NO. 100774-4

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THOMAS BOSTELLE,

Petitioner.

Pierce County Superior Court No. 18-1-04191-2
Court of Appeals No. 54280-3-II

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

During a bench trial where Thomas Bostelle faced charges for sexually assaulting his stepdaughter, B.H., the trial court permitted cross-examination of B.H. about whether she texted a friend on her cell phone about an unrelated attempted sexual assault by a stranger. On direct appeal, Bostelle did not challenge the exclusion of testimony from B.H.'s mother that B.H. told her the attempted sexual assault did not happen—his challenge was limited to his claim that excluding evidence that the cell phone belonged to B.H. violated his constitutional rights. But as the Court of Appeals properly concluded, this evidence was not excluded—B.H.'s brother testified that B.H. owned the cell phone. The Court of Appeals properly concluded that the trial court did not violate Bostelle's right to confrontation or right to present a defense.

Consistent with well-established law, the trial court properly excluded the testimony from B.H.'s mother. After B.H. denied making the prior accusation, the inquiry was at an end. It

is well established that specific instances of the conduct of a witness to attack the witness' credibility may not be proved by extrinsic evidence under ER 608(b). The trial court properly exercised its broad discretion to prohibit testimony about a collateral matter that was not germane to Bostelle's guilt. The petition does not raise an issue of substantial public interest under RAP 13.4(b)(4). This Court should deny review.

II. RESTATEMENT OF THE ISSUES

A. Should this Court deny review where the petition improperly raises an issue that Bostelle opted not to raise in the Court of Appeals and where the Court of Appeals properly concluded that Bostelle's right to confrontation and right to present a defense were not violated?

B. Did the trial court properly exclude testimony from B.H.'s mother about the text messages where specific instances of the conduct of witness to attack the witness' credibility may not be proved by extrinsic evidence under ER 608(b) and where the court had broad discretion to prohibit testimony about a collateral matter that was not germane to Bostelle's guilt?

III. STATEMENT OF THE CASE

Thomas Bostelle waived his right to a jury trial, and the trial court found him guilty of incest in the first degree, two

counts of rape of a child in the third degree, and child molestation in the third degree for sexually assaulting his stepdaughter, B.H., on several occasions when she was 14 to 16 years old. CP 7, 22-33. The court found B.H.'s testimony credible and Bostelle's denial of the incidents not credible. CP 30. The Court of Appeals affirmed the convictions in an unpublished decision. *State v. Bostelle*, No. 54280-3-II, 2022 WL 601870 (Wash. Ct. App. Mar. 1, 2022) (unpublished).

During pretrial motions, the State noted it was not seeking to exclude cross-examination of B.H. about text messages she allegedly sent to a friend about a prior unrelated attempted sexual assault by a stranger on the street and whether she lied about this accusation. *See* RP 17-18; *see also* RP 12-16; CP 67-71. The State agreed that the court should allow Bostelle to cross-examine B.H. about the texts under ER 608 because it is "fair game on cross" but that testimony from other family members about the texts is inadmissible hearsay. RP 17-18.

The trial court ruled that the prior allegation of attempted rape "is something that you all can go into because it does weigh on her credibility as to another allegation of a sexual assault[.]" RP 18-19. But the court noted that any testimony would be limited by the evidence rules, including hearsay and who has "firsthand knowledge of that information," and that appropriate objections should be made by the parties. RP 19.

At trial, Bostelle cross-examined B.H. about the text messages and whether she lied about the attempted sexual assault. RP 224-29. B.H. reviewed a copy of the text messages after she expressed not knowing what Bostelle was referring to. RP 224-29; *see* Ex. 9.[1] B.H. then denied sending the texts:

> A: No, I do not remember any of this part at all. Because none of this ever happened and I wouldn't say something like that.
> Q: Okay. So you're -- you're saying that is not --
> A: No, I'm saying --
> Q: -- a text from you to --
> A: No, I did not text that.
> Q: You did not text that?

[1] Exhibit 9 is a copy of the text messages, which was neither offered nor admitted into evidence at trial. CP 74; RP 547.

A: No.

RP 229. B.H. agreed that her parents had access to her E-mails and texts. RP 229. Bostelle did not cross-examine B.H. any further on this issue. RP 229-31. And he did not call the friend as a witness at trial. RP 378; *Bostelle*, 2022 WL 601870 at *1.

