NO. 71822-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ERIC SCHNEIDER,

Appellant.

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

The Honorable Timothy Bradshaw, Judge

REPLY BRIEF OF APPELLANT

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A. FACTS IN REPLY

1. APPELLANT'S FAILURE TO CHALLENGE EVERY FINDING OF FACT FOR PURPOSES OF THE ER 404(b) ISSUE DOES NOT MEAN HE CONCEDES THOSE FINDINGS ARE FACTUALLY ACCURATE.

The State observes appellant did not challenge on appeal every single pretrial finding of fact for purposes of the ER 404(b) issue; e.g., that Eric Schneider raped Alisha on multiple occasions, threatened Alisha and Jesci, wore a condom when raping them, choked them, requested them to wear lingerie, or explained he was "fixed." Resp. Br. at 29, 32, 36-38.

Failure to challenge on appeal the sufficiency of evidence to support these findings for purposes of the pretrial hearing is not a concession that any of these actions occurred. Mr. Schneider denied all criminal acts in this case, and maintains his innocence on all factual issues.[1]

2. THERE WAS NO EVIDENCE CONNECTING ERIC TO SUGGESTIVE MESSAGES ON JESCI'S PHONE.

The State claims messages with subject lines "that indicated they had links to pornographic

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[1] There was no evidence of admissions of the abuse here, as there was in *State v. Sexsmith*, 138 Wn. App. 497, 502, 507, 157 P.3d 901 (2007); or *State v. Gresham (Scherner)*, 173 Wn.2d 405, 416-17, 269 P.3d 207 (2012).

content" were forwarded from Eric Schneider to Jesci. Resp. Br. at 8. This assertion is incorrect.

The State's analyst found these items on Jesci's phone, but testified she could not determine who sent them to Jesci. The messages did not exist on Eric's phone. RP 1153-58.

3. THIS RECORD CONTAINS JUSTICE SPICER'S ANSWER THAT HER QUESTIONS TO JESCI MADE JESCI AWARE OF ALISHA'S ALLEGATIONS.

The trial court excluded evidence of whether Justice Spicer believed Jesci when she denied Eric had ever abused her. Although the State tries to merge the two issues, the issue on appeal is different: Whether Justice Spicer was permitted to testify that during her interview of Jesci, Jesci learned of Alisha's accusations against Eric. Before the trial court struck it, she answered "yes," she had conveyed Alisha's allegations so to Jesci. This answer remains on the record, and is properly before this Court for purposes of appeal. ER 103. RP 1232; Resp. Br. at 56-58.

4. DEFENSE COUNSEL'S ARGUMENT WAS A REASONABLE INFERENCE ON THIS RECORD.

The State wildly speculates to a groundless, unsworn accusation raised only at sentencing --

that Jesci believed Eric had murdered men in Oregon -- to shift the burden of proof to the defense regarding the propriety of counsel's closing argument. Resp. Br. at 62 & n.19. Counsel's argument regarding the meaning of Jesci's letter, Ex. 4, was entirely correct on this trial record, and is a fair inference from the evidence.

Due process, however, holds the State to a higher standard -- to do justice, not merely to win.[2] The State cites no evidence that Jesci was referring to murders in her letter.

B. ARGUMENT IN REPLY

1. THE ISSUE OF SUFFICIENCY OF EVIDENCE TURNS ON THE RIGHT TO A UNANIMOUS JURY VERDICT AND TO DUE PROCESS.

Most telling for this issue is the fact that, just as it could not at trial, on appeal the State still cannot identify a single actus reas on which the jury could be unanimous as to any of the charged crimes. Resp. Br. at 15-26. The evidence is equally insufficient for a jury of twelve to do the same, although the Constitution requires it.

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[2] *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956); U.S. Const., amend. 14; Const., art. 1, § 3; *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935).

