same crime. *State v. Romero-Ochoa*, 193 Wn.2d 341, 362-63, 440 P.3d 994 (2019).

The decision of the Court of Appeals also completely failed to address whether the U visa evidence was necessary to present Nikolenko's defense. *Nikolenko*, 2025 WL 1563545 at *6. Nikolenko advanced two primary defenses that were not at all dependent on the U visa evidence. Those main defenses, which were not backup plans[12], were that FT fabricated the sexual assault to take revenge on Fisenko for the issues at work and her (FT's) eventual firing, and that there simply was not enough time between FT's arrival at work and Nikolenko's departure to the airport for the crime to have happened as FT reported. *See, e.g.*, RP 268, 271-73; Br. of App. at 2-3, 5. The U visa evidence was not relevant to, and would not have strengthened, either of these defenses.

While Nikolenko chose not to testify, his sister testified at length to advance his version of the events where nothing happened, or could have happened, between him and FT, and

[12] *See* Nikolenko's CrR 7.8 motion-turned personal restraint petition.

where FT was a bad employee who lacked credibility. RP 198-200, 204-06, 208-211, 220-21; Ex. 108. Additionally, Nikolenko challenged the credibility of FT in multiple ways, such that the U visa evidence was not the only evidence by which Nikolenko could argue that FT was not credible. RP 267-271.

Consequently, The Court of Appeals's failure to look at the U visa evidence in the context of Nikolenko's actual defenses and the other evidence in the case, puts the decision in direct conflict with *Jennings* and *Arndt*. 199 Wn.2d at 66-67; 194 Wn.2d at 812-14. The trial court's ruling did not violate Nikolenko's right to present a defense since he had "an opportunity to defend against the State's accusations" by "present[ing] his version of the incident even if some evidence was excluded." *Jennings*, 199 Wn.2d at 66; *Arndt*, 194 Wn.2d at 812-14. The U visa evidence exemplifies the difference this Court noted in *Jennings* between "minimally relevant" evidence that goes towards "credibility," the exclusion of which does not

result in a violation of a defendant's right to present a defense, and "evidence that is necessary to present a defense." 199 Wn.2d at 66-67. The U visa evidence is the former. Simply put, the U visa evidence did not constitute "essential facts of high probative value whose exclusion effectively barred [Nikolenko] from presenting his defense." *Jones*, 168 Wn.2d at 721.

B. Evidence Rule 413, immigration evidence, and the right to present a defense.

Without considering the purposes of ER 413 and the inflammatory nature of immigration evidence, the Court of Appeals concluded that because the State elicited testimony that FT did not call the police because she feared deportation[13] that there did not exist "a compelling interest in excluding the [U visa] evidence" *Nikolenko*, 2025 WL 1563545 at *6. This simplistic reasoning is contrary to this Court's method,

[13] Nikolenko continuously argued that FT's two-month delay in reporting the crime to the police constituted evidence that she lacked credibility. RP 270-71, 273 ("Why did she wait for two months, two months to report his? Because she did get fired from her work.").

described in *Hudlow*, for assessing the State's interest in limiting the prejudicial effect of evidence. 99 Wn.2d at 16. Moreover, when combined with the Court of Appeals's determination that the exclusion of the U visa evidence amounted to a violation of the right to present a defense, this reasoning essentially turns ER 413 into a dead letter for immigrant victims of crimes who may *need* a U visa and appropriately fear the deportation consequences of reporting crimes and showing up to court to testify against their attackers.

In *Hudlow*, this Court explained how to assess the State's interest in limiting the prejudice effect of evidence:

> If the evidence is of minimal relevancy, the evidence may be excluded *if the state's interest in applying the rape shield law is compelling in nature*. Here, the state's interest in applying the rape shield statute is to bar evidence that may distract and inflame jurors if it is of arguable probative worth. To the degree exclusion of prior sexual history evidence aids in achieving just trials and preventing acquittals based on prejudice against the victims' past sex lives, it tends to further the truth-determining function of criminal trials. *Further, the statute is designed to encourage rape victims to step forward and prosecute these crimes where*

> *conviction rates historically have been very low*. The above state interests appear to us to be compelling enough to permit the trial court to exclude minimally relevant prior sexual history evidence if the introduction of such evidence would prejudice the truth-finding function of the trial.

