SUPREME COURT NO. 99952-0
COURT OF APEALS NO. 80042-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEVIN SCOTT THOMAS,

Petitioner.

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

The Honorable David Svaren, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Kevin Scott Thomas, the appellant below, seeks review of the Court of Appeals decision State v. Thomas, noted at ___ Wn. App. 2d ___, 2021 WL 777829, No. 80042-6-I (Mar. 1, 2021) (Appendix A), following denial of his motion for reconsideration on June 3, 2021 (Appendix B). Mr. Thomas cites the appended slip opinion in this petition.

B. ISSUES PRESENTED FOR REVIEW

1a. Does the Court of Appeals decision conflict with ER 608 and cases applying ER 608, such that review should be granted pursuant to RAP 13.4(b)(1) and (2)?

1b. Does the Court of Appeals decision conflict with constitutional precedent that exclusion of highly relevant evidence to the defense violates the Sixth Amendment and article I, section 22 rights to present a defense, such that review should be granted under RAP 13.4(b)(1), (2), and (3).

2. Does the Court of Appeals decision conflict with constitutional precedent that prohibits opinion evidence that embraces the ultimate fact, meriting review under RAP 13.4(b)(1), (2), and (3)?

3. Mr. Thomas's former public defender advised his future client, Ryan Keith, to snitch on Mr. Thomas, Mr. Keith did so, and Mr. Keith testified against Mr. Thomas at trial. Because of the ongoing duty

of attorneys to their former clients to avoid conflicts of interest and because this important question has not been answered in the case law, did the former attorney's actions violate Mr. Thomas's Sixth Amendment and article I, section 22 right to counsel, such that review should be granted under RAP 13.4(b)(3) and (4)?

C. STATEMENT OF THE CASE

Mr. Thomas and his ex-wife Jasmine Bolzell have three children, including teenage son C.T., teenage daughter M.T., and a younger son. RP[1] 186. According to Ms. Bolzell, C.T., and M.T., the marriage ended in August 2013 and the couple separated. RP 199, 231, 340.

In April 2016, then 10-year-old M.T. told her brother, and later the same day her mother and stepfather, that Mr. Thomas had "raped" her. RP 193, 227-28, 337. M.T. testified to that two incidents occurred in the summer of 2013, when she would have been eight, when the family lived in a house in Mount Vernon (or the "chicken" house on account of the family owning chickens in the property).[2] RP 332-33. As for the first incident, M.T. testified,

> I recall one day my mom was going to get groceries and Kevin told her that he wanted to cuddle with me So I went to his room, and few minutes go by cuddling with him and all

[1] Thomas refers to the consecutively paginated volumes of trial transcripts as "RP" and to the separately paginated sentencing transcript as "SRP."
[2] M.T. was born in mid-June 2005. RP 327.

> the sudden he grabs me, takes my hands, pulls off my pants, tells me to lay down, and he put his penis inside my vagina.

RP 333. She said he held her arms and legs and "I told him to stop," but could not recall any other details because she went to play with dolls to distract herself because she "didn't want to remember it." RP 334. M.T. testified that later during the same summer,

> One day I was watching TV in the living room; that's what little kids do in the summertime. And he took my hand, took me to his room where, again, he put me on the side of his bed, grabbed my hands, pulled my pants down. I was bent over. He put his penis in my vagina.

RP 335. This time, she said she was on her stomach and told him to stop, felt scared, but could not remember Thomas saying anything or any other details, so M.T. "went to go play with my dolls to distract myself." RP 336. M.T. said she could describe only these two events in the summer of 2013 but tried to forget or block out her other memories. RP 353. She said she could not describe more details of the 2013 incidents themselves. RP 354.

Despite having repeatedly described an inability to remember other abuse or details about any abuse, M.T. stated before trial that she had remembered another occasion in the Mount Vernon house when she was only four or five years old, explaining her "mom went to get groceries; she comes back; these events happened; you put your clothes back on and just help your mother unpack the groceries." RP 366. In fact, during a defense interview, M.T. stated that *this* occasion was when her mother directed her to

cuddle with Thomas, acknowledging during her trial testimony that the incident occurred earlier than the summer of 2013 as she had claimed moments earlier. RP 364-65

M.T. agreed that "much of this comes to [her] in connection with [her] dreams" and that "in a sense" "[t]hese kind of memories are sort of derived from dreams." RP 368-69. When asked, "But these memories in your experience frequently are associated with your dreams," M.T. responded, "Not memories, they are my dreams." RP 369. M.T. also agreed that her memories and dreams were associated. RP 369.

On redirect, the state refocused M.T. on the two incidents that allegedly occurred in the 2013, which she insisted did happen, and she also said other rapes happened "basically everywhere." RP 372-74. Nevertheless, she could provide no detail as to any other incident aside from the two she had described without much detail. RP 374. And she acknowledged she again that she had previously remembered only two incidents, one in Mount Vernon and one in Everett, and that her memories and dreams sometimes get crossed. RP 374. Based on the two incidents in the summer of 2013, the state charged Mr. Thomas with two counts of first degree child rape and two counts of first degree incest. CP 19-21.

Given that M.T.'s memories or dreams lacked specificity and detail in many respects, the defense sought to introduce evidence of a conversation

M.T. reported having with her mother, which "triggered" her memory of Mr. Thomas's sexual game-playing witnessed by her mother when she was four or five years old during the mother-grocery-shopping/cuddle incident. RP 156, 160. According to M.T., the triggering conversation consisted of her mother describing her own sexual activity with Thomas. RP 156-57. M.T.'s mother claimed this conversation never happened and claimed never to have witnessed any or suspicious game-playing of any kind. RP 160. The defense wished to elicit both M.T.'s description of what triggered her memory of alleged abuse and the contradictory testimony of Bolzell to attack M.T.'s perception of reality and her overall credibility.

