SUPREME COURT NO. 101514-3

NO. 82624-7-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERIC OTT,

Petitioner.

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

The Honorable David Steiner, Judge

PETITION FOR REVIEW

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A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner Eric Ott seeks review of the Court of Appeals' decision in State v. Ott, 82624-7-I (Op.), filed October 24, 2022, which is appended to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. Division One held that the non-corroboration rule means the State can prove biological parentage, in an incest prosecution, simply by presenting evidence of legal parentage. Does this holding misapply the non-corroboration rule and conflict with published decisions on the sufficiency of the evidence? (Yes. This Court should grant review and clarify that the legal fiction of parenthood does not prove biological parenthood beyond a reasonable doubt.)

2. Division One held that a witness's prior acts of dishonesty, which are expressly admissible under ER 404(a) and 608(b), are prohibited "propensity evidence" under ER 404(b). Is this holding consistent with one part of the analysis in State v. Lee, 188 Wn.2d 473, 396 P.3d 316 (2017), and directly contrary

to another? (Yes. This Court should grant review to clarify that an accuser's prior acts of dishonesty are not improper "propensity evidence.")

C. STATEMENT OF THE CASE

TP was born in 1996. RP 913, 941. At that time, Eric Ott was married to TP's biological mother, so the law presumed he was her "natural parent," as well. RP 1232; Former RCW 26.26.040(1)(a), (b) (1996). Because both parents were facing terms of incarceration when TP was born, they relinquished their parental rights to her when she was two months old. RP 1232.

TP was legally adopted by her maternal grandparents, and she maintained contact with the parents who had relinquished her as an infant. RP 1232-33. Her contact with Mr. Ott was limited, however, because he was incarcerated for the first 18 years of her life. RP 941, 946, 1232-33. During this time, TP rarely saw Mr. Ott in person. RP 942-44. The two did communicate by mail and phone, however, exchanging about 10 letters and 10 calls per year. RP 943.

When Mr. Ott was released, in 2013, TP did not see him as much as she had hoped. RP 946-48, 1087-90. They lived in different parts of the state, and TP struggled to "understand that . . . I'm not the only part of his life that he was trying to catch up with." RP 947.

In 2015, Mr. Ott married Lacey Ott. RP 947. There was considerable tension between Mrs. Ott and TP. RP 948, 955-56. TP described Mrs. Ott as possessive and jealous, and she believed Mrs. Ott was the reason Mr. Ott spent so little time with TP. RP 948-49. TP increasingly felt Mr. Ott was not living up to his promises to be more involved in her life. RP 952.

In late August of 2018, TP was living in Arizona but needed to return to Washington for a brief visit. RP 953, 1005. At that time, she had been addicted to methamphetamine for about a year. RP 949-50. Mr. Ott had cut off contact with her due to her drug use and erratic behavior. RP 1234, 1237.

On her way to Washington, TP had the "overwhelming urge" to contact Mr. Ott. RP 953. She sent him several text

messages saying, "I'd really like to see you and maybe figure out some of my problems," and telling him that she was coming over whether he invited her or not. RP 953-54, 1094. After receiving multiple calls and text messages, Mr. Ott responded and told her to meet him at his home in Kirkland. RP 954, 1238.

Mrs. Ott was away at the time, so TP and Mr. Ott were able to have what TP described as "a really good conversation." RP 954-55. TP spent that night at Mr. Ott's house. RP 955.

When Mrs. Ott arrived home the following morning, she was furious that TP was there. RP 955-56, 1095-96. She accused TP of stealing from her, and Mr. and Mrs. Ott fought about this. RP 955-56, 1095-96. Mr. Ott left with TP, telling Mrs. Ott that, "if my own kid can't be here, then I'm not going to be here either." RP 955-56, 1238-39.

Mr. Ott and TP went first to the home of Mr. Ott's coworker and then to a hotel. RP 956, 959, 1240.

TP and Mr. Ott continued to live in hotels for several weeks. RP 1132, 1140-42, 1241. During this time, TP and Mr. Ott regularly used methamphetamines. RP 964, 1100-02, 1241.

In early November, Mr. Ott told TP that he needed to go get some money from a friend. RP 1142. TP did not believe him and suspected he was really going back to live with Mrs. Ott. RP 1140-41. She confronted him the next day and confirmed her suspicions, and the two parted company. RP 1142.

On November 29, 2018, Kirkland Police Detective Jacob Thune contacted TP in connection with an investigation that "involved some folks at the Ott residence." RP 1314-15, 1009. Over the course of four or five phone calls, between November 29 and 30, TP developed what she described as an unusually positive rapport with Detective Thune. RP 1010-11.

TP met with Detective Thune and his partner and told them that she and Mr. Ott had engaged in multiple acts of consensual sex while living in hotels together, and that Mr. Ott had raped her on one occasion. RP 1010-11, 1080-81, 1117-18,

1216-17. TP provided the detectives with several text exchanges stored on her cell phones, in which she sent sexually explicit messages to a number designated "Eric." RP 1080-81, 1117, 1280-81; Ex. 2.

The State charged Mr. Ott with one count of second-degree rape and three counts of first-degree incest, all with special allegations of domestic violence. CP 1-3.

Before trial, the defense sought permission to cross-examine TP regarding several prior instances of dishonesty. RP 725-94; Pretrial Ex. 4. These prior instances fell into two broad categories: (1) instances in which TP stole money or property, or lied in order to get money, and (2) instances in which TP gave a false statement to law enforcement or told lies regarding family matters unrelated to money. RP 725-94; Pretrial Ex. 4.

The State stipulated to the admissibility of virtually every instance related to money or theft. RP 724-26, 751-52, 788-94; Pretrial Ex. 4. This meant that the State agreed to the admission of two prior convictions, for third-degree theft and second-

degree possession of stolen property, and to cross-examination on three separate instances in which TP stole money and checks from Lacey Ott, lied to another individual in order to get money, and stole from her biological mother). RP 724-26, 751-52, 788-94; Pretrial Ex. 4. The State also stipulated to cross-examination on the fact that TP had once lied to Mrs. Ott about being in rehab. RP 757-58.

But the State opposed any cross-examination on the other instances of dishonesty. RP 727-87. These instances included: (1) TP's decision to lie about the identity of her second child's father, with the result that this man did not know that he had a child; (2) a time TP falsely claimed that her first child was conceived through rape, because she was concerned her family would disapprove of the child's mixed race; and (3) a time TP gave a false name to a police officer who arrested her. RP 753-66, 784-87; Pretrial Ex. 4. The trial court excluded all this proposed impeachment. RP 757, 765-87. It concluded these

instances of dishonesty were prohibited "propensity evidence" under State v. Lee, 188 Wn.2d 473. RP 757, 781-87.

Consistent with the State's stipulations, the jury heard that TP had a history of stealing to support a drug addiction. E.g., RP 949-50. This fit nicely into the State's theory that, by the time Mr. Ott was release from prison, TP was struggling and vulnerable to abuse. RP 913-17.