B.H. did not leave "the prosecutor with the impression that she would admit" texting a friend that a stranger attempted to sexually assault her as Bostelle asserts. *See* Pet. at 6-7 (citing RP 387).[2] The State made no such representation to the court. *See* RP 17-18; *see also* RP 286 (prosecutor's statement that *the defense* discussed *with the prosecutor* texts "allegedly between [B.H.] and this CJ person"). Nothing in the record indicates that the prosecutor and B.H. discussed the text messages. B.H.'s confusion about the alleged accusation during cross-examination supports this inference. *See* RP 224-29.

[2] Bostelle's reference to RP 387 involves *the court's* explanation of its initial understanding of the anticipated evidence.

The trial court permitted Bostelle to admit B.H.'s prior cell phone for illustrative purposes to question witnesses about ownership of the phone and other relevant information about the text messages, subject to the proper foundation. RP 286-301, 306-08. B.H.'s brother testified that B.H. owns the cell phone and that he has seen her texting people on the phone. RP 309-10. Although Bostelle claims—without any citation to the record—that B.H. "denied ownership of her phone" and "denied that she used that phone to text her friend", the record shows that B.H. was never questioned about the phone. *Compare* Pet. 2, 7, *with* RP 103-231.

After B.H.'s brother testified, the court reconsidered its ruling to allow B.H.'s mother to testify about her conversation with B.H. about the text messages and concluded that this is improper impeachment evidence under ER 608 and *State v. Harris*, 97 Wn. App. 865, 989 P.2d 553 (1999). RP 375-87.

Bostelle alleged that B.H. texted her friend about a "false" prior attempted sexual assault. RP 379-80. But nothing in the text

messages indicated that the allegation was false, and Bostelle did not call the friend as a witness at trial. *See* RP 378; Ex. 9. Rather, Bostelle wanted B.H.'s mother to testify about the contents of the text messages and B.H.'s statement to her that the incident did not happen. RP 378.

The trial court explained that whether B.H. made a prior accusation of attempted sexual assault is not a material fact that tends to prove or disprove Bostelle's guilt. RP 385. The court noted that the evidence is being offered to attack B.H.'s credibility, which triggers ER 608, and concluded that it is improper impeachment evidence. RP 385-87. Relying on *Harris*, where the victim also denied making the prior accusation, the trial court determined that ER 608 precludes impeachment of B.H. through extrinsic evidence from her mother about the text messages:

> The *Harris* case…says that by telling the trial court that M.T subsequently withdrew or recanted this prior unrelated accusation -- which is similar to this case, an unrelated prior accusation -- Mr. Harris in that case implied that the victim in that case or

> alleged victim in that case admitted making the accusation in the first place. But in that case, the alleged victim did not withdraw or recant the prior accusation, she utterly denied it. And that's the situation that we have in this case. When [B.H.] testified, she denied the text messages. It goes on to say in the Harris case: Since M.T would deny ever having made the statement, it could be proved only by extrinsic evidence from the witness. It was therefore inadmissible under Evidence Rule 608 to impeach M.T's general character for truthfulness.

RP 385-86. Relying on the reasoning in *Harris*, and not having heard any argument or been provided any case law to the contrary, the trial court concluded that allowing B.H.'s mother to testify to out-of-court statements is improper and inadmissible. RP 386-87.

On direct appeal, Bostelle did not challenge the exclusion of testimony from B.H.'s mother about the text messages. *Bostelle*, 2022 WL 601870 at *3 n. 5, *4 n. 6. Bostelle stated that he "was not attempting to prove the falsity of B.H.'s text" and instead argued that the trial court violated his constitutional rights by excluding evidence that the cell phone with the text messages belonged to B.H. *Id.* at * 3 (citing Br. of Appellant at

2, 14). The Court of Appeals concluded that because the trial court did not exclude, but actually allowed, evidence that the cell phone belonged to B.H., Bostelle's right to confrontation and right to present a defense were not violated. *Id.* at *3-4.

IV. REASONS WHY REVIEW SHOULD BE DENIED

The petition improperly raises an issue that Bostelle opted not to raise in the Court of Appeals. He did not challenge the exclusion of testimony from B.H.'s mother that B.H. told her the attempted sexual assault did not happen. Rather, he challenged the exclusion of evidence that the cell phone with the text messages belonged to B.H. But as the Court of Appeals properly determined, this evidence was not excluded. B.H.'s brother testified that B.H. owned the cell phone.