The State argues the Constitution permits a conviction based on "generic" testimony of sexual abuse. It then would have this Court define "generic testimony" to include an array of bits and pieces of the charged crimes, articulated in the most generic fashion, which could be combined in various formulations to prove elements of a crime, without having to prove any one specific occurrence of the crime. Resp. Br. 20-26, relying on *State v. Brown*, 55 Wn. App. 738, 780 P.2d 880 (1989), *review denied*, 114 Wn.2d 1014 (1990); *State v. Hayes*, 81 Wn. App. 425, 430-31, 914 P.2d 788, *review denied*, 130 Wn.2d 1013 (1996) (emphases added; citations omitted); and *People v. Jones*, 51 Cal. 3d 294, 792 P.2d 643, 270 Cal. Rptr. 611 (1990).

Our Supreme Court has not squarely addressed this issue. In *State v. Noltie*, 116 Wn.2d 831, 809 P.2d 190 (1991), however, it considered whether two charges of statutory rape in the same charging period were duplicitous. The jury convicted of one count each of indecent liberties and statutory rape, but not a second count of statutory rape. The verdicts were based on the child's testimony. Although she testified to multiple occurrences of

the defendant having her rub his genitalia with her hand and of fellatio:

> **She was able, however, to describe the specific time and location for only one specific incidence [sic] of fellatio.** She also described in detail an incident where he had asked her to have vaginal intercourse with him. M said that this had happened more than once, but, again, **she was only able to recall the details surrounding one incident of vaginal intercourse.**

Noltie, 116 Wn.2d at 834 (emphases added). The Court again noted the child testified

> to **specific times and places for two separate incidences [sic] of statutory rape**, one oral and one vaginal, in addition to her testimony of ongoing sexual intercourse and sexual abuse. ... **Different evidence was introduced to support each count** and jury unanimity was required by the trial court's instructions.

Noltie at 847-48 (emphasis added). Thus the evidence was sufficient to support the three charges there.

More recently in *State v. Carson*, 184 Wn.2d 207, 357 P.3d 1064 (2015), the Court held the State made a clear election of three acts in its closing argument, specifying three incidents to which the child gave sufficient details to distinguish them from each other, "thus eliminating the risk that the jury might convict Carson based on any supposed

other acts." *See* 184 Wn.2d at 211, 212 n.2, 228. The Court further criticized the unanimity instruction in *Noltie*: It was error to require "the jury to unanimously agree on 'at least one separate act' for each count," when the law requires "the jury must agree on the **same** act for each count." *Carson*, 184 Wn.2d at 224 n.11 (Court's emphasis). Thus *Carson* casts doubt on the analysis of *Hayes*.[3]

The State refers to Jesci describing the first time of intercourse. Resp. Br. at 18-19. Jesci also described an incident the night of the father-daughter dance. Yet these incidents both occurred before Jesci was 12, thus defining a different crime than charged and not within any of the charging periods.[4] But, as in *State v. Edwards*, 171 Wn. App. 379, 403, 294 P.3d 708 (2012), *review*

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[3] *Hayes*, 81 Wn. App. at 432-34 (court's analysis turned on evidence sufficient for jury to find charged crime committed "at least once" for each count, as instructed).

[4] *See:* App. Br. at 35. *Compare*: CP 1-12 (earliest charges when Jesci was at least 12); RP 792, 892-93 (Jesci told nurse abuse began when she was 7); Ex. 1-G 73 (father-daughter dance was when she was 7-8).

denied, 176 Wn.2d 1025 (2013):[5] "There was no evidence defining the time period in which any other act occurred."

Except for these two incidents, Jesci never described a single incident sufficiently to identify what act occurred, when it occurred, and where -- that is, to specify a single actus reas the jury could unanimously agree occurred. The State does not attempt to identify such evidence.[6] Instead, the State makes a policy argument why the law should not require so much in cases of a "resident child abuser." Resp. Br. at 20.

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[5] Affirming the trial court's dismissal of a second count of child molestation for insufficient evidence despite testimony that Edwards touched child's "front private" 10-15 times. "The evidence does not clearly delineate between specific and distinct incidents of sexual abuse during the charging period." 171 Wn. App. at 403. (Counsel apologizes for the erroneous citation to this opinion in Appellant's Brief. The citation changed when the Court of Appeals granted a Motion to Publish the entire opinion. That order did not change the substance of the opinion, previously published only in part at 169 Wn. App. 561, 280 P.3d 1152 (2012).)

