COA No. 34334-1-III

NO. 95121-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EDUARDO CHAVEZ,

Petitioner.

PETITION FOR REVIEW

RESPONDENT'S BRIEF
IN OPPOSITION TO REVIEW

Respectfully submitted:

by: Teresa Chen, WSBA 31762
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Petitioner/Defendant.

III. ISSUE

1. Has the Defendant established a conflict of laws where the Court of Appeals in fact relied upon and strictly applied the particular authority at issue?

2. Has the Defendant established an issue of substantial public interest where the Court of Appeal found the trial court tenably excluded so-called "reputation" testimony based on the conversation of 3-5 youth at a skate park discussing their opinions of the veracity of the minor sexual assault victim's allegations as having insufficient foundation?

IV. STATEMENT OF THE CASE

The Defendant Eduardo Chavez appeals from a jury conviction for the second degree rape of A.S.. CP 31, 120-40, 151-53.

A.S. was not getting along with her father and decided to run away from home. RP 139-40, 155, 159-60. She was 15 years old. CP 56; RP 139, 154. 25 year old Jesus Torres picked up A.S. from her house at midnight. RP 155-56, 159-60, 244. Mr. Torres took A.S. and her girlfriends A.B. and M.B. (12 and 13 years old) to his house in Walla Walla. RP 158-59, 161, 200, 245, 262-66. There, A.S. smoked some marijuana and drank "a lot of vodka" straight from the bottle as well as in large mixed drinks. RP 162-64, 245-46, 269. A.S. was so inebriated that she does not remember exactly how she lost her eyebrows. RP 246, 270. Eventually A.B. and M.B. passed out or fell asleep. RP 245, 281.

Mr. Torres and his brother Gustavo decided that, because A.S. was a runaway, she could not sleep there. RP 165, 380, 393. They called the Defendant Eduardo Chavez to come get her. RP 165, 246. A.S. did not know the Defendant, but was able to identify him later by the tattoo over his eyebrow. RP 165-66, 168, 185, 249.

Under the street lights, she walked to his house carrying a bottle of vodka. RP 166-67, 396. She had trouble walking due to her intoxication. RP 164. There were no lights on in the Defendant's house, and A.S. had to hold on to the Defendant's back to make her way. RP 167, 185, 401. There were two beds in the room, one already occupied by two people.

RP 167, 349 (also runaway girls). The Defendant said that he was going to sleep on the floor, and that she could have the other bed. RP 167-68, 247. She sat down on the bed, drank some more vodka, and then passed out. RP 167, 246-47.

When the Defendant woke her the next morning, A.S.'s pants were unzipped and twisted around her ankles, and her shirt was raised. RP 168-72, 247-48. Her hips hurt, and she had hickeys on her neck. RP 169-72, 247-48, 253-54, 259, 273. She "just kind of wanted to get out of there." RP 172. Mr. Torres and his brother picked her up again, and A.S. told A.B. and M.B. that she thought she had been raped. RP 171, 273-74. A.S. seemed scared, freaked out, sad, and upset. RP 273-74, 279-80. She was dropped off at her boyfriend's house, where her father located her in the late afternoon and took her home. RP 141, 173, 248.

A.S. had a headache, reeked of alcohol, and was groggy, hung over, and in a fog or a daze until the next day. RP 144-45, 149, 178. At home, A.S.'s aunt and grandmother were very angry with her. RP 141-42, 174. A.S. left to family friend Sheridan Breeding's house nearby where she was able to process what had happened to her. RP 142, 174-76, 290. A.S. told Ms. Breeding she had nowhere to go. RP 291. A.S. looked "rough" as if she had been at a party; her hair had been cut and her

eyebrows shaved. RP 294-95. A.S. had vaginal soreness and scratchiness, and she realized that she had probably been raped. RP 146, 176.

Ms. Breeding's mother Christa Shannon was not home; she runs a foster care for disabled adults out of another residence. RP 328-29, 334. Ms. Breeding's father took his daughter and A.S. to see Mrs. Shannon. RP 329. Mrs. Shannon testified that A.S. looked tired, sleep-deprived, and not herself; she had alcohol on her breath. RP 330, 333.

The girls went downstairs by themselves. RP 331. There A.S. told Ms. Breeding that she had been raped. RP 292. Ms. Breeding shared with her mother that A.S. had been raped and wanted to change her underclothing. RP 294, 331. A.S. shared the details of the night with Mrs. Shannon, consistent with A.S.'s trial testimony. RP 332-33.