The Court of Appeals correctly concluded that the trial court did not violate Bostelle's right to confrontation or right to present a defense. The trial court allowed Bostelle to cross-examine B.H. about the prior accusation. But after she denied the accusation, the inquiry was at an end. It is well established that

specific instances of the conduct of a witness to attack the witness' credibility may not be proved by extrinsic evidence under ER 608(b). The trial court properly exercised its broad discretion to prohibit testimony about a collateral matter that was not germane to Bostelle's guilt. The petition does not involve an issue of substantial importance under RAP 13.4(b)(4). This Court should deny review.

A. The Petition Improperly Raises an Issue Bostelle Opted Not to Raise Below and Cannot Raise Now.

The issue raised in the petition was not properly raised in the Court of Appeals and is based on a misrepresentation of the appellate record. Without citation, Bostelle asserts that the "Court of Appeals misread the record when it concluded there was no order limiting Mr. Bostelle's [sic] from fully presenting evidence to support his defense that B.H. admitted to her mother she made a false accusation of attempted sexual assault". *See* Pet. at 1. Not so. After noting that the trial court "did exclude testimony" from B.H.'s mother about her conversation with B.H. about the text messages, the Court of Appeals expressly stated

that "*Bostelle does not challenge exclusion of that testimony on appeal*." *Bostelle*, 2022 WL 601870 at *3 n. 5 (emphasis added). The Court of Appeals further explained that "[i]n his reply brief, Bostelle argue[d] for the first time" that excluding this testimony was improper. *Id.* at *4, n. 6. The Court of Appeals declined to address an argument raised for the first time in a reply brief. *Id.* (citing *State v. Chen*, 178 Wn.2d 350, 358 n. 11, 309 P.3d 410 (2013) (declining to address arguments raised for the first time in a reply brief)); RAP 2.4(a), 2.5(a).

Consistent with RAP 2.4(a), this Court has repeatedly declined to consider issues that were not properly raised in the Court of Appeals. *See, e.g.*, *State v. Shale*, 182 Wn.2d 882, 886 n. 3, 345 P.3d 776 (2015); *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 315, 45 P.3d 1068 (2002). Bostelle's petition indicates that his newly raised issue impacts his constitutional right to appeal. If this argument were sufficient to meet the requirements of RAP 2.5(a), the exception would swallow the rule and there would be no limit on the ability to raise new issues on appeal.

What Bostelle actually claimed on appeal was that the trial court denied his right to confrontation and right to present a defense by excluding evidence that the cell phone belonged to B.H. *Bostelle*, 2022 WL 601870 at *1, 3. He identified the issue as "[t]he court refused to allow Mr. Bostelle to present evidence the phone from which the text was obtained was B.H.'s." *Id.* at *3 (quoting Br. of Appellant at 2). He argued that evidence that the phone was B.H.'s was admissible to attack her credibility. *Id.* (citing Br. of Appellant at 12). He further argued that he "was not attempting to prove the falsity of B.H.'s text, rather he wished to have Kymberly Bostelle testify that the text was from the phone that Ms. Bostelle knew to be B.H.'s." *Id.* (quoting Br. of Appellant at 14) (emphasis added).

But as the Court of Appeals properly determined, the trial court did not exclude this evidence. *Id.* at *3-4. B.H.'s brother testified that B.H. owned the phone. *Id.* at *3; RP 309-10. And contrary to Bostelle's claims, B.H. did not deny ownership of the

cell phone. *See* Pet. at 2, 7. Rather, the record shows that B.H. was never questioned about the phone. *See* RP 103-231.

Nothing in the decision from the Court of Appeals indicates that it "misread the record" as Bostelle claims or that it failed to properly address his asserted violation of his constitutional rights. On the contrary, the Court of Appeals correctly concluded that "because the trial court did not exclude, but actually allowed, evidence that the cell phone belonged to B.H., the trial court did not violate Bostelle's constitutional rights." *See Bostelle*, 2022 WL 601870 at *4.

There is no reason to allow Bostelle to revamp his argument and raise a new issue on appeal, particularly since the issue he now seeks to address turns on the unique facts of his case.

B. Even If Bostelle Could Raise a New Issue on Appeal, It Is Well Established that a Sexual Assault Victim's Credibility May Not Be Attacked By Using Extrinsic Evidence To Prove Prior Conduct.

Even if Bostelle had timely raised the issue regarding exclusion of the testimony from B.H.'s mother, it would not

merit review under RAP 13.4(b)(4). It is well established that specific instances of the conduct of a witness, for the purpose of attacking the witness' credibility, may not be proved by extrinsic evidence under ER 608(b). The trial court properly exercised its broad discretion in limiting testimony about this collateral issue that had questionable probative value and was not germane to Bostelle's guilt.