The prosecution complained that the alleged incident was outside of the charging period and that it was barred by ER 608(b) because the contradiction constituted impeachment by specific instances of conduct. RP 159-62. Yet, the description M.T. gave about what happened when she was four or five matched the description she gave about what happened during the first summer 2013 rape. Compare RP 333 with RP 364-65.

The trial court denied the defense request to elicit evidence about M.T.'s supposedly triggering conversation with her mother but permitted the defense to put on offers of proof with Bolzell and M.T. RP 163-64. During the offer of proof, Bolzell testified she had never had a conversation with M.T. about sex acts that occurred between Bolzell and Thomas. RP 176.

She also could not recollect walking into M.T.'s bedroom and finding the two in bed together or playing some kind of game. RP 176-77, 180. Before M.T. testified, Thomas was permitted to supplement his offer of proof with her. M.T. described the incident in her bedroom that occurred when she was four or five, when her mother went to get groceries. RP 317. M.T. described being in her bed with Thomas and Thomas forcing her to perform a sex act on him when her mother came into the room; M.T. reported that Thomas was undressed. RP 320-21. M.T. said Thomas said they were playing a sort of game and her mother left and shut the door. RP 320-21. M.T. stated that this particular memory was triggered when she and her mother had a conversation within the last six to 12 months during which her mother described sex acts between her and Thomas. RP 318-19, 321. The trial court maintained its ruling that this evidence was extrinsic and inadmissible under ER 608. RP 325-26. So, the defense was left with cross-examining M.T. regarding the various inconsistencies in her own statements before and during trial, as described above, but was never able to attack M.T.'s accounts of what triggered one of her memories about one of the incidents she described or the accuracy of the memory itself (sexual game-playing) with the contradictory account of Bolzell.

During trial, the prosecution called Jamie Fredeen, a clinician at Compass Health. RP 388. When asked to describe her work as a clinician,

Fredeen stated, "So I provide mental health therapy for children, adolescents, young adults, and their families that are coping with sexual abuse." RP 388-89. The prosecution attempted to elicit the reason Fredeen was seeing [M.T.], as though it weren't obvious enough, and the defense objected that such was "an inappropriate comment on the evidence basically." RP 391. The prosecutor said he would "just move on," but didn't, continuing to discuss the subject matter of counseling sessions with M.T. RP 391-92. When Fredeen invoked posttraumatic stress disorder, the defense objected "[a]ssuming facts not in evidence." RP 392. The state responded, "she's talking generally about therapy and not anything specific with [M.T.], just generally why." RP 392. The defense said, "Then it's irrelevant" and the stated responded, "It's not irrelevant. She's her counselor. She's been seeing her for close to two years at this point." RP 392. The court overruled the defense objection. RP 392.

When the state elicited Fredeen's testimony that "Maddy was diagnosed with Posttraumatic Stress Disorder," the defense lodged a hearsay objection and claimed Fredeen had not made this diagnosis. RP 393. Fredeen then said she had made diagnoses, including posttraumatic stress and major depressive disorders, agreeing these disorders were "related to the issues she was seeing [Fredeen] about." RP 393. Fredeen also said she discussed self-harm behaviors with M.T. and discussed generally her

treatment goals with M.T. and how she has helped M.T. cope with PTSD. RP 394-96.

The state asked Fredeen what M.T. was most distressed about, drawing another hearsay objection. RP 396. The state responded, "she's talking about part of counseling and helping her. That's the exact point of having her on the stand today," and the court overruled the objection. RP 396. Then Fredeen testified that on the "top tier" of M.T.'s distress was "talking about it"; "it" was "[b]eing raped by her father." RP 396. The court sustained the defense objection and struck this answer. RP 396. However, the trial court overruled the defense's objections to Fredeen's discussion of what specific effect disclosure had on M.T.'s PTSD symptoms. RP 399-400. Fredeen stated M.T. "was experiencing increased heart rate, feeling ashamed, guilty, nervous, scared, feeling that no one would love her, increase of symptoms." RP 400. In closing, the prosecution emphasized M.T.'s sex abuse counseling and the components of posttraumatic stress she supposedly discussed by Fredeen. RP 474-75.

In addition, Ryan Keith, who was in jail at the same time as Thomas on failure to register as a sex offender and drug possession charges, was a witness for the prosecution. RP 300-07. He stated that Thomas rated the sexual attractiveness of his daughter in jail and commented on her body size and the size of her breasts. RP 304-06. Keith had been represented by Mr.

Thomas's former public defender, who had represented Mr. Thomas from August 2017 to April 2018. CP 14-15; RP 16-17. In Keith's defense interview, Keith said he brought up the supposed conversations he had with Mr. Thomas to his attorney, who "suggested that they should be disclosed to law enforcement." CP 17. Mr. Thomas attempted to explore more about the advice Keith received to involve law enforcement, but Keith's attorney objected to further questioning on this subject during Keith's interview on the basis of attorney-client privilege. CP 17; RP 21-22.

Mr. Thomas moved to exclude Keith as a witness due to the conflict of interest that Thomas's former and Keith's current attorney had, noting that the prohibition against "side switching" maintains an attorney's ethical obligations of confidentiality and loyalty. CP 17-18. The court denied the defense motion to exclude Keith, stating that the rules only "arguably" required disqualification of Keith's attorney but not suppression of witness testimony, given he could find no case law on the subject. RP 25.

The jury returned guilty verdicts on both counts of first degree child rape and on both counts of first degree incest; the jury also returned a special domestic violence verdict. CP 131-35. The trial court imposed an indeterminate sentence of 279 months to life for the first degree child rape convictions and concurrent 102-month terms for the first degree incest convictions. CP 71.

Mr. Thomas appealed. CP 62. Among other things, he argued that the trial court had erroneously excluded Bolzell's testimony that contradicted M.T.'s timeline and accounts in violation of his right to present evidence in his defense. He also asserted that counselor Fredeen's testimony was unconstitutional opinion testimony under Division One's Florczak decision and that Mr. Thomas's attorney deprived Mr. Thomas of the effective assistance of conflict-free counsel. Br. of Appellant at 19-39, 32-39, 45-49. The Court of Appeals rejected these arguments and affirmed. Slip op., 4-15.