But the jury heard absolutely no evidence that TP had a history of telling grave lies, with profound consequences, to and about her family members, or that she had previously lied to the police. The prosecutor capitalized on that omission in closing argument, telling the jury:

> So, here what you have is a credible witness coming in to tell you, quite frankly, all of the things about her life that don't reflect very well upon her: her criminal history, her drug addiction, and her consensual sexual relationship with her father . . ..

RP 1384. He also argued:

> [TP] is obviously very damaged from the lack of a father figure in her life and that has taken the forms of her own trouble with the law as well as her

> own falling victim to substance abuse addiction as well, her addiction to methamphetamines. She's willing to come in here and talk to you all openly and honestly about those things in her history. And that is important to consider when you talk about her credibility.

RP 1390.

The jury acquitted Mr. Ott of the rape charge but convicted him of all three counts of incest. RP 1442-43; CP 118-21. It also found, as to each count, that Mr. Ott and TP were members of the same family or household. CP 122-23. The trial court imposed 95 months of total confinement for each count, to be served concurrently, followed by 36 months of community custody. CP 144-45.

Court of Appeals Decision

Mr. Ott appealed, challenging the sufficiency of the evidence to prove incest and arguing that the trial court abused its discretion and violated confrontation clause protections when it excluded virtually all impeachment based on TP's prior instances of dishonesty. Op. at 1.

The Court of Appeals rejected the sufficiency challenge because, "T.P. addresses Ott as her father, Ott addresses T.P. as his daughter, and Ott was married to T.P.'s mother when she was born." Op. at 7. It rejected Mr. Ott's confrontation clause claim because it concluded that the prior instances in question—including a prior false allegation of rape—were "little more than propensity evidence" and therefore properly excluded under Lee, 188 Wn.2d 473. Op. at 19.

D. REASONS REVIEW SHOULD BE ACCEPTED

Division One's decision merits review under RAP 13.4(b)(3) because it involves two significant questions under the state and federal constitutions. It also merits review under RAP 13.4(b)(2) because it conflicts with published decisions of this Court and the Court of Appeals holding that the State bears the burden to prove every element of an offense beyond a reasonable doubt, and that the trial court violates fundamental principles of fairness when it excludes all meaningful impeachment of an accuser.

1. Division One Erroneously Held that, where Genetic Parentage is an Element of a Sex Offense, the Non-Corroboration Rule Means the State Need Only Present Evidence of Legal Parentage

Evidence is legally sufficient to support a guilty verdict if a rational trier of fact, viewing the evidence in the light most favorable to the State, could find each element of the offense proved beyond a reasonable doubt. State v. Longshore, 141 Wn.2d 414, 420-21, 5 P.3d 1256 (2000). A defendant claiming insufficient evidence "'admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom.'" State v. Scanlan, 193 Wn.2d 753, 770, 445 P.3d 960 (2019) (quoting State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

While the jury may draw reasonable inferences from the evidence, no element may be established by speculation alone. State v. Garcia, 179 Wn.2d 828, 841, 318 P.3d 266 (2014). If the

evidence at trial was insufficient to prove any element, the remedy on appeal is reversal and remand for dismissal of the unsupported charge with prejudice. State v. Rodgers, 146 Wn.2d 55, 60, 43 P.3d 1 (2002).

a. On appeal, Mr. Ott argued that the State does not prove biological paternity, beyond a reasonable doubt, by presenting only evidence of "presumed" paternity.

A person commits the crime of incest in the first degree, as charged in this case, if "he or she engages in sexual intercourse with a person whom he or she knows to be related to him or her . . . as a[] . . . descendant." RCW 9A.64.020(1)(a); CP 110. For purposes of the incest statute, a "descendant" includes stepchildren and adopted children only if such children are under the age of 18. RCW 9A.64.020(3). A person 18 or older is a "descendant," under that statute, only if they are biologically related to the person charged. State v. Hall, 112 Wn. App. 164, 167-69, 48 P.3d 350 (2002) (RCW 9A.64.020(1)(a) evidences

clear "legislative intent that the biological, not the legal relationship controls").

Because TP was over 18 years old during the charging window, the State could not obtain an incest conviction without proving she was Mr. Ott's biological daughter. Id.; RP 941, 946, 953, 1005.

The State presented some evidence that Mr. Ott was briefly TP's legal parent. See RP 1232. This evidence took the form of Mr. Ott's disclosure to detectives, during his interrogation, that he had been married to TP's "biological mother" and that both had "signed our parental rights over to my wife's . . . parents." RP 1232. But evidence that Mr. Ott was TP's legal parent is not evidence sufficient to show, beyond a reasonable doubt, that he is her biological parent.

When TP was born, in 1996, Washington's Uniform Parentage Act (UPA) conferred legal paternity on men in a variety of circumstances that did not include genetic testing or any formal attestation to a biological relationship. Former RCW

26.26.010 (1996) ("natural or adoptive parents" are "legal" parents), .040 (listing circumstances in which a man will be "presumed" to be a child's "natural father"). For example, the UPA presumed a man was the "natural father" of any child born to the man's wife during their marriage or within 300 days following its termination. Former RCW 26.26.040(1)(a), (b) (1996). The law also presumed paternity of a man who married the child's mother after she gave birth, and who acknowledged paternity in a document such as the birth certificate, and of any man who "receive[d] the child into his home and openly h[eld] out the child as his child." Former RCW 26.26.040(1)(c), (d).

Consistent with the evidence presented at Mr. Ott's trial, his legal status as TP's father may have been established by any of these means. See RP 1232. There is no evidence in the record that this legal father-child relationship was ever determined through either genetic testing or a sworn statement attesting to biological paternity. See RP 1429-30 (prosecutor arguing, in closing, that mere fact that TP and Mr. Ott considered one

another father and daughter should be enough to prove a biological relationship beyond a reasonable doubt).

Because "presumed" paternity is a legal fiction, the UPA has always provided for its rebuttal, but only under limited circumstances. Case law addressing these circumstances makes manifestly clear (even if common sense did not) that a "presumed father" is by no means necessarily a biological father. E.g., Marriage of Wendy M., 92 Wn. App. 430, 440, 962 P.2d 130 (1998) (affirming trial court's decision to disallow paternity adjudication even though blood tests showed presumed father was not biological father); Marriage of Thier, 67 Wn. App. 940, 841 P.2d 794 (1992) (same); In re K.R.P., noted at 160 Wn. App. 215, 221-29, 247 P.3d 491 (2011) (where dissolution changed respondent's status from presumed father to adjudicated father, petitioner was entitled to court-ordered genetic testing to establish he was children's biological father); In re S.C., noted at 169 Wn. App. 1004, 2012 WL 2501061, at *1-*5 (trial court erred by ordering genetic testing, because disproving presumed

father's biological paternity would not be in child's best interests); Welfare of S.W.C., 196 Wn. App. 1034, 2016 WL 6082237, at *3 (sworn declaration stating that mother told presumed father he was not child's biological parent insufficient to overcome statutory presumption of parenthood).