[6] The State's description of the variety of evidence offered is akin to winning the game of Clue by saying it was "Miss Scarlett and Professor Plum and Colonel Mustard, with the knife and the rope and the lead pipe in the conservatory and the kitchen and the library."

But this court should not adopt such a policy to diminish due process and the right to a unanimous jury verdict. Many published cases demonstrate children much younger than Jesci, an adult at the time of this trial, are able to describe specific incidents.[7]

Jesci also testified to a variety of methods of penetration. Resp. Br. at 18-19. Thus some individual jurors could conclude: oral sex at ages 12-13 in her bedroom, anal sex at age 14-15 in a house under construction, and vaginal sex at age 16 on the couch; others could disbelieve any vaginal sex, but conclude anal sex at ages 12-13 in a car, anal sex with an object age 14-15 in her bedroom, and oral sex in his bedroom at age 16. They could believe separate and distinct combinations of acts occurred in different years in different places, while disbelieving the evidence as to other acts.

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[7] *See, e.g.: Hayes*, 81 Wn. App. at 430-31 (11 at trial); *Noltie, supra*, 116 Wn.2d at 843) (8 at trial); *Edwards, supra* (child 11 at trial testifying to events when 5-6); *Carson, supra* (age 6 when gave recorded statement admitted at trial); *State v. Jensen*, 125 Wn. App. 319, 325-26, 104 P.3d 717, *review denied*, 154 Wn.2d 1011 (2005) (11 at trial); *State v. Corbett*, 158 Wn. App. 576, 242 P.3d 52 (2010) (10 at trial); *Gresham*, 173 Wn.2d 405, at 417-18 and at 435 (J.M. Johnson, J., dissenting) (13 at trial).

To the extent they do not agree on the actus reas, they are not unanimous, as the Constitution requires.

Even the California court in *Jones*, on which *Brown* and *Hayes* relied, approved such an approach only "so long as there is no possibility of jury disagreement regarding the defendant's commission of any of these acts." *Jones*, 51 Cal. 3d at 321. Here jurors could have disagreed about some acts. The nurse noted that Jesci's hymen was entirely intact, RP 898-99, Ex. 25 at 5 -- despite her claim to have experienced frequent vaginal intercourse with an adult penis and dildos over many years. Yet the State and the evidence never distinguished which of various forms of "sexual intercourse" occurred during any one charging period.[8] She also claimed to have been repeatedly bruised and choked with a belt during intercourse, although she recalled no marks on her neck and no one saw any bruises. A juror thus would be entitled to disbelieve claims of vaginal intercourse, or acts

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[8] RP 894 ("ha[ving] sex") meant "entering me," although did not distinguish between vaginal and anal entry. The evidence included vaginal, anal, and oral intercourse without distinguishing charging periods or locations. Resp. Br. at 23.

involving bruising or choking with a belt, while yet believing some other allegations. But it could not unanimously identify any of these acts occurring at a time to define any one charge.

While *Hayes* listed the three requirements separately, at least the prosecutor there was able to identify testimony of seven distinct acts of alleged intercourse, albeit not necessarily within the charging period. 81 Wn. App. at 430.[9] Appellate opinions since then have applied the test by analyzing evidence supporting distinct acts with all three essential elements proven together. App. Br. at 31-35. This court should do the same.

2. APPELLANT'S RIGHT TO DUE PROCESS IS VIOLATED BY THE TRIAL COURT NOT PRESERVING THE RECORD. THE RECONSTRUCTED RECORD IS INSUFFICIENT FOR APPELLATE REVIEW.

Whether a record for appeal is sufficient for appellate review depends on the issues sought to be raised on appeal, the law regarding those issues, and what is missing from the record. Thus in *State*

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[9] In *Hayes*, all charges were while the child was under age 12, and so described the same crime. Here the charging periods also define the crimes charged: the State was required to prove the specific acts occurred when the complaining witness was a certain age. *See* App. Br. at 28-29; Resp. Br. at 17-18.

v. Tilton, 149 Wn.2d 775, 72 P.3d 735 (2003), the Supreme Court carefully reviewed the potential issue (ineffective assistance of counsel for failing to present a defense of diminished capacity), the legal standard for that issue, and what the remaining portions of the record revealed. It held the undisputed portions of the record supported the possibility of presenting such a defense, but to assess the issue, the defendant's testimony was essential. That portion was missing from the record. The Court reversed.