D. ARGUMENT IN SUPPORT OF REVIEW

1. **The Court of Appeals decision merits review because it renders ER 608 a nullity and conflicts with constitutional precedent on the right of the accused to present highly evidence in their defense**

The Court of Appeals opinion is misleading in that it refers to M.T.'s testimony about "uncharged acts of abuse she described in the interviews" noting that "M.T. was not clear about the exact timing or location of the incident[.]" Slip op., 5. But M.T. initially testified to two rapes in the summer of 2013 that neatly lined up with the charging period and then she testified that one of these events—where her mother went grocery shopping allegedly told her to go cuddle with Mr. Thomas—had in fact occurred years earlier. Br. of Appellant at 8-10, 20-22; compare RP 333 with RP 364-66. Thus, M.T.'s testimony about the cuddle

incident was not an "uncharged act[]" of abuse, an "uncharged crime," or "an incident that did not form the basis for the charges." M.T.'s trial testimony confirmed that *this* grocery shopping/cuddle incident was one and the same incident of abuse she had previously described. RP 364-65.

As for this incident, M.T. said her memory of it was triggered by a conversation she had with her mother, Bolzell, about Bolzell's sexual activity with Thomas. RP 318-19, 321. During the defense offer of proof, Bolzell insisted that no such conversation ever occurred. RP 176. M.T. also said Bolzell witnessed M.T. and Thomas in M.T.'s bed together when Thomas was naked, accepted Thomas's explanation that they were merely playing a game, left the room, and shut the door. RP 320-21. During the defense offer of proof, Bolzell said she never witnessed any such thing. RP 176-77, 180.

Bolzell's contradiction of M.T.'s testimony was highly relevant to Mr. Thomas's central defense. The differing accounts of mother and daughter went to whether the abuse occurred in reality or was imagined, and tended to make the latter more probable, given that M.T. seemingly remembers things that didn't happen. M.T. could recall few details other than a brief, scripted explanation of the rapes, agreed she had difficulty discerning her dreams from memories, and gave several other contradictory statements. As defense counsel put it, "It's claims of sexual impropriety that

appear to have been proven to be potentially imagined. It goes right to the very core of the defense." RP 184.

It also was extremely relevant to *when* the abuse occurred. M.T. described only two incidents she could remember, both of which occurred comfortably within the state's charging period, June to August 2013. RP 332-33, 353. The first incident, which she claimed happened in summer of 2013, she recalled her mother grocery shopping and asking her to cuddle with Thomas, followed by rape. RP 333. Yet M.T. was confronted with pretrial statements she made about the grocery shopping/cuddle incident, and agreed on cross examination that this memory was from when she was four or five years old in the Mount Vernon house. RP 364-66. M.T. was born in 2005, putting M.T.'s description sometime in 2009 or 2010. RP 327. The reasonable doubt created from the fact that M.T. had been inconsistent about the timeline would have been greatly augmented by evidence that both what triggered this questionable memory and part of the memory itself was unequivocally contradicted by her mother. The evidence suggests that the abuse did not occur or that, if it did, did not occur during the period the state claimed.

The Court of Appeals held the trial court properly excluded Bolzell's testimony under ER 608, calling it extrinsic because it pertained to an "uncharged crime" that occurred before the 2013 incidents. Slip op., 7. As

noted this is factually incorrect, as M.T. herself confirmed that the grocery shopping/cuddle incident occurred before 2013. Therefore, this evidence was not extrinsic to the charged crime but intrinsic to M.T.'s own description of the crime.

Under the Court of Appeals' reasoning, moreover, no witness may ever testify to anything inconsistent with another's under ER 608. This would effectively bar any contradiction evidence. In his brief, Mr. Thomas cited State v. Stambach, 76 Wn.2d 298, 299-300, 456 P.2d 362 (1969), but it is not discussed by the Court of Appeals. Br. of Appellant at 25. In that case, the defendant claimed he was in Idaho when a robbery occurred, but witnesses were allowed to contradict him by testifying they saw him in a bar on the date in question. Stambach, 76 Wn.2d at 299-300. Stambach was wrongly decided per the Court of Appeals' reasoning because these witnesses' contradictory testimony was "'adduced by means other than cross examination of the [defendant].'" Slip op., 7 (quoting BLACK'S LAW DICTIONARY 700 (11th ed. 2019)).

In fact, all the ER 608 examples Professor Tegland collects about proper contradiction evidence are just wrong according to the Court of Appeals. See 5A WASH. PRACTICE: EVIDENCE LAW AND PRACTICE § 609.15 (6th ed. 2019) (discussing State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004) (a police officer properly allowed to testify that the

accused told three inconsistent versions of events); State v. Spencer, 111 Wn. App. 401, 45 P.3d 209 (2002) (witness allowed to recount out-of-court statements of another witness to reveal other witness's prejudicial state of mind); Tamburello v. Dep't of Labor & Indus., 14 Wn. App. 827, 545 P.2d 570 (1976) (video evidence of claimant's physical activities permitted to contradict claimant's testimony about his disability)). According to the Court of Appeals, no witness may ever contradict another witness because that would constitute evidence adduced by a means other than cross examination of the witness in question. This is not accurate and turns ER 608 into a categorical bar against contradiction evidence. Given the conflict between the Court of Appeals decision and other published decisions applying ER 608, review is appropriate under RAP 13.4(b)(1) and (2).

Due to the violation of Mr. Thomas's constitutional right to present highly relevant evidence in his defense, RAP 13.4(b)(3) review is also warranted. The Sixth Amendment to the United States Constitution and article I, section 22 of the state constitution guarantee accused persons the right to confront and cross-examine adverse witnesses. Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. McDaniel, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996). "Cross examination is the principal means by which the believability of a witness and the truth of [her]

testimony are tested." Davis, 415 U.S. at 315. The more essential the witness is for the prosecution, the more latitude the defense should be given to explore motive, bias, credibility, or foundational matters. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).