99 Wn.2d at 16 (emphasis added). Thus, the focus of the Court of Appeals on whether State's introduction of FT's deportation fears "undermin[ed] its argument that such evidence could distract the jury" misses the point. *Nikolenko*, 2025 WL 1563545 at *6. Like with the rape shield law, the State's interest in applying ER 413 "is compelling in nature" because the State has an interesting in "bar[ring] evidence that may distract and inflame jurors if it is of arguable probative worth." *Hudlow*, 99 Wn.2d at 16. Similarly, ER 413 is designed, in part, to encourage immigrant victims "to step forward and prosecute these crimes" without fear that the trial will be focused on, or the jury biased against them because of, their immigration status. *Hudlow*, 99 Wn.2d at 16; *see* GR 9 Cover Sheet for Proposal to Adopt New Rule of Evidence 413, *Concerning*

Evidence of Immigration Status, Columbia Legal Services, Northwest Immigrant Rights Project, Legal Voice, and the Washington Association of Prosecuting Attorneys[14]. This interest remains even if some immigration evidence is necessarily admitted at trial.

This Court has long recognized 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." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 672, 230 P.3d 583 (2010). In particular, this Court has concluded that "the risk of prejudice inherent in admitting immigration status [evidence] to be great." *Id.* at 673. But not all immigration evidence is equally problematic, "our nation's history—remote and recent—is rife with examples of discrimination against Latinxs based on ethnicity." *State v.*

[14]https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplayArchive&ruleId=605 (last accessed, July 1, 2025)

Zamora, 199 Wn.2d 698, 719-21, 512 P.3d 512 (2022). As Justice González emphasized, "bias, intentional and unintentional, persists among some residents of Washington against people they perceive as immigrants from countries south of the United States." *Id.* at 723 (González, C.J., concurring).

For these reasons and others, ER 413 was proposed. The drafters of the rule explained, "Immigration status evidence is of special concern in the context of criminal cases involving domestic violence [and] sexual assault" since for "many victims, the fear of being reported to immigration and fear of deportation are the most intimidating factor that kept battered immigrants from seeking the services they needed." *Concerning Evidence of Immigration Status* (citations omitted). The result of this fear is that victims are "deterred from seeking criminal legal assistance." *Id.* This Court adopted ER 413 pursuant to its GR 9 rulemaking authority.

Evidence Rule 413(a), captioned "Criminal Cases; Evidence Generally Inadmissible," provides that

> In any criminal matter, evidence of . . . a witness's immigration status shall not be admissible unless immigration status is an essential fact to prove . . . a defense to, the criminal offense with which the defendant is charged, or to show bias or prejudice of a witness pursuant to ER 607.

The rule also contains a procedure that "shall apply." *Id.* Following the review of the requisite submissions and a hearing, the "court may admit evidence of immigration status to show bias or prejudice if it finds that the evidence is reliable and relevant, and that its probative value outweighs the prejudicial nature of evidence of immigration status." ER 413(a)(4). And, understandably, the rule shall not be "construed to exclude evidence if the exclusion of that evidence would violate a defendant's constitutional rights." ER 413(a)(5).

The Court of Appeals's decision waves away the State's concerns about prejudice and Nikolenko's failure

to comply with ER 413's procedural component, does not conduct a *Hudlow* analysis of the purposes of ER 413 or the prejudice inherent in immigration evidence, and gives no weight to the trial court's concerns that, due to the timing of FT's application for the U visa, that the evidence would "confuse the jury." *Nikolenko*, 2025 WL 1563545 at *6; RP 72. The decision's direct response that "the U visa program could have incentivized FT to embellish her testimony, and evidence about the program would have allowed Nikolenko to address the differences between FT's trial testimony and statements she made before she applied for the U visa," describes a trial different from the one that actually took place. *Id.*

If in the context of immigration evidence and U visas, (1) defendants do not need to follow any portion of ER 413's procedural rule or perfect the appellate record on the issue; (2) a trial court's assessment of the probative value of the evidence under the rule is given no

weight; and (3) the exclusion of evidence of such a limited probative as the U visa evidence in this case is considered to constitute a violation of the defendant's right to present a defense; then attempting to follow the rule presents only risk to prosecutors, trial courts, and immigrant victims. The better course would be to concede to the admissibility of U visa evidence in each and every case. Despite her immigration status, FT waited six years before she testified at trial and received justice. Decisions like the Court of Appeals's imperils other victims from making the same decision if their immigration status is either going to be front and center at trial or require them to face the near certain prospect that their attacker's conviction will be reversed on appeal years later.