A.S.'s family and the police were called, and a rape kit was collected. RP 143-45, 176-78, 240-41, 341. Walla Walla police officer Tracy Klem interviewed A.S. on videotape that was played for the jury. RP 241-52.

The Defendant provided multiple inconsistent statements. Initially he denied knowing anything about A.S.. RP 342. When his DNA was identified on A.S.'s underwear as well as on perineal, cervical, and anal swabs, then the Defendant claimed the sex had been consensual. RP 345-

47. Initially he denied knowing Jesus Torres, but later admitted knowing even Jesus' criminal history. RP 343, 393. He told police he barely knew Gustavo Torres, but at trial he admitted they had known each other for years. RP 343, 391. At trial, he tried to claim the police brought him to the station in custody. RP 395. However, he had been recorded in the police interview saying that he came to the police station on his own. RP 411-13.

The Defendant testified that he had encountered A.S. just as she had reported. RP 393. He had learned A.S.'s age from Gustavo Torres prior to the sex and had been "gunning to hit that." RP 388, 419. Although A.S. had consumed so much alcohol and marijuana that she remained in a fog the next day and continued to reek of substances the next afternoon, the Defendant testified that A.S. did not smell of alcohol or marijuana or have trouble walking. RP 144-45, 149, 419. He gave multiple inconsistent statements about A.S.'s degree of inebriation, ultimately claiming she "wasn't F-upped." RP 348. He could not answer whether it would have been wiser to find out whether A.S. had the ability to consent. RP 420-21.

The Defendant testified to multiple bad acts. He admitted the two other people sleeping in his room were also runaway girls, one with a

warrant for her arrest – information he withheld from his parents. RP 349, 418. He admitted that he had burned his parents' fence in an outdoor grill that night. RP 401, 423.

The Defendant said he had not known A.S.'s name, but claimed it was not at all suspicious or uncommon for strange girls to remove their clothes and throw themselves at him. RP 347, 417-18, 422. He bragged about his stamina, claiming he had clocked the sex act. RP 404-06, 422.

Young Ms. Breeding had an expectation that a rape victim should behave a certain way. RP 293, 297. And at trial, defense counsel attempted to elicit her opinion testimony.

> And if understood correctly on direct examination when you were answering questions from Ms. Mulhern a bit ago, you said something about that your mom said maybe you shouldn't believe her because you weren't there or something like that? ... And that's because you were having a hard time believing her; weren't you?

RP 298. When ordered to rephrase, defense counsel then asked what A.S.'s reputation was among the students at school. RP 298-99. The court excused the jury to permit a proper voir dire. RP 299-303.

Ms. Breeding was 14 at the time of her testimony. RP 290. Under cross-examination, she was easily led. RP 297, 300-01. So led by defense counsel, she said that A.S. did not have a good reputation in the school

community for truthfulness. RP 300-01. However, when pressed, Ms. Breeding was only able to say that she had heard other people discussing whether they believed A.S. had been raped. RP 300-02 ("They were just saying how she was raped and that they didn't believe her"). Ms. Breeding could not recall who these 3-5 kids were. RP 302, 318.

The court excluded the testimony, stating:

> The Court finds that the relevant factors of the frequency of contact between members of the community, the amount of time known in the community and the role the person played in the community and the number of people, that that foundation has not been met and that that opinion statement with reference to truthfulness and veracity will not come in.

RP 316.

V. ARGUMENT

The sole issue on appeal was whether the trial court abused its discretion in refusing to admit opinion testimony on the credibility of the minor-aged rape victim under the guise of so-called "reputation" evidence. This petition does not present any issue deserving of discretionary review.

A. THE PETITION DOES NOT DEMONSTRATE ANY CONFLICT OF CASE LAW.

The Defendant claims the unpublished opinion conflicts with *State v. Land*, 121 Wn.2d 494, 851 P.2d 678 (1993). Petition for Review at 6

(citing RAP 13.4(b)(1)). In fact, the opinion specifically relied upon, applied, and followed *State v. Land.* Unpublished Opinion at 6-8.

Relying upon the *Land* factors, the trial court considered the frequency of contact between community members, the amount of time the victim had been known in the community, and her role in the community. Unpub. Op. at 8. The victim had only been at Weston Middle School a short time in her short life, and then she was in a different grade than the witness. The witness had spoken with her own classmates, not the victim's classmates. The record did not establish that these people knew the victim well or for any length of time. And the record did not establish that their opinions were based on actual general reputation, but only their personal opinions about the veracity of the rape allegation, i.e. an event that occurred after the victim had changed schools. Those opinions appeared to have been formed after the victim had left their community.