Central to Mr. Thomas's defense was attacking M.T.'s perceptions and memory, theorizing that she had imagined or dreamed these incidents. M.T. could not recall any details of the abuse other than the robotic scripts of the abuse she shared with the jury, indicating she blocked everything else out. RP 353-54, 358-62. She admitted she could not distinguish between what really happened and what she dreamed had happened. RP 368-69. She said, when asked about her memories, "Not memories, they are my dreams." RP 369. She also agreed that her memories and her dreams got crossed in her mind. RP 374. As counsel stated to the trial court, the "core of the defense" was asserting that M.T.'s accusations were "potentially imagined." RP 184.

M.T.'s mother said she never had the memory-triggering conversation with M.T. and never witnessed any aspect of the grocery shopping/cuddle incident when M.T. and Mr. Thomas were supposedly in bed naked together playing. This excluded testimony would have cemented Mr. Thomas's trial theory that M.T. was remembering things that had never actually happened. The evidence was therefore highly

relevant to the defense theory (even the Court of Appeals acknowledged that this evidence was relevant, slip op., 6).

There must be a compelling state interest to preclude the defense from any relevant area of inquiry. State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). "[F]or evidence of *high* probative value, 'it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and"' article I, section 22. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting Hudlow, 99 Wn.2d at 16). The Court of Appeals decision conflicts with these decisions pertaining to the constitutional right of the accused to present highly relevant evidence in his defense. Review should be granted under RAP 13.4(b)(1) and (3).

2. **The Court of Appeals decision conflicts with constitutional precedent prohibiting witnesses opining on the ultimate fact before the jury**

The right to have factual questions decided by the jury is an essential ingredient of the constitution right to trial by jury. U.S. CONST. amend. VI; CONST. art. I, §§ 21, 22; Sofie v. Fibreboard Corp., 112 Wn.2ds 636, 656, 771 P.2d 711 (1989). "To the jury is consigned under the constitution 'the ultimate power to weigh the evidence and determine the facts.'" State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008) (quoting James v. Robeck, 79 Wn.2d 864, 869, 490 P.2d 878 (1971)). It is exclusively "the

function of the jury to assess the credibility of a witness and the reasonableness of the witness's responses." State v. Demery, 144 Wn.2d 753, 762, 30 P.3d 1278 (2001) (lead opinion). No witness may testify to an opinion as to the guilt of a defendant, either directly or by inference. State v. Black, 109 Wn.2d 336, 348, 754 P.2d 12 (1987). Nor may a witness give an opinion on another witness's credibility. State v. Carlson, 80 Wn. App. 116, 123, 906 P.2d 999 (1995). Such testimony is improper "[b]ecause issues of credibility are reserved strictly for the trier of fact." City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993).

Division One's decision in State v. Florczak, 76 Wn. App. 55, 882 P.2d 199 (1994), is particularly instructive. There, a social worker gave her opinion that the child's diagnosis was "secondary . . . to sexual abuse." 76 Wn. App. at 74. "By stating that her diagnosis of post-traumatic stress syndrome was secondary to sexual abuse, Wilson rendered an opinion of ultimate fact—*i.e.*, whether KT had been sexually abused—which was for the jury alone to decide." Id. The statement also amounted to a statement that the defendants were "guilty, either individually or jointly, of sexually abusing KT. Admitting that evidence invaded the province of the jury." Id.

Fredeen's testimony likewise invaded the province of the jury. Fredeen said she provided therapy exclusively for those "coping with sexual abuse." She said she provided therapy to M.T. RP 389-90. She said she

diagnosed M.T. with PTSD and major depression which were related to the issues discussed in therapy. RP 391-93. She said M.T. exhibited PTSD symptoms and distress caused by "disclosure" and talking about "it." RP 393-96. These were Fredeen's unmistakable opinions that M.T.'s symptoms, diagnoses, and distresses for which she was in therapy were caused by sexual abuse and talking about sexual abuse. As in Florczak, Fredeen "rendered an opinion of ultimate fact—*i.e.*, whether [M.T.] had been sexually abused." 76 Wn. App. at 74.

The Court of Appeals decision conflicts with Florczak and other constitutional decisions prohibiting opinion evidence that invades the province of the jury. RAP 13.4(b)(1), (2), and (3) review should be granted.

3. **Review should be granted to address an attorney's duties of loyalty to former clients under the Sixth Amendment and article I, section 22**

The Sixth Amendment right to counsel requires that counsel be conflict-free: counsel may not simultaneously represent conflicting interests between two clients. Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Glasser v. United States, 315 U.S. 60, 69-70, 62 S. Ct. 457, 86 L. Ed. 680 (1942). Counsel necessarily has duties of confidentiality and loyalty to former clients and may not undertake representation of a client whose interests are adverse to a former client. E.g., State v. Stenger, 111 Wn.2d 516, 521-22, 760 P.2d 357 (1988) (prosecutor's

office disqualified by virtue of one deputy's former representation of accused); State v. Dhaliwal, 113 Wn. App. 226, 237-38, 53 P.3d 65 (2002) (conflict shown where interests of former client diverge from current client); State v. Robinson, 79 Wn. App. 386, 399-400, 902 P.2d 652 (1995); Cuyler v. Sullivan, 446 U.S. 335, 64 L. Ed. 2d 333, 100 S. Ct. 708 (1980).

Mr. Thomas's former attorney advised a future client to disclose Mr. Thomas's incriminating statements to law enforcement, thereby having to "'slight the defense of one defendant to protect another."' Robinson, 79 Wn. App. at 400 (quoting State v. James, 48 Wn. App. 353, 369, 739 P.2d 1161 (1987)). There is no requirement that the former client prove that the attorney divulged actual confidences for an impermissible conflict of interest to arise. Stenger, 111 Wn.2d at 520-21. Because Thomas's former attorney failed to adhere to his duty of loyalty to Thomas, Thomas's former attorney had an impermissible conflict of interest. This violated Thomas's Sixth Amendment right to conflict free counsel on the part of his former public defender.