In his briefing to the Court of Appeals, Mr. Ott found no Washington case on point, but he discussed seven cases from other states addressing the sufficiency of the evidence to prove a biological relationship for purposes of an incest prosecution: State v. Skinner, 338 Mont. 197, 163 P.3d 399 (2007); State v. Sockbeson, 430 A.2d 1105, 1106 (Maine 1981); State v. Lewis, 582 S.W.3d 162, 166 (Mo. Ct. App. 2019); King v. State, 344 Ga. App. 244, 245-46, 809 S. E. 2d 824 (2018); Williams v. State, 89 So.3d 676 (Miss. Ct. App. 2012); In re D.W., 27 A.3d 1164, 1166-69 (D.C. Ct. App. 2011); Jackson v. State, 682 N.E.2d 564, 566 (Ind. Ct. App. 1997).

Mr. Ott explained that four of these decisions rejected a sufficiency challenge because the State presented either DNA

evidence or testimony by the victim's biological mother,[1] evidence that was completely absent from his trial. He also explained, in both his opening and reply briefs, that an eighth case, State v. Ware, 188 N.C. App. 790, 656 S.E.2d 662 (2008), was inapposite. BOA at 29 n.7; Reply Br. at 6-7. The statute at issue in Ware required only proof of legal parenthood—not genetic parenthood. 188 N.C. App. at 793. Thus, despite dicta in that case referring to "biological" fatherhood and DNA testing, no question was presented regarding the sufficiency of the evidence to prove a genetic, as opposed to legal, relationship. Id. Moreover, the prosecution met its burden in Ware by providing both "witness testimony and birth records," which included the victim's birth certificate identifying the defendant as her father. 188 N.C. at 793-94. Leaving aside the question of whether they

[1] BOA at 29-31 (citing Skinner, 338 Mont. 197; King, 344 Ga. App. at 245-46; Williams, 89 So.3d at 682-84; Lewis, 582 S.W.3d at 164-66).

would have been sufficient to prove a biological relationship, no such records were presented at Mr. Ott's trial.

Finally, Mr. Ott urged the Court of Appeals to adopt the reasoning in the dissenting opinions to D.W., 27 A.3d at 1166-69; Jackson, 682 N.E.2d at 566. In those cases, witnesses testified that they had always regarded the defendants as biological relatives of the alleged victims—in D.W., 27 A.3d at 1166-69, the alleged victim's half-brother and, in Jackson, 682 N. Ed. 2d at 566, her father. But the prosecution presented no direct evidence of a genetic tie. Id.

The dissenting judges concluded that, when the evidence is consistent with both biological and adoptive kinship, it is insufficient to sustain a conviction leading to loss of liberty and profound social stigma. D.W., 27 A.3d at 1173-77 (Thompson, A.J., dissenting); Jackson, 682 N.E.2d at 568 (Kirsch, J., dissenting). The same conclusion is compelled by Washington precedent on sufficiency of the evidence. State v. Jameison, 4 Wn. App. 2d 184, 198, 421 P.3d 463 (2018) ("evidence . . .

equally consistent with two hypotheses . . . tends to prove neither," and cannot sustain a criminal conviction).

b. The Court of Appeals applied the non-corroboration rule to relieve the State of its burden to prove TP was Mr. Ott's "descendant"

The Court of Appeals rejected Mr. Ott's argument, instead adopting dicta from Ware, 188 N.C. App. 790, and the majority's reasoning in Jackson, 682 N.E.2d 564. Op. at 6-7. The Court did so, it explained, because Washington observes the non-corroboration rule in incest prosecutions. Op. at 6 (citing State v. Coffey, 8 Wn.2d 504, 505-06, 112 P.2d 989 (1941); State v. Davis, 20 Wn.2d 443, 446-47, 147 P.2d 940 (1944); and State v. Chenoweth, 188 Wn. App. 521, 536, 354 P.3d 13 (2015)).

The Court of Appeals' reliance on the non-corroboration rule is profound legal error.

Neither Davis nor Coffey addressed the sufficiency of the evidence to prove a biological relationship, as that question was not before either court. Rather, they each rejected the

defendant's argument—a vestige of the era in which some jurisdictions required corroboration of an accuser's testimony to sustain a conviction for a sex offense—that the victim's allegation of sexual misconduct was inherently unreliable. Davis, 20 Wn.2d at 447 (citing State v. Morden, 87 Wash. 465, 151 P. 832, 834 (1915); Coffey, 8 Wn.2d at 505-06.

The non-corroboration rule recognizes that sex offenses often occur in secret, hidden from "knowledge and observation by persons other than the accused and the complaining witness." State v. Galbreath, 69 Wn.2d 664, 669, 419 P.2d 800 (1966). The corroboration it contemplates is of the alleged sexual misconduct and the victim's credibility. Id. at 669-70 (collecting cases). It has nothing to do with proof of an element, such as age or a particular relationship between the victim and the defendant, which is readily obtained.

By applying the non-corroboration rule out of context, the Court of Appeals violated basic tenets of due process: it affirmed a conviction where the evidence was consistent with a non-

criminal act. Compare Op. at 7-8 (jury could find proof of biological paternity because TP and Mr. Ott address each other as father and daughter and Mr. Ott was married to TP's mother when she was born) with Garcia, 179 Wn.2d at 841 (evidence insufficient if jury must speculate about an element); Jameison, 4 Wn. App. 2d at 198 (evidence equally consistent with two different hypotheses proves neither).

This Court should accept review, reject the Court of Appeals' misapplication of the non-corroboration rule, and reverse Mr. Ott's convictions.

2. This Court Should Grant Review to Clarify that Prior Acts of an Accuser's Dishonesty, which are Expressly Admissible under ER 404(a) and 608(b), are not Impermissible "Propensity Evidence" under ER 404(b)

ER 608(b) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in rule 609 . . . may . . . in the discretion of the court, if probative of truthfulness or untruthfulness,

> be inquired into on cross examination of the witness . . . concerning the witness' character for truthfulness or untruthfulness . . .

While ER 404(a) generally "bars evidence that uses a person's propensities to show how the person acted on a particular occasion," the exception in ER 404(a)(3) "permits propensity-based evidence of the character of a witness, as provided in ER 607, 608, and 609." State v. McSorely, 128 Wn. App. 598, 611, 116 P.3d 431 (2005) (alterations omitted.)[2]

The trial court's evidentiary rulings are reviewed for abuse of discretion, but there are special limits on the court's discretion

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[2] ER 404(a) provides, in relevant part:

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion *except*:
>
> . . . Evidence of the character of a witness, *as provided in rules 607, 608, and 609*.