The decision of the Court of Appeals finding that exclusion of the U visa evidence constituted a violation of Nikolenko's defense conflicts with this Court's

decisions *Arndt*, *supra*, and *Jennings*, *supra*, by failing to apply the proper legal analysis. RAP 13.4(b)(1). The reasoning in the decision of Court of Appeals that State did not demonstrate a compelling interest in excluding the U visa evidence conflicts with *Hudlow*, *supra*. RAP 13.4(b)(1). And issues related to a defendant's right to present a defense, immigration evidence, and immigrant victims' ability to participate in the justice system are significant question of laws under the Constitution and involve issues of substantial public interest that should be determined by this Court. RAP 13.4(b)(3)-(4). This Court should accept review.

II. The decision of the Court of Appeals finding that the violation of the defendant's right to present a defense was not harmless because the excluded evidence would have allowed the defendant "to argue that [the victim] was embellishing her story to secure her immigration status" despite the fact that not only did the victim do the opposite of embellishing her story—she declined to identify her attacker from the witness stand—any invented embellishment would not have changed the nature the accusation, crime alleged

to have been committed, or damaged the defendant's theory of the case, conflicts with this Court's decisions applying the constitutional harmless error standard.

A violation of the right to present a defense constitutes constitutional error, in which the "State bears the burden of showing the error was harmless beyond a reasonable doubt." *Jones*, 168 Wn.2d at 724-25. "Where impeachment evidence has been erroneously excluded, the correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, we can nonetheless say that the error was harmless beyond a reasonable doubt." *State v. Orn*, 197 Wn.2d 343, 482 P.3d 913 (2021) (alterations, citations, and internal quotation omitted). Other relevant considerations when determining harmlessness "include the properly admitted direct and circumstantial evidence (i.e., the strength of the State's case and the plausibility of the defense theory) and the overall significance of the erroneously admitted or excluded evidence in this context (e.g., whether it was cumulative or corroborated, or consistent with the defense theory)." *Romero-Ochoa*, 193

Wn.2d at 348 (citations omitted). In short, "[h]armless error review requires close scrutiny of all the evidence." *Id.* at 349.

Here, in response to the State's harmlessness argument the Court of Appeals stated:

> evidence that FT applied for a U visa would have been at least minimally probative of FT's bias and allowed Nikolenko to argue that she embellished the incident rather than outright fabricated it. And as discussed above, the psychologist did not completely corroborate FT's version of events, so the U visa evidence would have allowed Nikolenko to argue that FT was embellishing her story to secure her immigration status.

Nikolenko, 2025 WL 1563545 at *7.

The Court of Appeals's focus on "embellishment" has no support in the record. As previously detailed, FT did the opposite of embellish her testimony; she declined to point out Nikolenko as her attacker in court and was criticized by Nikolenko for frequently answering questions with, "I don't remember." RP 99-100, 271-72. Nikolenko had every opportunity impeach FT's trial testimony with the statements she made about the sexual assault before she applied for the U

visa (all save for a defense interview) or argue that her trial testimony amounted to an embellishment, but he never once attempted to impeach her trial testimony with statements she made about the sexual assault to the police or to her counselor or accused her of embellishment. RP 106-126.

Furthermore, FT's counselor corroborated FT's version of events in three ways. The first is that she was the one who convinced FT to make a report to the police. RP 125-26, 174. Second, she testified that FT told her that Nikolenko "came upon her suddenly, grabbed her arm, then touched her breast with one hand while holding a large knife in the other." RP 172-73. This truncated version is the gravamen of FT's allegation[15]. The third way was by testifying to the length of time that FT continued to see her (into 2018) and the reasons

[15] That FT's counselor did not provide an extremely detailed recitation of the events at trial is hardly surprising since he probably did not need to know every detail in order to properly treat FT, and she was testifying around 5 years since she last treated FT.

she continued to see her (persistent anxiety and nightmares related to the assault), and that for those reasons FT also began seeing a psychiatrist who her prescribed her medications. RP 171-184.

But FT's counselor was not the only corroborating witness. FT's husband noticed changes in FT's mood and behavior at home that coincided with when the assault occurred and another corresponding change when she finally disclosed what had happened. RP 98, 130-31, 174. And even Fisenko testified, consistent with what she wrote in her letter terminating FT's employment, that FT had told her that Nikolenko "touched her or abused her." RP 220, Ex. 108. Combined, this is weighty circumstantial evidence, and evidence that the Court of Appeals did not address when assessing harmlessness.

The Court of Appeals also remarked that "FT's testimony that she feared deportation went unchallenged, and the State relied on this testimony in closing argument, even though that

fear would have been a basis for FT to seek the U visa and cooperate with the investigation." *Nikolenko*, 2025 WL 1563545 at *7. This claim is puzzling. FT did not disclose what had happened for two months because she feared deportation. RP 97-98, 126. The U visa evidence (she applied for U visa seven months after disclosing and nine months after the incident) would not have challenged this claim. She did not testify at trial that she still feared deportation. *See* RP. And, of course, this did not stop Nikolenko from questioning FT's credibility based on the delayed reporting. RP 270-71, 273. In any event, the State did not use the fear of deportation to enhance her credibility, but to explain her delay in reporting and to rebut Nikolenko's argument that the delay occurred because she fabricated the assault.