The right to confront and cross-examine witnesses is not absolute and is limited by general considerations of relevance. *State v. Darden*, 145 Wn.2d 612, 620-21, 41 P.3d 1189 (2002). This Court typically disfavors evidence intended to suggest that because a person acted wrongfully in the past, he must also be doing so now. *State v. Lee*, 188 Wn.2d 473, 489-90, 396 P.3d 316 (2017). This Court is particularly mindful of this when the purpose of the testimony is to show that because a victim lied about an unrelated sexual assault in the past, "she must be lying now." *Id.* at 490, 493-94. As the Court has explained, "[w]hen a prior false accusation bears no direct relationship to a witness'

motive to lie in the present case, its admission detracts attention from the defendant's alleged actions and places an undue focus on the victim's history." *Id.* at 495. Such testimony has questionable probable value and is highly prejudicial. *Id.* at 490; *State v. Demos*, 94 Wn.2d 733, 737, 619 P.2d 968 (1980).[3]

In this case, the trial court properly exercised its broad discretion to prohibit testimony about a collateral issue that had questionable probative value and was not germane to Bostelle's guilt. First, there were no factual similarities between the attempted sexual assault by a stranger on the street and the current accusation that B.H.'s stepfather repeatedly sexually assaulted her as a young teenager in her home. The prior accusation "bears no analogous relationship" to the issues in Bostelle's case. *See Lee*, 188 Wn.2d at 493.

[3] As a public policy matter, this Court has stressed that admission of this highly prejudicial testimony "may discourage victims from reporting their assaults and participating in the prosecution of their offenders. Further, prosecutors may avoid pursuing these otherwise successful cases simply because the victim made a false accusation in the past." *Lee*, 188 Wn.2d at 495.

Second, the prior alleged accusation does not demonstrate that B.H. had a motive to lie about the sexual abuse by her stepfather. Rather, it invited the factfinder to improperly infer that because she may have lied before, she must be lying now. *See id.* at 493-94. Finally, Bostelle could not prove the accusation was false, and he did not call the friend who allegedly received the text messages as a witness at trial. Thus, the trial court properly concluded that the prior accusation is not a material fact that tends to prove or disprove Bostelle's guilt. *See* RP 385.

This did not, however, shut the door on cross-examination. The trial court allowed Bostelle to cross-examine B.H. about the text messages and whether she lied about the prior accusation. RP 224-29. But once B.H. denied sending the text messages and denied the prior accusation, the inquiry was at an end. *See* 5A Karl B. Tegland, *Washington Practice: Evidence Law and Practice*, § 608.11 at 447-48 (6th ed. 2016). It is well established that specific instances of the conduct of a witness to attack the

witness' credibility may not be proved by extrinsic evidence under ER 608(b).

Once the witness denies the specific misconduct on cross-examination, the attorney must accept the answer and the inquiry is at an end. 5A Tegland § 608.11; *State v. Benn*, 120 Wn.2d 631, 651-52, 845 P.2d 289 (1993) (trial court properly refused to allow defendant to introduce extrinsic evidence to rebut prosecution witness's denial of conduct under ER 608(b)). Thus, the trial court properly excluded testimony from B.H.'s mother that B.H. told her the attempted sexual assault did not happen.

Washington courts have upheld the exclusion of false rape accusation evidence. *Lee*, 188 Wn.2d at 490 (citing *Demos*, 94 Wn.2d 733 and *Harris*, 97 Wn. App. 865). Here, the trial court properly relied on *Harris* to limit testimony from B.H.'s mother because it was improper impeachment through extrinsic evidence under ER 608(b). *Harris* affirmed the exclusion of an allegedly false rape accusation for similar reasons. *See Harris*, 97 Wn. App. at 872-73. There, the victim denied making the

prior accusation to her friend, and there was no evidence that the accusation was false. *Id.* at 868, 872. The Court held extrinsic evidence from the friend was inadmissible to impeach the victim's credibility under ER 608(b). *Id.* at 872-73.

Similar to *Harris*, Bostelle's proffered testimony involved an unrelated accusation that B.H. denied making and that could only be proved by extrinsic evidence. The trial court properly excluded this evidence under ER 608(b) and *Harris*. The trial court sufficiently accommodated Bostelle's right to adequate confrontation by permitting him to cross-examine B.H. about the prior accusation. *See Lee*, 188 Wn.2d at 496.