(Emphasis added.)

under ER 608(b). State v. Clark, 143 Wn.2d 731, 766, 24 P.3d 1006 (2001). "Failing to allow cross-examination of a state's witness under ER 608(b) is an abuse of discretion if the witness is crucial and the alleged misconduct constitutes the only available impeachment." Id. (citing State v. York, 28 Wn. App. 33, 621 P.2d 784 (1980)); McSorely, 128 Wn. App. 598. The court may exclude impeachment that is cumulative or irrelevant to the witness's credibility on the stand, but it must do so consistent with fundamental fairness. State v. O'Connor, 155 Wn.2d 335, 350-53, 119 P.3d 806 (2005) (citing York, 28 Wn. App. at 35).

In Mr. Ott's case, the trial court did not exclude TP's prior acts of dishonesty because they were cumulative of other impeachment evidence, because they were not probative of TP's credibility, or because TP was not an important witness. See RP 781-84. Instead, the court found that all this impeachment evidence was per se inadmissible "propensity evidence" under Lee, 188 Wn.2d 473. RP 754-57, 759-62, 766-84, 786-87. The

Court of Appeals affirmed this application of Lee. This Court should grant review and disavow it.

In Lee, the defendant faced charges of third-degree rape of a child. 188 Wn.2d at 478. The victim had previously filed, and then rescinded, a police report falsely accusing another individual of raping her. Id. at 479. She had fabricated the allegations to explain a sexual encounter that was, in fact, consensual. Id.

The trial court believed the prior false accusation was admissible under ER 608(b), but potentially barred by the rape shield statute. Id. at 480. In an attempt to "strike a 'fair balance between those two competing interests,'" the trial court ruled the defense could cross-examine the victim as to the fact of the prior false police report but could not inquire into the nature of the underlying allegation, i.e., that it was a false allegation of rape, specifically. Id.

At trial, defense counsel asked the victim whether she had "'ever made any false accusations about another person to the

police,'" and she said she had but that she had "'immediately corrected it,'" so as to "'make it right.'" Id. at 482. The jury convicted the defendant. Id. at 483.

The Court of Appeals held the trial court abused its discretion in excluding the nature of the prior false accusation, but it affirmed under a non-constitutional harmless error standard. Id. at 484. This Court granted review to determine whether the error was constitutional. Id. at 484-85.

Applying the three-prong test for a confrontation clause violation, this Court held that (1) the excluded evidence had minimal probative value, because it went to the complaining witness's credibility in general, as opposed to her bias against the defendant in particular; (2) the evidence was prejudicial to the fact-finding process because "evidence of a false rape accusation asks the jury to make the improper inference that because a complaining witness lied before, she must also be lying now,"

which is disfavored under ER 404(b);[3] and (3) the trial court properly balanced the defendant's interest, in "attack[ing the victim's] credibility," against the State's interest in protecting rape victims from abusive cross-examination. Id. at 488-96.

In reaching those conclusions, the Lee Court called the appeal "a close case." Id. at 496. It explained that it was affirming the trial court's evidentiary ruling only "[b]ecause Lee *was still able to attack [his accuser's] credibility*," by eliciting the fact (albeit not the substance) of the prior false allegation. Id. at 496 (emphasis added). And it called that fact "relevant for impeachment purposes—to cast doubt on [the accuser's] credibility." Id.

As indicated by the foregoing summary, Lee is a deeply self-contradictory opinion. It says in one breath that it is "improper" (under ER 404(b)) to infer that, "because a

[3] ER 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show conformity therewith," but may be admissible for any other reason.

complaining witness lied before, she must also be lying now," and in the next that a witness's prior false allegations are probative of her credibility, and therefore admissible under ER 608(b). Id. at 488-96. Indeed, Lee held that the trial court would have violated the defendant's right of confrontation, had it excluded the fact of the alleged victim's prior false allegation. Id. at 496.

If a complaining witness's prior false allegations were inadmissible under ER 404(b), then both ER 404(a)(3) and ER 608(b) would be meaningless. And if a witness's prior acts of dishonesty were per se inadmissible propensity evidence, then Lee would not have been a "close case," where the defendant was constitutionally entitled to elicit the fact of his accuser's prior false allegation.

At Mr. Ott's trial, the State exploited Lee to shape the evidence in the image of its theory. It argued that TP's drug addiction and two property crimes constituted "all of the things" that reflected poorly on her, and that her openness about them

enhanced her credibility. RP 1384, 1390. This was possible only because the trial court excluded evidence that TP had a history of telling lies and making false accusations. It was therefore fundamentally unfair. See McSorely, 128 Wn. App. at 613-14 (noting that prosecutor was able to portray complaining witness as particularly credible only because trial court excluded "prior 'pranks'"); York, 28 Wn. App. at 35-36 ([the agent's] credibility, based on his apparent unsullied background and the total lack of meaningful impeachment, was stressed heavily by the prosecution").

Had Mr. Ott's jury heard TP admit to falsely accusing another man of raping her, lying to cover up the paternity of her second child, and making a false statement to police, the prosecutor could not have argued that these things enhanced her credibility. Instead, he would have had to argue that, although she had lied in the past, the jury should conclude she was not lying now. That is exactly the kind of credibility determination the jury, not the trial court or the prosecution, should make. See

State v. Fernandez-Medina, 141 Wn.2d 448, 460, 6 P.3d 1150 (2000) (jury, as opposed to trial court, is sole arbiter of credibility) (quoting State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999)).

By excluding all meaningful impeachment of Mr. Ott's accuser, the trial court abused its discretion under ER 608(b) and violated Mr. Ott's constitutional right to confront adverse witnesses. This Court should grant review, disavow the trial court's and the Court of Appeals' interpretation of Lee, and reverse Mr. Ott's convictions.

E. CONCLUSION

Division One's decision merits review because it raises significant questions under the state and federal constitutions, and conflicts with published decisions from this Court and the Court of Appeals.

I certify that this document was prepared using word processing software and contains 4,901 words excluding the parts exempted by RAP 18.17.

DATED this 23rd day of November, 2022.

Respectfully submitted,
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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ERIC CLINTON OTT, Appellant.	No. 82624-7-I DIVISION ONE UNPUBLISHED OPINION

MANN, J. — Eric Ott appeals his conviction for one count of incest in the first degree. Ott argues that the evidence was insufficient to prove the crime of incest. Ott also argues that the trial court abused its discretion under ER 608(b), and violated his Sixth Amendment right to confrontation when it limited the scope of his cross-examination of the alleged victim, T.P., based on several prior instances of dishonesty.

We affirm.