Applying the established law and standards, the Unpublished Opinion upheld the trial court's discretionary decision (to exclude evidence where the *Land* factors had not been satisfied) as tenable. *Id.*

The majority noted the Defendant's argument had misrepresented the trial court's ruling to be that a school cannot be a community.

Opening Brief of Appellant at 5, 8. The court of appeals noted that "the record does not read as Mr. Chavez argues it does." Unpub. Op. at 6.

THE COURT:	Yeah. No, it is not coming in, counsel.
MR. MCCOOL:	And, again, are you indicating it is because it is fifth and sixth graders?
THE COURT:	No. I'm indicating the foundation has not been met.

RP 322. "Trial counsel attempted to bait the court into ruling that a school was not a community, but the trial judge declined to bite on the argument. RP 321-322." Unpub. Op. at 7.

This interpretation of the factual record does not establish a conflict of case law. The majority opinion did not create new law or disagree with any case law. It only applied decades-old decisions of the Washington Supreme Court. *State v. Lord*, 117 Wn.2d 829, 822 P.2d 177 (1991) (five factor test for admitting reputation testimony); *State v. Land*, *supra*, (defining a "community" under ER 608).

B. THE TRIAL COURT'S DISCRETIONARY DECISION TO EXCLUDE IMPROPER EVIDENCE DOES NOT PRESENT AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

The Defendant claims that, because the application of *Land* prevented him from presenting what amounted to mean girl opinion testimony, that this presents an issue of substantial public interest.

Petition for Review at 8 (RAP 13.4(b)(4)). It does not. The court appropriately investigated and excluded so-called reputation testimony that lacked a proper foundation.

A trial court "may" admit evidence of a witness' reputation to attack or support the witness' credibility. ER 608(a). "The standard of review for challenges to the foundation of reputation testimony is abuse of discretion." *Boyd v. Kulczyk*, 115 Wn. App. 411, 416, 63 P.3d 156, 160 (2003).

The trial court excluded the so-called reputation testimony on foundational grounds. The party seeking to admit the evidence must lay a proper foundation. Unpub. Op. at 6 (citing *State v. Lord,* 117 Wn.2d 829, 873, 822 P.2d 177 (1991) (quoting 5A KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 231, at 202-204 (3d ed. 1989)). The evidence is limited to reputation for truth and veracity in the witness' own community in a relevant period of time. *Id.* In determining a valid community, the court considers the size of the community, frequency of contact, time known in the community, and the role the person play in the community. Unpub. Op. at 7 (quoting *State v. Land*, 121 Wn.2d at 500).

Ms. Breeding spoke with 3-5 people at a skate park regarding

whether they believed the rape had taken place. RP 300-02, 318. From that conversation, Ms. Breeding was prepared to testify as to A.S.'s reputation for truthfulness in the community. The Defendant argues that whether the evidence was "only how a few middle school students felt" is a decision for the jury, not the judge. Petition at 12. If the evidence is only the opinions of a few people, it is not general reputation evidence. This is the proper subject for a court's evidentiary ruling. It is also proper for a trial court to control evidence so that the jury's time is not wasted by a general swearing contest of little probative value. ER 403.

The superior court found the foundation was not met, because the Defendant had not established a valid community. RP 316. The court of appeals found this to be tenable.

> Mr. Chavez sought to impeach A.S. with her alleged reputation at her former school, one that she had only attended for a portion of her eighth grade year. The witness was not even a classmate, but a student who had trailed her through the years at various schools. It appears that the children to whom S.B. had talked were her classmates rather than A.S.'s, although the record is less than clear on that point. There was no discussion about how well those children knew A.S. nor how long they had known her or her purported reputation. It also is very unclear that they were reporting an actual reputation as opposed to their personal opinions about A.S. It was also unclear whether the reputation was recent rather than one developed years previously in her grade school days. In short, S.B. did not

> provide sufficient information to establish the foundation recognized in *Land.*

Unpublished Opinion at 6-8 (emphasis added).