The Court of Appeals correctly noted that there is no Washington case law that directly answers a criminal defense attorney's obligation when she or he undertakes representation of a new client with interests adverse to a former client. Slip op., 15. The United States Supreme Court has recognized that the duty to former clients in avoiding conflicts of interest

may be just as important as avoiding conflicts between concurrently represented clients, although the standards governing such matters remain open questions. Mickens v. Taylor, 535 U.S. 162, 175-76, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002).

These open questions about a criminal defense attorney's ongoing duties of loyalty to former questions are important as constitutional matters and as matters of public interest. Review of this issue should be granted pursuant to RAP 13.4(b)(3) and (4).

E. CONCLUSION

Because he satisfies every RAP 13.4(b) review criterion, Mr. Thomas asks that the Washington Supreme Court grant review.

DATED this 6th day of July, 2021.

Respectfully submitted,

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APPENDIX A

FILED
3/1/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KEVIN SCOTT THOMAS, Appellant.	No. 80042-6-I DIVISION ONE UNPUBLISHED OPINION

MANN, C.J. — Based on evidence that he sexually assaulted his biological daughter, a jury convicted Kevin Thomas of rape of a child and incest. Thomas challenges several evidentiary rulings and the supervision fee imposed as a condition of community custody. We affirm Thomas's convictions but remand for the court to strike the provision requiring him to pay supervision fees.

FACTS

Kevin Thomas and Jasmine Bolzell are the parents of three children, including a daughter, M.T. During Thomas and Bolzell's 13-year marriage, the family moved frequently—at least 10 times after M.T. was born. When the couple separated in

August 2013, they were living in a house on Section Street in Mt. Vernon that the family referred to as the "Section Street" house, or because they owned chickens when they lived there, the "chicken house."

In the two years that followed the parents' separation, the family had numerous different living arrangements. The children initially lived with Bolzell, but later lived primarily with Thomas at several locations, including a trailer parked on a friend's Oak Harbor property, the rural home of a girlfriend, a homeless shelter, and housing in Everett provided by the Veteran's Administration. By November 2015, Bolzell had remarried and the children returned to live with her full-time in Marysville.

Approximately a year-and-a-half later, after someone spoke to her class at school about sexual abuse, M.T. told her older brother that Thomas had raped her. M.T. was "in tears" and trembling, and appeared to be frightened and upset. Bolzell learned about M.T.'s allegations that same day and called the police. A Mt. Vernon police officer arranged for a professional interviewer at the Skagit County Child Advocacy Center to interview M.T. and attended the interview. A pediatric nurse practitioner also conducted a non-acute medical examination of M.T. that included a genital examination.

Based on M.T.'s disclosures, the State charged Thomas with two counts of first degree rape of child and two counts of incest and designated all counts as domestic violence offenses.

At trial, M.T. described two sexual assaults that occurred during the summer that her parents separated when she was approximately eight years old and the family lived at the Section Street house. She said that on one occasion, Thomas told her mother he

wanted to cuddle with her, and after her mother left to go shopping, she went into Thomas's room. After they cuddled for a few minutes, Thomas grabbed her hands. M.T. said that Thomas pulled off her pants and put his penis inside her vagina, while restraining her arms and legs. She told him to stop. Afterwards, M.T. went to another room to play with dolls to "distract herself."

M.T. described another assault that happened during the same summer. M.T. testified that she was watching television in the living room and Thomas took her by the hand and led her to his bedroom. M.T. said that Thomas faced her toward the bed and held her wrists behind her back. She said that Thomas pulled her pants down and put his penis in her vagina. M.T. testified that she felt afraid and experienced pain in her wrists and vagina. After Thomas stopped, M.T. said she again went to play with dolls.

When cross-examined about some of her prior statements, M.T. said that Thomas sexually abused her from the time she was around four years old, until she was eight or nine years old. She recalled that the abuse happened in many locations, including the Section Street house, "the house next to my mom's house, the Everett house, Amanda's home, the homeless shelter, basically everywhere." M.T. said that Thomas told her that if she told anyone, people would not believe her and would stop loving her. She explained that she did not realize that what was happening was wrong when she was younger because it had been happening for so long and she "just thought it was a normal thing."

In addition to M.T.'s testimony, the State presented the testimony of Bolzell, M.T.'s older brother, the child forensic interviewer, the nurse practitioner, the

investigating police officer, and the therapist that M.T. began to see after she disclosed abuse.

The State also presented the testimony of two individuals who came into contact with Thomas in jail. Ryan Keith testified that when he shared a cell with Thomas, he heard Thomas rate his daughter's level of sexual attractiveness as a "7 or 8" and describe her relative breast size. Keith was able to describe M.T.'s physical appearance, although he had never met her. Matthew Shope testified that Thomas told him that he assaulted his daughter. Shope said that Thomas explained that he ensured M.T.'s silence by buying her makeup and he was convinced that he would be acquitted because the investigation was limited to vaginal intercourse and did not encompass anal intercourse. The State reduced Shope's charges in exchange for his cooperation in Thomas's case.

The primary themes of Thomas's defense were that M.T. was unable to distinguish between dreams and reality and that her allegations arose from an "overriding theme of abandonment." The defense also claimed that there was a lack of corroborating evidence and that M.T.'s outward behavior toward Thomas was incongruous, in view of her allegations.

The jury convicted Thomas as charged. Thomas appeals.

ANALYSIS

Extrinsic Impeachment Evidence

M.T. told Courtney Long, the child forensic interviewer, that she could only remember two incidents of abuse, both of which occurred at the Section Street house in Mt. Vernon. M.T. provided minimal details to Long, explaining that she tried to "block"

the memories. In two pretrial interviews with defense counsel, M.T. mentioned previously undisclosed acts of abuse, including one that happened when she was four or five years old and another that took place in Everett. M.T. also reported a sexual assault that happened in her bedroom and said that a conversation with her mother about sex triggered her memory of that incident. M.T. was not clear about the exact timing or location of the incident, but said she was older than five. M.T. also said her mother entered her bedroom while the abuse was happening, found Thomas in her bed, and Thomas explained to her mother that they were playing a game.