FACTS

T.P. was born in 1996. At that time, Ott and T.P.'s biological mother were married. Because both parents were facing terms of incarceration when T.P. was born, they relinquished their parental rights to her when she was two months old. T.P. was legally adopted by her maternal grandparents, and maintained contact with her parents

while growing up. T.P. visited her father in prison when she was 4 or 5 years old, and beginning at age 12, visited him 5 times before he was released. The two also often sent letters to each other and sometimes spoke on the phone. T.P. was close to Ott despite their physical separation and he was "the only person that [T.P.] would tell a lot of personal things to." Ott was released from prison in 2013 when T.P. was 18 years old.

Ott married Lacey in 2015.[1] Lacey and T.P. had a strained relationship. T.P. felt Lacey monopolized Ott's time. T.P. and Ott rarely visited because doing so "seemed to cause problems with [Ott's] marriage." Ott started to ignore T.P.'s phone calls; sometimes the two would only speak every few months.

Ott distanced himself from T.P. after she began using methamphetamine in 2017. While he told T.P. that her drug use was the reason he distanced himself, he was using methamphetamines as well. T.P. traveled to Washington from Arizona where she lived with her grandparents. On a night that Lacey was away, Ott invited T.P. to his home in Kirkland. Ott and T.P. used methamphetamines and conversed, with Ott lamenting that he "promised . . . to be more involved" in her life.

The next morning, Lacey returned and demanded that T.P. leave after she accused her of stealing. Angry, Ott left with T.P. and told Lacey "if my own kid can't be here, then I'm not going to be here either." Ott booked the two a motel room. Because of limited vacancy, the room had a single bed. T.P. and Ott spent the day using methamphetamines and watching YouTube videos.

[1] We refer to Lacey Ott by her first name to avoid confusion. We mean no disrespect.

Before sleeping, Ott began caressing T.P., "which eventually resulted in [them] having sex." T.P. claimed she agreed to have sex with Ott because she was afraid he would choose his relationship with Lacey over her unless she satisfied his needs. T.P. stated that she and Ott used methamphetamines and had sexual intercourse almost every day for the next several months. Ott told T.P. that other cultures tolerate incest. On November 9, 2018, Ott told T.P. that he needed to get some money from a friend. Instead, Ott returned to Lacey.

On November 29, 2018, Kirkland Police Detective Jacob Thune contacted T.P. in an unrelated matter over "circumstances that involved people at Lacey Ott's residence." Over the course of a few phone calls, T.P. developed a rapport with Thune. She eventually disclosed Ott's behavior and gave consent for police to search her phone.

On November 30, 2018, T.P. met with Thune and Detective Clayton Slominski. She told the detectives that she and Ott engaged in multiple acts of consensual sex and that Ott raped her once. She brought an LG Stylo 4 phone and a ZTE Max Blade 2 phone to the meeting. Incriminating text messages and photographs transmitted between Ott and T.P. were discovered on T.P.'s phone, including: (1) an image of Ott and T.P. lounging on a couch with ice packs over their genitals; (2) a text message from T.P. to Ott stating that "all I want to do right now is go back to the room and make love to you"; (3) a text message where Ott asked T.P. to "flash me in the bathroom window"; (4) an exchange where T.P. mentions smelling like Ott's cologne; (5) an exchange where Ott tells T.P. there are muffins for her in the kitchen and T.P. responds "[a]nd there is a muffin for you in my pants," to which Ott replies "fuck yes"; (6) a message

where T.P. tells Ott that she wants to "eat some meth, and suck your cock"; and (7) several erotic photographs T.P. sent of herself to Ott.

On December 7, 2018, Ott was arrested and he agreed to give a recorded statement. Ott acknowledged that T.P. was his daughter, admitted to using drugs with T.P., and explained that he left to get sober. He said T.P. started "spreading malicious stuff and talking bad about me." When asked about his sexual relationship with T.P., Ott responded, "[w]hy would you ask me a question like that?" Ott later admitted he was "not surprised that you're accusing me of it." Ott explained that the text messages were "extremely interpretive."

When shown a nude photograph that T.P. sent to Ott, he replied: "My—my daughter is an adult." In response to the message where T.P. offered to "suck [his] cock," Ott explained:

> I interpret that as myself and my daughter having a few different instances where she needed to be corrected about her behavior. That's how I interpret it.

During the interview, Ott insisted that the text messages, nude pictures, and time in hotel rooms does not prove the two were having sex. After the recording, Ott told Slominski that "I just want you to know off the record, I never raped her."

The State charged Ott with one count of second degree rape and three counts of first degree incest. A jury acquitted Ott of second degree rape but convicted him on all three counts of first degree incest. The court imposed a sentence within the standard range.

Ott appeals.

ANALYSIS

A. Sufficiency of Evidence

Ott argues first that the evidence was insufficient to prove the crime of incest because the State failed to prove that T.P. was his biological daughter. We disagree.

We review the sufficiency of the evidence to determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Luther, 157 Wn.2d 63, 77-78, 134 P.3d 205 (2006); Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). A defendant claiming insufficient evidence "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Scanlan, 193 Wn.2d 753, 770, 445 P.3d 960 (2019) (quoting State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). A sufficiency analysis is "highly deferential" to the jury's verdict. State v. Davis, 182 Wn.2d 222, 227, 340 P.3d 820 (2014). Whether sufficient evidence exists is a question of law reviewed de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

A person commits the crime of incest in the first degree if "he or she engages in sexual intercourse with a person whom he or she knows to be related to him or her . . . as a[] . . . descendant." RCW 9A.64.020(1)(a). Under the statute, "descendant" includes children and adopted children under 18. RCW 9A.64.020(3)(a). Thus, a person 18 or older is a "descendant" only if they are biologically related to the person charged. State v. Hall, 112 Wn. App. 164, 167-69, 48 P.3d 350 (2002) (RCW 9A.64.020(3)(a) "expresses the legislative intent that the biological, not the legal, relationship controls.").

Ott was married to T.P.'s biological mother when T.P. was born and Ott was therefore presumed to be T.P.'s father as a matter of law. RCW 26.26A.115(1)(i). T.P. testified that Ott was her father and Ott acknowledged the same. Ott never denied that T.P. was his biological daughter.

Ott argues that there is insufficient evidence that T.P. was his biological "descendant" because the State did not confirm their relationship with DNA testing or "a sworn statement attesting to biological paternity." Instead, Ott claims that presumed paternity, under the Uniform Parentage Act conferred legal paternity on men but that this presumed paternity does not prove Ott is T.P.'s biological father.

Ott fails to offer Washington authority supporting his claim that DNA testing is required to prove a biological relationship to support the crime of incest. In State v. Coffey, 8 Wn.2d 504, 505-06, 112 P.2d 989 (1941), and State v. Davis, 20 Wn.2d 443, 446-47, 147 P.2d 940 (1944), the Washington Supreme Court held that uncorroborated testimony of a complaining witness in an incest case is enough to sustain a conviction. The Davis holding was more recently affirmed in State v. Chenoweth, 188 Wn. App. 521, 536, 354 P.3d 13 (2015) (explaining, "this [Davis] holding has not been overruled, and no statute requires corroboration in incest cases"). There is no support for the argument that the Washington courts specifically require DNA testing or a sworn statement to prove that Ott is T.P.'s biological father.