Given all of the evidence presented, and the minimal probative value of the U visa evidence, this Court "can nonetheless say that the error was harmless beyond a reasonable doubt." *Orn*, 197 Wn.2d at 359. Because the decision of the

Court of Appeals and its application of the constitutional harmless error standard conflicts with this Court's decisions applying the constitutional harmless error standard and is a significant question of Constitutional law, this Court should accept review. RAP 13.4(b)(1), (3). This Court should also accept review because the Court of Appeals' bare-bones harmless error analysis reversing Nikolenko's conviction is relevant to how our courts treat immigrant victims and their ability to receive justice if they put aside their fears and show up to testify, which is an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4)

CONCLUSION

The State respectfully asks this Court to accept review of the decision of the Court of Appeals.

This document contains 6,742 words based on the word count calculation of the word processing software used to prepare this motion, excluding the parts of the document exempted from the word count by RAP 18.17(b). Additionally, I certify that all text appears in 14 point serif font equivalent to Times New Roman. RAP 18.17(a)(2).

DATED this 3rd day of July, 2025.

Respectfully submitted:
ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____
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CLARK COUNTY PROSECUTING ATTORNEY

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Division Two

June 3, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. VLADIMIR VASILYEVICH NIKOLENKO, Appellant.	No. 57541-8-II Consolidated with: No. 58865-0-II
In the Matter of the Personal Restraint of: VLADIMIR VASILYEVICH NIKOLENKO, Petitioner.	UNPUBLISHED OPINION

LEE, J. — Vladimir V. Nikolenko appeals his conviction for one count of indecent liberties with forcible compulsion with a deadly weapon sentencing enhancement. He also filed a timely personal restraint petition (PRP) seeking relief from restraint resulting from his conviction. We consolidated Nikolenko's PRP with his direct appeal.

Nikolenko argues that the trial court abused its discretion and violated his right to present a defense by excluding evidence about the victim's immigration status. We hold that the trial court violated Nikolenko's right to present a defense by excluding evidence about the victim's

immigration status and that this error was not harmless. Accordingly, we reverse and remand for a new trial.[1]

FACTS

A. BACKGROUND

FT immigrated to the United States from Mexico when she was five years old. She was a nurse and began working in May 2016 as a caregiver at an adult care facility run by Nikolenko's sister, Olga Fisenko. The facility was inside Fisenko's home—Fisenko, her husband, and children lived in the basement and second floors of the house, while the facility residents lived on the main ground floor.

Fisenko and Nikolenko's father died November 25, 2016, the day after Thanksgiving. The funeral was to be held in Colorado. On November 29, Nikolenko spent the night at Fisenko's house, and the siblings boarded a plane to Colorado in the late morning on November 30.

FT started work at about 7 a.m. on November 30. That morning, Nikolenko walked up behind FT carrying a kitchen knife when FT was in the hallway collecting towels for a patient in the shower. Nikolenko grabbed FT, pulled her into a bathroom, and began to grope her while holding the knife to her face. FT called out for Fisenko, and Fisenko appeared and took Nikolenko downstairs. FT's patient in the shower called for her, so she resumed working.

[1] Nikolenko also argues that (1) the trial court abused its discretion by not admitting the victim's time sheets, and (2) he received ineffective assistance of counsel because trial counsel (a) failed to investigate his alibi or present testimony of corroborating witnesses, (b) failed to impeach the victim on cross-examination, and (c) refused to let him testify in his own defense. Because we reverse on other grounds, we do not address these arguments.

Although FT feared that she would be deported if she called the police, she told Fisenko that she was going to report the incident. Fisenko told FT to not say anything about the incident, telling her that Nikolenko would not come back and that Fisenko needed FT to keep working. Fisenko assured FT that she would report the incident and that FT did not need to do anything.

FT suffered from anxiety and nightmares after the incident. In January 2017, FT told Fisenko that she would be seeing a psychologist about the incident, and Fisenko fired her. FT then told the psychologist about the incident. The psychologist encouraged FT to call the police, which FT did.