Prior to M.T.'s testimony, counsel argued that the defense should be allowed to (1) ask M.T. about the uncharged acts of abuse she described in the interviews and (2) impeach M.T.'s testimony about those incidents by eliciting testimony from Bolzell. By means of an offer of proof, the defense established that Bolzell would deny having a conversation about sex like the one M.T. described and did not recall ever discovering Thomas in M.T.'s bed, claiming to be playing a game. The court ruled that the defense could question M.T. about her recollections and any prior statements, but would not be permitted to impeach her testimony with extrinsic evidence.

Thomas challenges the trial court's ruling. He argues that Bolzell's proposed impeachment testimony was highly relevant because M.T.'s perception, credibility, and the accuracy of her timeframe were central issues in the case. He contends that the evidence was admissible under the Rules of Evidence and the court's ruling deprived him of his constitutional right to present a defense.

Criminal defendants have a constitutional right to confront and cross-examine adverse witnesses and to present their defense. U.S. CONST., amends. V, VI, XIV;

WASH. CONST. art. I, §§ 3, 22; Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1005, 39 L. Ed. 2d 347 (1974). We review constitutional challenges to evidentiary rulings utilizing a two-step process. State v. Arndt, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019); State v. Clark, 187 Wn.2d 641, 648-56, 389 P.3d 462 (2017). We first review the evidentiary ruling under an abuse of discretion standard. Arndt, 194 Wn.2d at 797-98; Clark, 187 Wn.2d at 648-49. We then review the constitutional question. Arndt, 194 Wn.2d at 797-98; Clark, 187 Wn.2d at 648-49. "If the court excluded relevant defense evidence, we determine as a matter of law whether the exclusion violated the constitutional right to present a defense." Clark, 187 Wn.2d at 648-49.

A trial court abuses its discretion when its decision is based on untenable grounds, an erroneous view of the law, or if it is manifestly unreasonable. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). We defer to the trial court's evidentiary rulings unless "'no reasonable person would take the view adopted by the trial court.'" Clark, 187 Wn.2d at 648 (internal quotation marks omitted) (quoting State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001)).

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Bolzell's testimony contradicting details M.T. provided about an uncharged act of abuse was minimally relevant. But despite relevancy, evidence that is prohibited by other rules is inadmissible. ER 402.

The applicable rule is ER 608(b), which provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility . .

. may not be proved by extrinsic evidence." In some circumstances, and at the discretion of the court, such incidents may be inquired into on cross-examination of the witness. ER 608(b). Thomas cross-examined M.T. about several statements she made in prior interviews with Long and defense counsel. Although he was not precluded from doing so, he declined to cross-examine her about the alleged game-playing incident or the conversation that reportedly triggered her memory.

Thomas points out that ER 608 does not prevent witnesses from contradicting each other and maintains that Bolzell's testimony cannot be characterized as extrinsic because it went to the "complainant's very account that makes up the [S]tate's charges." But, in fact, witnesses cannot be impeached on matters collateral to the principal issues being tried. See State v. Oswalt, 62 Wn.2d 118, 120, 381 P.2d 617 (1963). The only basis for the charges were two sexual assaults that M.T. described that took place in the Section Street house during the summer of 2013. In this context, "extrinsic evidence" means evidence "adduced by means other than cross examination of the witness." BLACK'S LAW DICTIONARY 700 (11th ed. 2019). Because Thomas sought to introduce Bolzell's testimony in order to challenge M.T.'s testimony about an uncharged crime, the evidence was extrinsic and the court's ruling was appropriate under ER 608.

Criminal defendants have a constitutional right to present a defense. U.S. CONST. amends. V, VI, XIV; WASH. CONST. art. I, §§ 3, 22; Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). "The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). A defendant's right to present a defense is

subject to "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Chambers, 410 U.S. at 302; State v. Cayetano-Jaimes, 190 Wn. App. 286, 296, 359 P.3d 919 (2015).

Courts must balance a defendant's need for the evidence in question with the state's interest in excluding it. Arndt, 194 Wn.2d at 812. Under certain circumstances where the evidence is of high probative value, "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment" and our state constitution. State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983). For instance, a trial court may violate a defendant's right to present a defense if it refuses to admit evidence that represents the defendant's "entire defense." State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010) (exclusion of evidence relating to rape victim's consent).

The court's ruling did not prevent Thomas from presenting a defense. The excluded evidence would not have disproved any of the charges against Thomas. It would have helped the jury only to assess M.T.'s credibility and her perception of an incident that did not form the basis for the charges. This is not the type of highly probative evidence that the court has no discretion to exclude. See Jones, 168 Wn.2d at 721. The excluded impeachment testimony was not Thomas's entire defense. He was able to challenge M.T.'s credibility and her memory through other testimony. For example, he elicited testimony from Bolzell that contradicted M.T.'s version of one of the charged incidents. And Thomas questioned M.T. about her prior statement that the only incident that happened in Mt. Vernon took place when she was four or five years old.

He also elicited testimony indicating that M.T. exhibited no reluctance to visit with Thomas after the alleged abuse occurred.

The exclusion of extrinsic impeachment evidence did not preclude Thomas's defense. The trial court neither abused its discretion nor violated Thomas's right to present a defense.

Admission of Hearsay Evidence

Bolzell testified that because M.T. began to struggle and withdraw after disclosing the abuse, she began to see a therapist. The prosecutor asked whether there were specific "issues of concern" at school, and Bolzell testified that she received a telephone call from a school counselor. Defense counsel objected on the ground that any information provided by the school counselor was inadmissible hearsay. The prosecutor stated that the proposed testimony was offered to show that M.T. had "serious issues" following the disclosure. The court overruled the objection. Bolzell testified that the school counselor informed her that M.T. had reportedly told a friend that she had suicidal feelings.