Other jurisdictions have expressly rejected Ott's argument. In State v. Ware, 188 N.C. App. 790, 793-94, 656 S.E.2d 662 (2008), the court found sufficient evidence of a biological relationship without DNA testing:

> The victim testified at trial that defendant was her biological father and identified him in open court. Furthermore, the victim's birth certificate, clearly identifying defendant to be the victim's father, was admitted into evidence. Both the victim's testimony and her birth certificate are direct evidence of defendant's paternity. The crime of incest was first created by our legislature long before the advent of DNA or blood type paternity testing. . . . We hold that witness testimony and birth records are substantial evidence of paternity.

In Jackson v. State, 682 N.E.2d 564, 566 (Ind. Ct. App. 1997), the Indiana Court of Appeals similarly determined there was sufficient evidence to establish paternity through other evidence in the record such as the victim's testimony, the victim had the family name, and that the alleged father paid child support. The Montana Supreme Court also established paternity through various evidence:

> A conviction for a sex offense may be based entirely on the uncorroborated testimony of the victim . . . Here, testimony that Skinner is T.D.'s biological father was given not just by T.D., but also by T.D.'s mother. Further, T.D. and Skinner had been exchanging letters for two years, T.D. had labeled Skinner "Dad" in her scrapbook, and T.D. considered Skinner's sister as her aunt and Skinner's nephew as her cousin. Based on this evidence, a rational trier of fact could conclude, beyond a reasonable doubt, that Skinner was T.D.'s biological father.

State v. Skinner, 2007 MT 175, 338 Mont. 197, 202, 163 P.3d 399.

Ott presents seven cases from other jurisdictions for support, but these cases do not describe specific requirements to prove biological paternity. Rather, four of the cases use either DNA evidence or testimony by the other biological parent. The cases simply discuss what evidence the court used to determine a rational trier of fact could find biological paternity, none impose any requirements.

T.P. addresses Ott as her father, Ott addresses T.P. as his daughter, and Ott was married to T.P.'s biological mother when she was born. Taken in the light most

favorable to the prosecution, a rational jury could have found that Ott was T.P.'s biological father.

B. Prior False Statements

Ott next contends that the trial court abused its discretion and violated his Sixth Amendment right to confrontation when it limited the scope of his cross-examination of T.P. based on several prior instances of dishonesty. We disagree.

Our review of a Sixth Amendment claim invokes a two-part test. We first review the trial court's evidentiary rulings for abuse of discretion. State v. Jennings, 199 Wn.2d 53, 58, 502 P.3d 1255 (2022); State v. Arndt, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019). If we conclude that the evidentiary rulings were not an abuse of discretion, we then consider de novo whether the exclusion of evidence violated the defendant's constitutional right to present a defense. Jennings, 199 Wn.2d at 59.

Before trial, Ott sought permission to impeach T.P. based on prior instances of dishonesty. The prior instances fell into two categories: (1) instances in which T.P. stole money or property, or lied to get money; and (2) instances in which T.P. gave false statements to law enforcement or family members unrelated to money.

Ott first moved to admit T.P.'s prior convictions for third degree theft and second degree possession of stolen property under ER 609(a)(2). The trial court admitted these convictions, without objection, but denied Ott's request to elicit their underlying facts.

Ott later moved to cross-examine T.P. on specific instances of dishonestly under ER 608(b). The State agreed that some instances were admissible "because they deal with some of the people involved in this case and are from this specific time period that

we're talking about here." The State agreed that T.P. could be questioned about four specific instances: (1) that T.P. stole money from Lacey, (2) that T.P. lied to Lacey about being in rehab, (3) that T.P. borrowed money from Ott's ex-girlfriend under false pretenses and used it to buy drugs, and (4) that T.P. stole from her biological mother.

At issue are three other instances of dishonesty that the trial court excluded. First, Ott sought to admit T.P.'s prior conviction for disorderly conduct under ER 608. Second, Ott sought to elicit that T.P. falsely told the father of her second child that another man was the child's biological parent. Third, Ott sought to cross-examine T.P. about her alleged false accusation that her first child's father had raped her because she feared her family would not approve of their interracial relationship. The trial court excluded all three instances. Ott challenges the trial court's limitation on the scope of his cross-examination of T.P.

1. Evidentiary Rulings

We begin with the trial court's evidentiary rulings. Under ER 608(b), a party may, "in the discretion of the court," and if the conduct is "probative of . . . untruthfulness," cross-examine a witness about "[s]pecific instances of . . . misconduct" to attack the witness's credibility. ER 608(b) states:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

In exercising its discretion under ER 608(b), the trial court considers "whether the instance of misconduct is relevant to the witness's veracity on the stand and whether it is germane or relevant to the issues presented at trial. O'Connor, 155 Wn.2d at 349. "[N]ot every instance of a witness's (even a key witness's) misconduct is probative of a witness's truthfulness or untruthfulness under ER 608(b)." O'Connor, 155 Wn.2d at 350.

On the other hand, "[f]ailing to allow cross-examination of a state's witness under ER 608(b) is an abuse of discretion if the witness is crucial and the alleged misconduct constitutes the only available impeachment." State v. Clark, 143 Wn.2d 731, 766, 24 P.3d 1006 (2001).

Because the trial court here relied mainly on State v. Lee, 188 Wn.2d 473, 396 P.3d 316 (2017), a brief discussion is appropriate.[2] In Lee, the defendant was charged with third degree rape of a child for engaging in sexual intercourse with a child, J.W. Lee, 188 Wn.2d at 478-79. At trial, Lee sought "to introduce evidence that J.W. previously fabricated a rape allegation against another individual." Lee, 188 Wn.2d at 479. The trial court allowed the defense to elicit that J.W. "made a prior false accusation about another person to police . . . [but] prohibited Lee from specifying that it was a rape accusation." Lee, 188 Wn.2d at 480. Lee argued that the ruling violated his right to confront J.W. Lee, 188 Wn.2d at 486.

To determine whether the restriction on Lee's cross-examination was constitutionally permissible, the court applied a three-part test:

[2] While Lee specifically addressed the constitutional right to confrontation and did not analyze application of ER 608(b), the trial court here did not abuse its discretion in relying on the analysis.

> First, the evidence must be of at least minimal relevance. Second, if relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. Finally, the State's interest to exclude prejudicial evidence must be balanced against the defendant's need for the information sought, and only if the State's interest outweighs the defendant's need can otherwise relevant information be withheld.