In approximately August 2017, FT applied for a U visa, which gives temporary immigration status to victims of certain crimes who help investigate or prosecute those crimes. It is not clear from our record whether the U visa application was granted.[2]

In April 2018, the State charged Nikolenko with one count of indecent liberties with forcible compulsion and alleged that he was armed with a deadly weapon during the offense. Nikolenko's jury trial began in August 2022.[3]

[2] There is no U visa or U visa application in the appellate record.

Nikolenko's counsel listed exhibits related to that evidence in the designation of clerk's papers, but the superior court clerk's office reported that the exhibits were returned to counsel at the conclusion of the trial because they were not admitted as evidence. These exhibits are not in the clerk's possession.

[3] The trial court ordered multiple competency evaluations and competency restorations, starting in March 2019. Nikolenko's competency to stand trial was not restored until April 2021; thus, there was a lengthy delay in the proceedings.

B. TRIAL PROCEEDINGS

Nikolenko filed proposed exhibits seeking to admit evidence that FT applied for a U visa. The State objected, relying on ER 413, which allows a trial court to admit evidence of immigration status only if the offering party has made an offer of proof in a written motion supported by affidavits *and* the trial court finds that the evidence is reliable, relevant, and has probative value outweighing its prejudicial effect. ER 413(a)(1)-(4). The State emphasized that Nikolenko had not followed ER 413's procedure. The State also argued that FT applied for a U visa seven months after reporting the incident to law enforcement, so the evidence had limited probative value to show FT's motive of inventing a crime in order to secure her immigration status. The trial court excluded the U visa evidence because Nikolenko had failed to comply with ER 413's procedural requirements and because "given the timing" of the application, the court did not see how the evidence "would do anything but confuse the jury." Verbatim Rep. of Proc. (VRP) at 72.

At trial, FT testified consistent with the facts described above. At one point, FT testified that Nikolenko touched her breast with one hand. Defense counsel then refreshed her recollection with a transcript from a defense interview, and FT then testified that Nikolenko put the knife down and touched her with both hands. FT also testified that about 30 minutes after the incident which formed the basis for the charge, she saw Nikolenko again, this time sitting in the living room on the patients' floor with his pants down, touching his penis. She stated that she again found Fisenko and told her what Nikolenko was doing. FT further testified that Fisenko was happy with the quality of her work until FT mentioned in January 2017 about going to a counselor about the charged incident. And although FT believed that she would recognize Nikolenko if she saw him again, she testified that she did not see her assailant in the courtroom.

FT's psychologist testified that FT presented as hypervigilant, anxious, suffering from nightmares, and struggling with intimacy because she had not told her husband about the incident. FT told the psychologist that Nikolenko "came upon her suddenly, grabbed her arm, then touched her breast with one hand while holding a large knife in the other." VRP at 173. The psychologist also testified that FT told her she saw Nikolenko in the living room "several hours" after the charged incident. VRP at 173. FT told the psychologist that the charged incident occurred "prior to Thanksgiving 2016." VRP at 172.

FT's husband testified that in the fall of 2016, FT struggled with intimacy for the first time in their 20-year relationship, but this resolved after she went to counseling and then told her husband about the incident.

Nikolenko did not testify at trial. Nikolenko called Fisenko to testify. Fisenko testified that she never saw FT near Nikolenko at all before the siblings left to catch their plane. Fisenko also testified that the living room encounter involving Nikolenko occurred earlier in November 2016, when Nikolenko visited her for his birthday; Fisenko denied that Nikolenko did anything inappropriate during that visit. But an officer who had interviewed Fisenko in February 2017 testified that during the interview, Fisenko stated that FT and Nikolenko had an encounter in late November 2016 where Nikolenko was "doing something with the waistband of his pants" in the living room. VRP at 156.

Fisenko further testified that FT was a difficult employee who regularly threatened to report Fisenko to state authorities if Fisenko fired her. Fisenko claimed that she fired FT because FT came to work sick, and FT had intended to stop working for Fisenko at the end of January 2017 anyway.

In closing argument, the State argued that FT "was scared to tell authorities" about the incident "because she was afraid that they wouldn't believe her and/or she would be sent back to Mexico." VRP at 261. The State also argued that FT was not fabricating her story because, despite understanding that Nikolenko was on trial, she did not identify him as her assailant in the courtroom.

Nikolenko's closing argument emphasized inconsistencies between FT's trial testimony, what she reported to the psychologist, and what she said in her defense interview, such as conflicting dates, times, and details about the incident. Nikolenko argued that FT fabricated the incident in retaliation for Fisenko firing her. He emphasized the inconsistencies in FT's story that made it difficult to understand when and where in the house the charged incident occurred. He also highlighted testimony from Fisenko where she asserted that the siblings left Fisenko's house around 7 a.m., just as FT would have been starting work, meaning that there wouldn't have been enough time for Nikolenko to assault FT.