The record does not establish who the 3-5 speakers were or what familiarity they may have had with A.S. at what period in her life. That is, we have no information as to the frequency of contact factor. Nor do we know the role A.S. played in the community such that her business would be known to others generally or these 3-5 others specifically. Because A.S. transferred schools due to bullying (RP 195-97) and because she spent time with friends who were several years younger than her (RP 200), it is not likely she was well known by her classmates or played any significant role in her class such that she had any reputation at all in the community. All we know[1] is that there are approximately two hundred students at Weston (RP 306), and that A.S. was at Weston for less than a year. RP 195-97.

Whether Ms. Breeding's friends would know A.S. is likewise doubtful. A.S. was in a different year than Ms. Breeding. RP 313. They

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[1] The State reasonably disputes the Defendant's claims that Weston Middle School students spend as many hours in each other's company as adults do in the work place or that A.S. "regularly attended." Petition at 11-12. This is neither the record nor the statistic. ER 201(b). Students have shorter school days and longer vacations than adults. The record did not inquire into the breadth of A.S.'s truancy during her abbreviated and friendless stay at Weston.

only had "some" friends in common. RP 197. They had different school experiences. A.S. was bullied; Ms. Breeding was popular. RP 196, 198. Where Ms. Breeding had both her parents, A.S. was raised by her grandparents and struggled with her father's many issues. RP 138-40, 155, 160, 329. A.S. did not hang out with classmates, but with an unusual band of companions. RP 155-59, 161-64, 200, 262-66.

A valid community must be " 'neutral enough [and] generalized enough to be classed as a community.' " *State v. Lord,* 117 Wn.2d 829, 874, 822 P.2d 177 (1991) (quoting *Parker v. State,* 458 So.2d 750, 753-54 (Fla.1984)). A.S. denied telling any youth about the rape other than Ms. Breeding, A.B., and M.B.. RP 218. Ms. Breeding was not protective of A.S.'s privacy. She discussed the matter in a public skate park and claims she does not even remember with whom. Perhaps Ms. Breeding is the source of the rumors, and her listeners merely congenially agreed that A.S.'s behavior when she disclosed to Ms. Breeding did not fit their expectations of how a rape victim should act. These few kids at the skate park who chose to judge a rape allegation without personal knowledge of the events are neither neutral nor sufficiently generalized to be classified as a community.

The Petitioner cites three cases in support of his claim. Petition at

10-11. The first two are plainly distinguishable on the facts. And the third provides no facts from which to make a comparison.

In *State v. Land*, the defendant objected to the admission of his bad reputation for truthfulness in the manufacturing community. *State v. Land*, 121 Wn.2d at 496. Relying on *State v. Swenson,* 62 Wn.2d 259, 283, 382 P.2d 614 (1963), he argued that one's community is defined as "where a person lives, not where that person works." *State v. Land*, 121 Wn.2d at 496, 497. The *Land* court overruled *Swenson* and created our current rule. And it held that there was a sufficient foundation where Land had operated as a salesman in a close-knit community for several years, making numerous personal contacts with various members of the industry and had a well-known bad reputation for veracity. *Id.* at 500.

In *State v. Callahan*, 87 Wn. App. 925, 934, 943 P.2d 676 (1997), the case was reversed to permit Callahan to argue self-defense. The opinion also instructed that on remand the defendant could present evidence of his reputation in his workplace community for peacefulness, where this had previously been excluded under *Swenson*. *State v. Callahan*, 87 Wn. App. at 936. After *Land*, Callahan's workplace satisfied the meaning of a community where he was an adult who worked seven days a week at the Weyerhauser plant with 1,100 people who "were,

in many ways, better positioned to have opinions regarding Callahan's reputation than the community in which he resided." *State v. Callahan*, 87 Wn. App. at 935-36 ("assuming it is not objectionable" on other grounds).

State v. Carol M.D., 89 Wn. App. 77, 948 P.2d 837, 847 (1997), *review granted, cause remanded sub nom. State v. Doggett*, 136 Wn.2d 1019, 967 P.2d 548 (1998) provides no analysis of the point.. Like *Callahan*, the decision in *Carol M.D.* was reversed on grounds unrelated to the suppression of reputation evidence. *State v. Carol M.D.*, 89 Wn. App. at 88 (reversed for erroneous admission of child hearsay statements); *Id* at 96 n. 3 ("The trial court's decision to exclude [reputation] testimony is not a basis, by itself, to reverse Mrs. D.'s conviction."). Like *Callahan*, the lower court had excluded reputation testimony under the out-dated *Swenson* definition of reputation. As the Defendant notes, there is no other information, other than the improper reliance on *Swenson*, to explain the ruling. Petition at 11 (*Carol M.D.* did not analyze the foundation under the *Land* factors). Accordingly, nothing more can be interpreted from this case.