Bostelle thoroughly cross-examined B.H. and attacked her credibility during cross-examination and in closing argument. *See* RP 182-203, 210-31, 524-41. He argued that B.H. is "not being honest about what she told the school counselor, what she told her mother, [and] what she told her aunt…." RP 533-34, 540. And he repeatedly noted that her testimony is "not worthy of belief" and "hard to believe." *See* RP 535-40. Thus, B.H.'s

credibility was before the court. Yet the trial court determined, as the trier of fact, that B.H. was a credible witness. CP 30. Credibility determinations are for the trier of fact and are not subject to review on appeal. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

This Court's decisions recognizing the trial court's discretion to limit the use of extrinsic evidence offered to show that a sexual assault victim who lied in the past must be lying now do not implicate the Confrontation Clause. The Confrontation Clause does not prevent a trial court from imposing limits on defense counsel's inquiry into the potential bias of a witness. *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L.Ed.2d 674 (1986). Trial courts have wide latitude in imposing reasonable limits on cross-examination. *Id.* Even where the trial court places "significant limitations" on a witness's testimony, this Court has found no violation of the right to present a defense where the defendant was able to present

relevant evidence supporting the defense theory. *State v. Arndt*, 194 Wn.2d 784, 813-14, 453 P.3d 696 (2019).

Courts engage in a "two-step review process" when reviewing a trial court's evidentiary ruling that potentially implicates constitutional rights. *Arndt*, 194 Wn.2d at 797-98; *State v. Jennings*, 199 Wn.2d 53, 58-59, 502 P.3d 1255, 1257-58 (2022) (reiterating two-part test). First, the trial court's evidentiary ruling is reviewed for abuse of discretion. *Arndt*, 194 Wn.2d at 797-98. Second, the court analyzes de novo the constitutional question of whether exclusion of evidence violates the defendant's right to present a defense. *Id.*

"[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities through cross-examination". *Delaware v. Fensterer*, 474 U.S. 15, 22, 106 S. Ct. 292, 88 L.Ed.2d 15 (1985). ER 608(b) gives the trial court discretion to allow cross-examination of the witness to inquire into specific instances of conduct of the witness if probative of truthfulness or

untruthfulness. But the United States Supreme Court "has never held that the Confrontation Clause entitles a criminal defendant to introduce *extrinsic evidence* for impeachment purposes." *Nevada v. Jackson*, 569 U.S. 505, 512, 133 S. Ct. 1990, 186 L.Ed.2d 62 (2013) (emphasis in original). ER 608(b) explicitly excludes attacking the credibility of the witness with extrinsic evidence:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, 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.

ER 608(b).

Bostelle's reliance on *State v. McSorley*, 128 Wn. App. 598, 116 P.3d 431 (2005) and *State v. Clark*, 143 Wn.2d 731, 24 P.3d 1006 (2001) is misplaced. *McSorley* involved the trial

court's refusal to allow the defendant to *cross-examine the victim* about prior specific instances of his conduct that were probative of truthfulness or untruthfulness. *McSorley*, 128 Wn. App. at 610-14. Similarly, *Clark* involved the court's discretion in allowing cross-examination of the witness about his specific instances of conduct. *Clark*, 143 Wn.2d at 766-67.

Neither *McSorley* nor *Clark* involved the admission of extrinsic evidence through a second witness in order to impeach the credibility of the first witness. Here—unlike in *McSorley* and *Clark*—the trial court allowed Bostelle to cross-examine B.H. about specific instances of her conduct. But the court properly refused to allow extrinsic evidence from B.H.'s mother to impeach B.H.'s credibility.

A trial court's decision to admit or exclude evidence under ER 608(b) is reviewed for an abuse of discretion and will be reversed "only if no reasonable person would have decided the matter as the trial court did." *State v. Lile*, 188 Wn.2d 766, 783, 398 P.3d 1052 (2017). Bostelle seeks review of an evidentiary

ruling based on the specific facts of his case, and the trial court applied well-established law in excluding the proffered testimony. Review is not warranted.

V. CONCLUSION

For the foregoing reasons, this Court should deny review because the petition does not raise an issue of substantial public importance under RAP 13.4(b)(4).

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RESPECTFULLY SUBMITTED this 26th day of April, 2022.

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The undersigned certifies that on this day she delivered by E-file to the attorney of record for the appellant true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Gig Harbor, Washington on the date below.

4/26/2022	*s/ Kimberly Hale*
Date	Signature

PIERCE COUNTY PROSECUTING ATTORNEY

April 26, 2022 - 12:50 PM

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