The jury convicted Nikolenko of indecent liberties with forcible compulsion and entered a special verdict finding that he was armed with a deadly weapon at the time of the crime. The trial court imposed an indeterminate sentence at the middle of the standard sentencing range of 84 months to life.

Nikolenko appeals his conviction, arguing that the trial court should have admitted the evidence regarding FT's U visa application.

C. CrR 7.8 Motion/PRP

After appealing, Nikolenko filed a CrR 7.8 motion in the trial court. He argued that the trial court should vacate his conviction because he received ineffective assistance of trial counsel

when counsel failed to investigate and present alibi evidence, evidence of FT's bias, and testimony from corroborating witnesses. Nikolenko also argued that he wanted to testify at trial but trial counsel refused to call him as a witness.

The trial court ruled that Nikolenko failed to make a substantial showing that he was entitled to relief and transferred the CrR 7.8 motion to this court as a PRP. This court then consolidated Nikolenko's PRP with his direct appeal.

ANALYSIS

Nikolenko argues that the trial court abused its discretion by excluding evidence that FT applied for a U visa. He asserts that the U visa evidence was probative of FT's bias and that excluding it violated his right to present a defense. Nikolenko suggests that he "could have cross examined [FT] about her increasing boldness in asserting her allegations after applying for the U-visa" or "about why she even felt it was necessary to apply for U-visa status." Reply Br. of Appellant at 2.

The State responds that the trial court properly excluded the evidence because Nikolenko failed to comply with the procedural components of ER 413. The State also argues that the U visa evidence was not sufficiently probative to any defense to outweigh its prejudicial effect. The State asserts that Nikolenko argued below both fabrication and alibi defenses without needing to mention the U visa. And the State contends that any error in excluding the evidence was harmless beyond a reasonable doubt. We hold that the trial court violated Nikolenko's right to present a defense and that this error was not harmless, requiring a new trial.

A. LEGAL PRINCIPLES

We review a trial court's evidentiary rulings for abuse of discretion. *State v. Restvedt*, 26 Wn. App. 2d 102, 122, 527 P.3d 171 (2023). "A trial 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). But "[i]f the court excluded relevant defense evidence, we determine as a matter of law whether the exclusion violated the constitutional right to present a defense." *State v. Clark*, 187 Wn.2d 641, 648-49, 389 P.3d 462 (2017)

To determine if a defendant's right to present a defense was violated by a limitation on cross-examination, we first review for abuse of discretion "whether the excluded evidence was at least minimally relevant." *State v. Orn*, 197 Wn.2d 343, 353, 482 P.3d 913 (2021). If yes, we consider whether there was a compelling interest to exclude the evidence, which occurs when "the evidence was so 'prejudicial as to disrupt the fairness of the factfinding process' at trial." *Id.* (quoting *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)); *State v. Bravo*, __ Wn. App. 2d ___, 563 P.3d 1068, 1076 (2025). We then review "whether the State's interest in excluding the prejudicial evidence outweighs the defendant's need to present it." *Orn*, 197 Wn.2d at 353.

"[T]he right to present evidence of a witness's bias is essential to the fundamental constitutional right of a criminal defendant to present a complete defense, which encompasses the right to confront and cross-examine adverse witnesses." *Id.* at 352. "Evidence of bias is particularly probative of a witness's credibility when it stems from a witness's motive to cooperate with the State based on the possibility of leniency or the desire to avoid prosecution." *Id.* at 354. If impeachment evidence has been improperly excluded, the error may be "harmless if, in light of the entire trial record, we are convinced that the jury would have reached the same verdict absent

the error." *State v. Romero-Ochoa*, 193 Wn.2d 341, 348, 440 P.3d 994 (2019), *cert. denied*, 141 S. Ct. 398 (2020). It is the State's burden to show that the error was harmless beyond a reasonable doubt. *Id*.

ER 413(a) provides that in criminal cases "evidence of a party's or a witness's immigration status shall not be admissible unless immigration status is an essential fact to prove an element of, or a defense to, the criminal offense with which the defendant is charged, or to show bias or prejudice of a witness." The rule contains a mandatory procedure that "shall apply prior to any such proposed uses of immigration status evidence to show bias or prejudice of a witness." ER 413(a). The offering party must first make "an offer of proof of the relevancy of the proposed evidence" in a written pretrial motion, accompanied by affidavits. ER 413(a)(1)-(2). If the trial court "finds that the offer of proof is sufficient," the court may then hold a hearing. ER 413(a)(3). At the hearing, the trial court "may admit evidence of immigration status to show bias or prejudice if it finds that the evidence is reliable and relevant, and that its probative value outweighs the prejudicial nature of evidence of immigration status." ER 413(a)(4). However, "[n]othing in this section shall be construed to exclude evidence if the exclusion of that evidence would violate a defendant's constitutional rights." ER 413(a)(5).