The court of appeals could have affirmed the lower court on any number of grounds. *State v. Huynh*, 107 Wn. App. 68, 74, 26 P.3d 290, 294 (2001) (reviewing court need not rely on the rationale provided by the

lower court, but may affirm on any grounds supported by the record).

Ms. Breeding had two types of possible testimony to offer. First, she had personal knowledge of instances when A.S. had lied to a parent about having permission to visit a friend or to a teacher about completing an assignment. RP 305. This would be inadmissible under ER 404(b) (excluding evidence of specific bad acts offered to prove the character of a person in order to show action in conformity with character). Even if Ms. Breeding knew that others believed A.S. to be a liar in this capacity, and that is not the record, it would have been collateral to A.S.'s credibility on a rape allegation. *See* ER 403 (probative value substantially outweighed by unfair prejudice); *State v. Griswold*, 98 Wn. App. 817, 991 P.2d 657 (2000) (court did not abuse its discretion in excluding impeachment of child victim with prior false statement where the matter was collateral to allegations of sexual abuse). The suggestion that a child's past white lie about a late homework assignment was proof of a fixed character of dishonesty which would speak to a tendency to lie about a rape would be unfairly prejudicial and not at all probative of the truth.

And, second, Ms. Breeding had a conversation with a few kids on the subject of the rape allegation. RP 302 ("They were just saying how she was raped and that they didn't believe her"), 318. Their opinions as to

her veracity on the specific rape allegation do not amount to general reputation evidence under ER 608(a)(1). *State v. Land*, 121 Wn.2d at 500 ("evidence based solely on personal opinion is disallowed") (citing ER 608 comment). The rule only admits a reputation for having a "character for truthfulness or untruthfulness," and only if "the reputation is drawn from the community's perceptions, not personal opinion." *Boyd v. Kulczyk*, 115 Wn. App. at 416. No witness may opine on ultimate issues of the defendant's or victim's credibility on the charged offense, because it is said to invade the exclusive fact-finding province of the jury. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125, 131 (2007).

> A witness's expression of personal belief about the veracity of another witness is inappropriate opinion testimony in criminal trials. *State v. Montgomery,* 163 Wash.2d 577, 591, 183 P.3d 267 (2008). Admission of such testimony may be reversible error. *State v. Demery,* 144 Wash.2d 753, 759, 30 P.3d 1278 (2001).

State v. Perez-Valdez, 172 Wn.2d 808, 817, 265 P.3d 853, 857 (2011); *See also State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125, 131 (2007).

The court may also have found the evidence to be unreliable. Ms. Breeding could not remember who had made the statements, when, and her memory as to the number of speakers kept going down and down in number. RP 304 (eight to ten people), RP 318 (three to five people).

The court could have excluded the evidence under ER 403 as unhelpful and a confusing waste of the jury's time. Uninformed opinions on matters for which one has no personal knowledge are irrelevant, without probative value, and unduly prejudicial. ER 402; ER 403; ER 602. Ms. Breeding's testimony about others' opinions would also have been inadmissible as hearsay. ER 801(c); ER 802. And it was inadmissible under ER 701 as opinion testimony by a lay witness that was not based on any witness' perception, not based on any specialized knowledge, and not helpful to the trier of fact.

The court may also have excluded the testimony, because A.S. was too young to have a formed character for truthfulness or untruthfulness. *State v. Witherspoon*, 180 Wn.2d. 875, 890, 329 P.3d 888 (2014) (one of the primary differences between children and adults is that "children's characters are not well formed, meaning that their actions are less likely than adults to be evidence of depravity"); *In re Lundy*, 82 Wash. 148, 152, 143 P. 885, 887 (1914) ("there is ordinarily a lack of mature discretion, discriminating judgment, and stability of character in children under the age of 18 years"); ER 609(d) (evidence of juvenile adjudications found beyond a reasonable doubt are still generally not admissible).

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court deny the petition for discretionary review.

DATED: November 3, 2017.

Respectfully submitted:

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David P. Gardner dpg@winstoncashatt.com	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED November 3, 2017, Pasco, WA **Original filed at the Supreme Court, Temple of Justice, P.O. Box 40929, Olympia, WA 98504-0929 through the courts' portal.**

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