Thomas claims that the court abused its discretion by admitting Bolzell's hearsay testimony. He contends that there is a reasonable probability that admission of the evidence affected the outcome of the trial because the evidence served to evoke sympathy for M.T. and supported her allegations of assault.

Hearsay is any out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). Evidence constituting hearsay is not admissible at trial unless an exception applies. ER 802. The State contends that it the offered the evidence only to show the school had concerns about M.T., not for the truth of the matter asserted. But

even assuming that the court abused its discretion in admitting the evidence, any error was harmless.

An evidentiary error that does not result in prejudice is not grounds for reversal. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). "'The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.'" Thomas, 150 Wn.2d at 871 (quoting State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). In other words, an evidentiary error "is prejudicial if, 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

Although Thomas argues otherwise, M.T.'s testimony was clear and unequivocal about the rapes that formed the basis for the charges. There was ample admissible evidence, apart from the hearsay reported by Bolzell, that disclosure of abuse was emotionally traumatic for M.T., she struggled in the wake of that disclosure, and began seeing a therapist to help manage her feelings of sadness and anger. Bolzell did not elaborate on the report from M.T.'s school. Her testimony included no inflammatory or dramatic details. There is no reasonable probability that exclusion of the brief and isolated testimony would have changed the outcome of the trial.

Therapist's Testimony

Thomas contends that the testimony of Jamie Fredeen, M.T.'s therapist, violated his constitutional right to a jury trial by invading the fact-finding province of the jury. See State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

Fredeen testified that she had been providing mental health therapy to M.T. for more than a year and a half. Without objection, Fredeen described her background and credentials. She testified that she was employed as a mental health therapist under the auspices of a Child Advocacy Program and provided therapy to "adolescents, young adults, and their families that are coping with sexual abuse." She discussed her training in "trauma-focused cognitive behavioral therapy" specific to sexual abuse. Fredeen testified that she had diagnosed M.T. with posttraumatic stress disorder and major depressive disorder and agreed that those diagnoses were "related" to the issues which led M.T. to require therapy.

Thomas does not contend that it was improper for Fredeen to testify about M.T.'s diagnoses and symptoms, because her perceptions, memories, and ability to recall details and events were "very much in dispute." However, he claims that, like the social worker's improper testimony in State v. Florczak, 76 Wn. App. 55, 74, 882 P.2d 199 (1994), Fredeen's testimony was an "explicit statement that M.T. had indeed been sexually abused." We assume, without deciding, that Thomas properly preserved this claim of error by objecting to aspects of Fredeen's testimony.

In Florczak, law enforcement initiated an investigation after finding the defendants in possession of a sexually explicit nude photograph of the victim, three-year-old K.T. Florczak, 76 Wn. App. at 58. Police officers referred K.T. for an assessment at a sexual assault center for children for "an opinion about whether the photograph caused any injury to K.T. and whether any other abuse had occurred." Florczak, 76 Wn. App. at 59. The social worker who performed the assessment later

testified that K.T.'s diagnosis of posttraumatic stress disorder was "secondary" to sexual abuse. Florczak, 76 Wn. App. at 62.

There are critical contextual distinctions between M.T.'s therapist's testimony and the testimony at issue in Florczak. In Florczak, the victim did not testify at trial. The social worker's testimony was an improper opinion on her veracity and the defendants' guilt because it necessarily implied that the social worker evaluated the child's disclosures and found them sufficiently reliable to conclude that sexual abuse had occurred.

Here, Fredeen did not interview or assess M.T. for the purpose of determining whether sexual abuse had occurred. Fredeen explained that the purpose of her work with M.T. was therapeutic and directed toward strengthening her "coping skills and strategies." Fredeen said that while M.T. made disclosures to her in the course of therapy, disclosure itself was not the "point." According to Fredeen, the focus of therapy was to help M.T. to manage her difficult feelings and symptoms by exploring different techniques. In context, Fredeen's testimony about providing therapy for adolescents and families "coping with abuse," was not a judgment of veracity or guilt. Fredeen did not suggest that she made an independent assessment as to the veracity of any facts M.T. disclosed to her.

And in contrast to the very young victim in Florczak, M.T. was approximately 12 years old when she began seeing the therapist and 15 years old when she testified at trial. Jurors had the opportunity to assess her credibility for themselves.

Fredeen's testimony made it clear that her role as a treatment provider was not to determine whether actual abuse occurred, but was only to address the emotional and

psychological issues M.T. was experiencing. She did not state or imply that she believed Thomas to be guilty or comment on M.T.'s veracity. As such, her testimony was not improper opinion testimony.

Suppression of Jailhouse Informant Testimony

Thomas challenges the trial court's denial of his motion to exclude the testimony of Keith, one of the jailhouse informant witnesses.

Thomas's motion was based on the following facts. Attorney Robert Roth represented Thomas from the time of his arrest in August 2017 until April 24, 2018. Approximately two months after he withdrew from Thomas's case, Roth began representing Keith in an unrelated criminal matter. Keith was arrested some months later and came into contact with Thomas in jail. Keith spoke to law enforcement, apparently without counsel, about Thomas's alleged remarks in November 2018, and in January 2019, Roth withdrew from Keith's case. The State conceded below that Keith told Roth about the incident and Roth referred Keith to law enforcement. The court denied the motion to exclude Keith's testimony, concluding that while there may have been grounds to disqualify Roth from acting as Keith's attorney, there was no basis to suppress Keith's testimony.