B. CASES DISCUSSING IMMIGRATION EVIDENCE AND THE RIGHT TO PRESENT A DEFENSE

In a case that went to trial before ER 413 took effect, the Washington Supreme Court held that a trial court ruling excluding evidence that a rape victim twice applied for a U visa was harmless error. *Romero-Ochoa*, 193 Wn.2d at 344. In that case, "an overwhelming amount of evidence"—including physical evidence of injuries and witnesses who heard cries for help—supported the rape victim's account, while the defendant's theory of the case would have required

the jury to believe "that the victim hatched an elaborate immigration fraud scheme" in the hour between when she met the defendant and when she called the police. *Id.* at 361-62.

Also, Division One of this court has held that strict compliance with ER 413's procedure was not required when the rule took effect three days before a defendant's trial began, neither party mentioned the rule, and strict compliance would have required motions practice to occur before the rule was in effect. *State v. Bedada*, 13 Wn. App. 2d 185, 194-97, 463 P.3d 125 (2020). And "it has long been the law in our state that rules that impose procedural requirements cannot be wielded as a sword by the State to defeat the constitutional rights of an accused in a criminal trial." *State v. Chicas Carballo*, 17 Wn. App. 2d 337, 349, 486 P.3d 142, *review denied*, 198 Wn.2d 1030 (2021).

In *Chicas Carballo*, tried shortly after ER 413 took effect, a trial court prohibited a defendant from cross-examining the State's key witness about her immigration status in part due to Chicas Carballo's failure to comply with ER 413's procedural requirements. *Id*. at 347-48. The witness in that case had changed her story during an interview with law enforcement after being threatened with deportation. *Id*. at 350. In her trial testimony, the witness "conceded to lying and even went so far as admitting during cross-examination that she was fearful she might be arrested and that she was pregnant and did not 'want something bad for [her] son.'" *Id*. at 351 (alteration in original) (quoting record).

On appeal, the court held that evidence about the witness' immigration status was highly relevant because "[h]ad she been confronted with the deportation threat and its applicability to her because of her immigration status, a jury could reasonably find that her fear of arrest and for her son's welfare was related to the threat of deportation by police." *Id*. Further, "any fear of

generalized anti-immigrant prejudice by the jury would cut against those parties equally, but most particularly against the defendants," who were immigrants, members of an El Salvador gang, and required interpreters at trial. *Id.* at 352. And without the witness' testimony, the only evidence linking Chicas Carballo to the charged murder was phone records and money transfers to a codefendant. *Id.* at 355. As a result, the court held that the trial court's ruling violated Chicas Carballo's right to present a defense, and that the error was not harmless. *Id.*

Recently, Division One again remanded a case for a new trial on a similar basis. *Bravo*, 563 P.3d at 1071. Bravo was charged with second degree rape of a child; both the victim and her sister were undocumented immigrants. *Id.* at 1071-72. The trial court limited cross-examination of both the victim and her sister about the family's application for U visas. *Id.* at 1072-73. On appeal, Division One held that the evidence was relevant because "the structure of the U visa program can encourage some victims to be as helpful as possible to the prosecution in order to obtain citizenship," which "could have motivated either [witness] to embellish their stories and allegations." *Id.* at 1076. And the State's argument that the evidence was prejudicial focused "on the need to bring in a witness to explain the U visa process, and on the potential need to either dismiss a sitting juror with immigration experience or declare a mistrial," which, while inconvenient, "did not meet [the State's] burden of demonstrating a compelling interest in excluding prejudicial or inflammatory evidence." *Id.* Accordingly, "[t]he fact that there could have been a mistrial or a 'mini-trial' over immigration does not outweigh Bravo's constitutional right to meaningfully cross-examine the key witness against him." *Id.* at 1077. And because there was no physical evidence; limited corroborating evidence of the victim's testimony, none of which was contemporaneous to the rape; and the State's closing argument asserted that the victim and

her sister had no motive to lie; the victim's "credibility was critical." *Id.* at 1078. Thus, the error was not harmless, requiring remand for a new trial. *Id*.