Lee, 188 Wn.2d at 488. The court determined that the prior false accusation had "minimal probative value because it did not directly relate to an issue in the case." Since the proposed impeachment did not purport to show any specific bias towards Lee, it was essentially propensity evidence. Lee, 188 Wn.2d at 488. The court explained that:

> The confrontation clause primarily protects "cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." Evidence intended to paint the witness as a liar is less probative than evidence demonstrating a witness' bias or motive to lie in a specific case.
>
> Here, Lee did not offer the prior false accusation evidence to demonstrate that J.W. was biased or that she had a motive to lodge a false accusation against him. Instead, he invited the jury to infer that because J.W. made a false rape accusation in the past, her accusation here must also be false. . . . A prior false statement admitted for this purpose has questionable probative value because it does not directly relate to issues in the case.

Lee, 188 Wn.2d at 489-90 (internal citations omitted).

The court then determined the proposed evidence was unduly prejudicial given its "low probative value here." Lee, 188 Wn.2d at 493. The court noted that a false rape accusation is likely to "distract and inflame jurors," a risk that is constitutionally unnecessary "when the prior false accusation bears no direct relationship to the issues in the case." Lee, 188 Wn.2d at 493.

In summary, the court's holding rested on three interrelated bases: (1) that the prior false accusation was more prejudicial than probative because it bore "no direct relationship to the issues in the case"; (2) that "[t]he State's compelling interest in encouraging rape victims to report and cooperate . . . outweighs Lee's need to specify that J.W.'s prior false accusation was a "rape accusation"; and (3) that Lee's defense was minimally impacted because he could attack J.W.'s credibility in other ways. Lee, 188 Wn.2d at 493-96.

a. False Statement to Police

Ott argues that the trial court abused its discretion in not admitting evidence of T.P.'s prior conviction for disorderly conduct under ER 608. Ott argued that the conviction was admissible because the original complaint alleged that T.P. provided a false name to the police. T.P. had eventually pleaded guilty to an amended charge of disorderly conduct.[3]

Relying first on Lee, the trial court determined the alleged incident was outside the purview of ER 608(b) because it did not demonstrate bias in this particular case and was therefore only minimally relevant. And, under ER 403, the court determined that the evidence was substantially more prejudicial than probative.

The trial did not abuse its discretion. The alleged false statement at issue was at best only minimally relevant to show a propensity for T.P. to lie. There was no

[3] Ott originally sought to admit the incident under ER 609. ER 609 testimony is "limited to examining 'the elements and date of the prior conviction, the type of crime, and the punishment imposed.'" State v. Garcia, 179 Wn.2d 828, 847, 318 P.3d 266 (2014) (quoting State v. Newton, 109 Wn.2d 69, 71, 743 P.2d 254 (1987)). The prior conviction was inadmissible under ER 609. While the facts alleged a false statement, disorderly conduct is not a crime of dishonestly under ER 609(a)(2). RCW 9A.84.030. The conviction was also inadmissible under ER 609(a)(1) because disorderly conduct is a simple misdemeanor. RCW 9A.84.030(2).

argument that T.P.'s attempt to mislead police had any connection to Ott or demonstrated T.P.'s bias against him. It was not reasonable to infer that someone willing to lie about their name in order to avoid arrest would be more likely to falsely accuse their father of incest or rape. Consistent with O'Connor, the alleged incident was only minimally relevant to T.P.'s veracity and was not germane or relevant to the issues presented at trial. 155 Wn.2d at 349.

b. Statement on Parentage

Ott sought to cross-examine T.P. on allegations that she falsely told the father of her second child that another man was the child's biological parent. The trial court found the allegation was essentially propensity evidence and had little bearing on whether T.P. lied about the rape or incest. The court also explained its exclusion under ER 403:

> why would a mother lie about the paternity of her child? There are many possible reasons for that potentially relating to concerns about the relationship she had with the actual father, the biological father, concerns about the relationship that she has with the married husband, concerns about the effect that this might have on the well-being of the child. There are many difficult reasons that that kind of a lie might come in, and ultimately I'm going to find that the probative value is extremely low and that the likelihood of prejudice by the jury with that low probative value is extremely high.
>
> And so, even if it were relevant, even if it could be proven by a preponderance of the evidence, ER 403 would say it's not admissible.

The trial court did not abuse its discretion. Whether T.P. lied to the father or not is a collateral matter with no relevance to Ott. Evidence of a witness's truthfulness or untruthfulness is admissible only if it is relevant to the subject of the prosecution. O'Connor, 155 Wn.2d at 350. This evidence does not demonstrate a motive for T.P. to

lie about Ott, nor is it related, thus, the court properly excluded this line of cross-examination.

c. False Rape Allegation

Ott sought to cross-examine T.P. on her alleged false accusation that her first child's father raped her because she feared her family would not approve of their interracial relationship. Ott argued that T.P. lied because of the social consequences, which is analogous to this case because T.P. falsely accused Ott "to present to the family members an account that puts her in the victim role."

In excluding the accusation, the trial court applied the analysis from Lee to conclude the evidence is more prejudicial than probative, explaining:

> [F]irst of all . . . this was not a false report to the police which is a substantially more serious step than simply telling a family member . . . Lee also talks about the fact that this kind of evidence is really intended to paint the witness as a liar, and is therefore less probative than evidence demonstrating a witness' bias or motive to lie in this specific case.
>
> [I]t is less probative because the facts [regarding Derick] are not similar to the allegations . . . in Mr. Ott's particular case. So . . . the Lee court goes on to look at the allegations to determine whether they can be tied to the facts here and I'm going to find that as in Lee, the alleged false allegation is not offered to demonstrate that [T.P.] is biased against Mr. Ott or that she had a motive to lodge a false accusation against him.
>
> In other words, the evidence related to the . . . alleged false rape claim [against Derick] . . . is not evidence that would demonstrate she's biased against Mr. Ott or that she had a motive to lodge a false accusation against him. And the Lee court goes on to say that courts generally disfavor evidence that's intended to suggest that because a person acted wrongly in the past, they must be doing so now . . . that's the first, that there has to be some relevance.
>
> The second is the prejudice that might occur . . . the issue is whether or not the evidence is so prejudicial as to disrupt the fairness of the fact finding process at trial.
>
> . . . .

> [Lee concluded that] a prior false rape accusation may distract and inflame jurors with evidence of arguable probative worth. This is particularly true, they state, when the prior false accusation bears no direct relationship to the issues of the case, which is what I have found here . . . that the evidence is too thinly minimal or too thinly relevant. It is very prejudicial and in balancing it, the interest of a fair trial outweighs the defendant's need for this otherwise minimally relevant evidence.

Consistent with Lee, there is no demonstrated motive or bias toward Ott from this allegation. The evidence about an alleged false rape allegation, with no connection to Ott, is simply propensity evidence. It is not enough to suggest that because T.P. lied about a past rape, she would be lying about incest. The topics are only tangentially related and as stated in Lee, propensity evidence does not become admissible because it is topically related to the present charges. Lee, 188 Wn.2d at 490.