Thomas argues that the court's ruling deprived him of the right to conflict-free counsel. In all criminal cases, the Sixth Amendment to the United States Constitution gives defendants "the right . . . to have the assistance of counsel for his defense." U.S. CONST. amend. VI. This includes the right to an attorney who is free from any conflict of interest. State v. Dhaliwal, 150 Wn.2d 559, 566, 79 P.3d 432 (2003). An actual conflict of interest is "'a conflict that affected counsel's performance—as opposed to a mere

theoretical division of loyalties.'" Dhaliwal, 150 Wn.2d at 570 (quoting Mickens v. Taylor, 535 U.S. 162, 171, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002)). The actual conflict must be readily apparent. Dhaliwal, 113 Wn. App. at 237. For example, an actual conflict of interest exist when an attorney owes a duty of loyalty to clients whose "interests diverge with respect to a material factual or legal issue or to a course of action'" or "'where counsel must slight the defense of one defendant to protect another.'" Dhaliwal, 113 Wn. App. at 237 (quoting State v. Robinson, 79 Wn. App. 386, 394, 902 P.2d 652 (1995)). Whether the circumstances demonstrate a conflict under ethical rules is a question of law which this court reviews de novo. State v. Regan, 143 Wn. App. 419, 428, 177 P.3d 783 (2008).

Thomas claims that Roth engaged in impermissible "side-switching" when he represented Keith and the State benefitted from that conflict when it presented Keith's incriminating testimony. Although he does not rely on the Rules of Professional Conduct (RPC) in his appellate briefing, Thomas appears to maintain that Roth owed him a duty of loyalty which prevented him from representing a person in a separate matter who was later identified as a State witness in his case.

But the record does not establish that Roth violated any ethical responsibility under RPC 1.9 to Thomas, his former client, by representing Keith. See RPC 1.9 (a lawyer shall not represent another person in the "same or a substantially related matter" whose interests are "materially adverse" to the former client, without the consent of the former client). Roth did not represent Thomas and Keith in the same or a substantially related matter and it does not appear that Keith had an actual interest in the proceedings against Thomas. There is no evidence that Keith obtained a benefit in the

form or a plea deal or reduction in charges in exchange for the information he reported to law enforcement. And as the State points out, there is no evidence to suggest that Keith's involvement in his case was the result of or associated with any information Roth learned in representing Thomas or any improper disclosure of confidential client information. See RPC 1.9(c)(1)(2) (except as provided for elsewhere in the rules, a lawyer who formerly represented a client may not "use information relating to the representation to the disadvantage of the former client" and may not "reveal information relating to the representation.")

No legal authority supports Thomas's claim of an actual conflict of interest that compromised his legal representation or his argument that suppression of relevant witness testimony was warranted. The cases he cites involve conflicts that arise, for instance, when a prosecutor has "previously personally represented or been consulted professionally by an accused with respect to the offense charged" or closely related matters. See State v. Stenger, 111 Wn.2d 516, 520, 760 P.2d 357 (1998). He also cites cases involving conflicts arising from joint representation. For instance, an actual conflict existed where defense counsel's representation of the defendant and another individual who was a prior target of prosecution caused a "lapse in representation contrary to the defendant's interests" when the attorney failed to call a witness that could have provided potentially useful testimony. See Robinson, 79 Wn. App. at 399 (quoting Sullivan v. Cuyler, 723 F.2d 1077 at 1086 (3d Cir. 1983)). There are no analogous circumstances here giving rise to an actual conflict.

Thomas was not deprived of his constitutional right to conflict-free counsel. The trial court did not err in denying his motion to exclude Keith's testimony.

Cumulative Error

Even if no particular error warrants reversal on its own, Thomas argues that the cumulative effect of the court's errors merits reversal. But, as here, when a party fails to demonstrate any prejudicial error, we will not reverse a conviction. State v. Stevens, 58 Wn. App. 478, 498, 794 P.2d 38 (1990). Because Thomas established no errors, the cumulative error doctrine does not apply.

DOC Supervision Fee

Finally, Thomas challenges the imposition of community custody supervision fees as a part of his judgment and sentence.

Community custody supervision fees are authorized under RCW 9.94A.703(2)(d), which states, "Unless waived by the court, as part of any term of community custody, the court shall order an offender to . . . [p]ay supervision fees as determined by the [Department of Corrections]." Because the sentencing court can waive these fees, they are discretionary Legal Financial Obligations (LFOs). See State v. Dillon, 12 Wn. App. 2d 133, 152, 456 P.3d 1199 (2020), review denied, 195 Wn.2d 1022 (2020); State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018), review denied, 193 Wn.2d 1007 (2019).

With regard to LFOs, the sentencing court stated, "I'm assuming that the parties deem Mr. Thomas to be indigent and incapable of paying fines at this time, and I am not going to be imposing any fines upon Mr. Thomas." In response to defense counsel's inquiry, the court clarified that it would waive the criminal filing fee and jury demand fee. Consistent with this ruling, the LFO portion of the judgment and sentence includes only a mandatory victim penalty assessment and strikes the typed dollar amounts listed next

to the criminal filing fee and jury demand fee. Nevertheless, the court did not strike the provision imposing community custody supervision fees in the preceding section of the judgment and sentence that was included in a preprinted lengthy list of community custody conditions.

The State points out that Thomas failed to object to the imposition of supervision fees and urges us to decline to address the issue on this basis. But conditions of community custody may be challenged for the first time on appeal. State v. Wallmuller, 194 Wn.2d 234, 238, 449 P.3d 619 (2019). And Thomas's failure to object was understandable after the court stated that, based on his indigence, it would impose no nonmandatory fines and the State failed to request the imposition of supervision fees.

Because the record reflects Thomas's indigency and the court's intent to waive all nonmandatory LFOs, we remand for the trial court to strike the provision imposing supervision fees. See Dillon, 12 Wn. App. 2d at 152.

We affirm Thomas's convictions, but remand with directions to strike the provision requiring him to pay supervision fees.

Mann, C.J.

WE CONCUR:

Chun, J.

Andrus, A.C.J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KEVIN SCOTT THOMAS, Appellant.	)	No. 80042-6-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Kevin Thomas moved to reconsider the court's opinion filed on March 1, 2021. Respondent, the State of Washington, has filed an answer.

The panel has determined that the motion should be denied.

Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Mann, C.J.

NIELSEN KOCH P.L.L.C.

July 06, 2021 - 2:30 PM

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