C. ANALYSIS

ER 413 took effect in 2018. Nikolenko's trial took place in 2022. The record shows that both the State and the trial court were aware of ER 413 at the time of trial. And it is undisputed that Nikolenko did not comply with ER 413's procedure when seeking to admit evidence about FT's U visa application. But ER 413's procedural requirements cannot mandate an exclusion of evidence when doing so violates the defendant's Sixth Amendment right to present a defense. ER 413(a)(5); *Chicas Carballo*, 17 Wn. App. 2d at 349.

As discussed above, to determine whether a defendant's right to present a defense was violated by a limitation on cross-examination, we first determine if FT's immigration status was "at least minimally relevant." *Orn*, 197 Wn.2d at 353. FT testified that she did not immediately call the police because she feared that she would be deported if she did so, and the State relied on this testimony to argue that FT was credible during closing arguments. In light of this testimony and argument, the fact that FT had applied for a U visa which would protect her from deportation as long as she cooperated with Nikolenko's prosecution was clearly relevant impeachment evidence. *Id*.

Next, the State argues that FT's immigration status could have distracted or confused the jury. But the State itself elicited testimony that FT did not call the police because she feared deportation, undermining its argument that such evidence could distract the jury. Thus, the fact that additional testimony may have been required to explain the U visa program to the jury does

not rise to the level of demonstrating a compelling interest in excluding the evidence. *See Bravo*, 563 P.3d at 1076.

Further, the relevance of the evidence outweighs any prejudice. The State argues that the probative value of the evidence did not outweigh its prejudicial effect because Nikolenko still challenged inconsistencies between FT's testimony and prior statements, and there was no evidence in the record that FT "was motivated to alter her immigration status or was aware of the availability of U visas for victims of crimes prior to reporting Nikolenko's sexual assault to the police." Br. of Resp't at 25. But the U visa program could have incentivized FT to embellish her testimony, and evidence about the program would have allowed Nikolenko to address the differences between FT's trial testimony and statements she made before she applied for the U visa.

Additionally, "'[a] defendant enjoys more latitude to expose the bias of a key witness.'" *Bedada*, 13 Wn. App. 2d at 205 (quoting *State v. Fisher*, 165 Wn.2d 727, 752, 202 P.3d 937 (2009)). FT was the centerpiece of the State's case. Although FT's psychologist partially corroborated her testimony by repeating what FT reported several months after the incident, there was no contemporaneous corroborating evidence nor was there any physical evidence of the incident. And FT's report to the psychologist lacked details FT included in her testimony, such as being dragged into a bathroom, or contained conflicting information, such as stating that the incident occurred before Thanksgiving even though Nikolenko's father did not die until the day after Thanksgiving. Because the case centered on FT's credibility, any risk of confusion the U visa evidence would have posed did not outweigh Nikolenko's constitutional right to meaningfully cross-examine the State's key witness. *Bravo*, 563 P.3d at 1077. Thus, excluding evidence about

the U visa violated Nikolenko's right to present a defense and constituted an abuse of discretion. *Orn*, 197 Wn.2d at 358.

Moreover, the constitutional error was not harmless. "In the context of an erroneous exclusion of impeachment evidence, '[t]he correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, [we can] nonetheless say that the error was harmless beyond a reasonable doubt.'" *Romero-Ochoa*, 193 Wn.2d at 348 (alterations in original) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)).

The State argues that the U visa evidence had little weight because FT's psychologist corroborated her version of events and FT failed to identify Nikolenko as her attacker in court. But evidence that FT applied for a U visa would have been at least minimally probative of FT's bias and allowed Nikolenko to argue that she embellished the incident rather than outright fabricated it. And as discussed above, the psychologist did not completely corroborate FT's version of events, so the U visa evidence would have allowed Nikolenko to argue that FT was embellishing her story to secure her immigration status. Instead, like in *Chicas Carballo*, FT's testimony that she feared deportation went unchallenged, and the State relied on this testimony in closing argument, even though that fear would have been a basis for FT to seek the U visa and cooperate with the investigation. In sum, the State does not prove beyond a reasonable doubt that the jury would have reached the same verdict absent any error.

Accordingly, we reverse Nikolenko's conviction and remand for a new trial.[4]

[4] Nikolenko also argues that the trial court abused its discretion by excluding FT's November 2016 and December 2016 time sheets and that he received ineffective assistance of counsel. Because we remand for a new trial, we decline to reach these issues.

CONCLUSION

We reverse Nikolenko's conviction and remand for a new trial.[5]

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.

Lee, J.

We concur:

Maxa, P.J.

Glasgow, J.

[5] Because we reverse Nikolenko's conviction and remand for a new trial, we do not reach the claims raised in Nikolenko's PRP.