Additionally, any minimally probative value was substantially outweighed by unfair prejudice to the State. Lee held that this type of propensity evidence had an effect "similar to the prejudice caused by prior sexual acts," and disrupted the State's compelling interest in encouraging victims of abuse to come forward. 188 Wn.2d at 494-95. The same rationale applies here. The trial court did not abuse its discretion in applying Lee and prohibiting cross-examination based on the incident.

d. York and McSorely

Ott argues that the court violated the standards applied in State v. York, 28 Wn. App. 33, 621 P.2d 784 (1981), and State v. McSorely, 128 Wn. App. 598, 116 P.3d 431 (2005), when it excluded cross-examination based on T.P.'s prior incidents of dishonesty. Both cases are distinguishable.

In York, the defendant was charged with delivery of a controlled substance. 28 Wn. App. at 34. The evidence consisted of testimony from an undercover agent who

claimed to have bought two bags of marijuana from the defendant. York, 28 Wn. App. at 34. The defense sought to present witnesses that the agent had a motive to fabricate the claim and to cross-examine the agent on his dismissal from a similar position with a sheriff's department for "irregularities in his paperwork procedures, and his general unsuitability for the job." York, 28 Wn. App. at 34-35. The trial court excluded the impeachment evidence as collateral evidence. York, 28 Wn. App. at 35.

The Court of Appeals did not address ER 608(b), but instead considered York's constitutional right to cross-examine witnesses. The court explained that the State introduced the agent's background as a military policeman investigating drug usage and his previous work as an undercover agent. But the State then sought pretrial suppression of the agent's prior employment as a trainee in drug related undercover work and his subsequent dismissal. York, 28 Wn. App. at 37. The court explained "'[i]t would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it.'" York, 28 Wn. App. at 37 (quoting State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)). The court concluded that, as a matter of fundamental fairness, the "defense should have been allowed to bring out the only negative characteristics of the one most important witness against York." York, 28 Wn. App. at 37.

In McSorely, the State's key witness was a 10-year-old boy who testified that the defendant drove by the boys' school bus stop a couple of times and then pulled over to order the boys in the vehicle. 128 Wn. App. at 600. The defense sought to cross-examine the boy on two prior instances of yelling wildly at passing cars and yelling

profanities and pretending to have crashed his bike in the middle of the road. McSorely, 128 Wn. App. at 600. The trial court excluded both incidents. McSorely, 128 Wn. App. at 600.

The Court of Appeals reversed. McSorely, 128 Wn. App. at 610-11, 614. Applying Clark, 143 Wn.2d at 766, and York, the court held that, on remand, the defendant must be permitted to cross-examine the boy on his prior pranks, provided the defense could show they were not too remote in time to be relevant. McSorely, 128 Wn. App. at 614. The court found error mainly because the trial court excluded the "only available impeachment," and it was "[o]nly because of [this] exclusion [that] the prosecutor [was] able to assert in closing argument, without controversion, that [the victim] . . . is not . . . going to say things that aren't true." McSorely, 128 Wn. App. at 613.

But unlike York and McSorely, the trial court did not exclude the only impeachment evidence, rather, it specifically admitted acts of dishonesty with some relationship to the case. The trial court allowed Ott to introduce T.P.'s prior convictions, her theft from Lacey and lie to Lacey, as well as her borrowing money under false pretenses to buy drugs. Based on defense's cross-examination of T.P., Ott argued extensively about T.P.'s lack of credibility, memory, and motivation based on her drug use, rehab, relapse, and "meth-induced psychosis."

The trial court did not abuse its discretion in applying ER 608(b) and limiting the scope of cross-examination of T.P. by precluding use of the three challenged incidents of dishonesty.

2. Right to Confrontation

Because we conclude that the trial court's evidentiary rulings were not an abuse of discretion, we next consider whether the trial court violated Ott's Sixth Amendment right to confrontation by limiting the scope of the cross-examination of T.P. Jennings, 199 Wn.2d at 59; Arndt, 194 Wn.2d at 797-98.

A defendant has a constitutional right to present a defense and to confront an adverse witness. U.S. CONST. amends. VI, XIV; WASH. CONST. art. I, § 22. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); State v. Arredondo, 188 Wn.2d 244, 265, 394 P.3d 348 (2017). "Cross-examination is the 'principal means by which the believability of a witness and the truth of his testimony are tested.'" Arredondo, 188 Wn.2d at 255 (quoting Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)). "Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question. . . . As such, the right to confront must be zealously guarded." State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002).

But neither the right to present a defense nor the right to cross-examination is absolute. "'The scope of such cross examination is within the discretion of the trial court.'" Arredondo, 188 Wn.2d at 266 (quoting State v. Russell, 125 Wn.2d 24, 92, 882 P.2d 747 (1994)). A limitation on cross-examination violates the confrontation clause where the testimony sought by the defendant, but excluded by the trial court, is (1) minimally relevant, (2) not so prejudicial as to disrupt the fairness of the fact-finding process at trial, and (3) the defendant's need for relevant but prejudicial information outweighs the State's interest in withholding that information from the jury.

Arredondo, 188 Wn.2d at 266 (citing State v. Jones, 168 Wn.2d 713, 720-21, 230 P.3d 576 (2010); Darden, 145 Wn.2d at 622; State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)). "No State interest is sufficiently compelling to preclude evidence with highly probative value." Arredondo, 188 Wn. 2d at 266. We review de novo whether the trial court's evidentiary rulings violated a defendant's Sixth Amendment rights. State v. Orn, 197 Wn.2d 343, 350, 482 P.3d 913 (2021).

Here, we agree with the trial court that all three excluded incidents of alleged prior dishonesty were, at best, of only minimal relevance. Consistent with Lee, none of the three incidents related to the issues or personalities in the case. The incidents did not demonstrate that T.P. was biased against Ott or relate to the allegations of incest between T.P. and Ott. Instead, the incidents were little more than propensity evidence—because T.P. had previously given false statements she must be doing the same here. "A prior false statement admitted for this purpose has questionable probative value because it does not directly relate to issues in the case." Lee, 188 Wn.2d at 489-90.

We also agree with the trial court that, consistent with ER 403, ER 404, ER 608(b), and Lee, Ott's need for the three excluded incidents did not outweigh the State's interest in withholding the propensity evidence from the jury. Finally, as discussed earlier, the trial court's actions precluding cross-examination based on the three prior incidents only limited the scope of Ott's cross-examination. The trial court allowed Ott to introduce T.P.'s prior convictions, her theft from Lacey and lie to Lacey, as well as her borrowing money under false pretenses to buy drugs. Based on defense's cross-examination of T.P., Ott argued extensively about T.P.'s lack of credibility, memory, and

motivation, based on her drug use, rehab, relapse, and "meth-induced psychosis." The trial court's limitation on the scope of cross-examination did not violate Ott's right to confrontation.

Affirmed.

Mann, J.

WE CONCUR:

Coburn, J.

NIELSEN KOCH, PLLC

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