Here, the issue on appeal is the erroneous admission of evidence under ER 404(b). The trial court had to:

> (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

State v. Slocum, 183 Wn. App. 438, 448, 333 P.3d 541, 543 (2014). The burden is on the party proposing the evidence. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003); *Gresham*, 173 Wn.2d at 420.

The legal standard of review on appeal, since the trial court only reviewed documentary evidence, is *de novo*.[10] Thus the issue differs from cases in which the court considered live testimony. The existing record shows the trial court relied in particular on the video interview of Alisha Swanson; it "was important" in reaching its decision to admit this evidence "to assess how an alleged victim presents herself." RP 238.[11] Furthermore, items in the recording were missing from the transcript of that interview, which contained 135 notations of "unintelligible" or "no response heard." Ex. 1-B. Thus the transcripts are not "duplicative" of the missing videos. Resp. Br. at 10-11.

As in *Tilton* and *State v. Larson*, 62 Wn.2d 64, 381 P.2d 120 (1963), appellate counsel was not trial counsel. "Like counsel for the appellant on

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[10] App. Br. at 37; *Smith v. Skagit County*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969); *Jenkins v. Snohomish County PUD*, 105 Wn.2d 99, 102, 713 P.2d 79 (1986).

[11] Thus this case differs from *State v. Johnson*, 147 Wn. App. 276, 282-83, 194 P.3d 1009 (2008), where there was no showing that the trial court relied on missing portions of the record to make its decisions.

this appeal, who was not present at the trial, I cannot say that the narrative statement of facts is adequate for the purposes of this appeal." *Larson*, 62 Wn.2d at 68 (J. Hill, concurring). Just as the court and both trial counsel were unable to recreate after the fact "responses decipherable on the audio recording but not included in the transcript,"[12] nor can this Court say the transcript is adequate for the purposes of this appeal. Once the defense has made every effort to recreate the record under RAP 9.3-9.5, the trial court or proponent of the evidence must bear the burden of failing to preserve the record,[13] not the defense.

The trial court considered and relied on the missing video and audio recordings in determining to admit the ER 404(b) evidence. The propriety of

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[12] Resp. Br. at 14 n.6.

[13] It is unfathomable that a judge with a lengthy career as a trial prosecutor would simply return all items he reviewed for a pretrial determination without making them exhibits and part of the record. RP 167-96, 233-38. Unlike *State v. Classen*, 143 Wn. App. 45, 176 P.3d 582, *review denied*, 164 Wn.2d 1016 (2008), the record was not reconstructed a mere one week after the trial with the help of television videos of trial, and this was not a case where the defendant confessed multiple times to the crime.

that ruling is a key issue on appeal. Appellant is entitled to this Court's *de novo* review of that evidence. The remains of the record do not permit that review. As in *Tilton* and *Larson*, this Court should reverse and grant a new trial.

3. IT WAS PREJUDICIAL ERROR TO ADMIT THE ER 404(b) EVIDENCE.

a. *Legal Standard*

The State accepts the standard of ER 404(b) from *DeVincentis*, 150 Wn.2d at 17. Resp. Br. at 27-29; App. Br. at 40-43, 46-52. Yet it rejects limiting the similarities to methods of obtaining access to the victims and the ability to commit the crime. It argues *DeVincentis* overruled the holding of *State v. Dewey*, 93 Wn. App. 50, 55-56, nn. 2-3, 966 P.2d 414 (1998), *review denied*, 137 Wn. 2d 1024 (1999), on this point. Resp. Br. at 39-41; App. Br. at 46-58.

While *DeVincentis* overruled an aspect of *Dewey*, it was not the aspect requiring a common scheme or plan to gain access to victims to commit the assault. *DeVincentis* clarified that a common scheme or plan did not require "unique" factors in common. Appellant does not disagree with this standard.

Dewey relied on *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995), which remains good law. The factors found to be sufficiently similar for a common scheme or plan in *Lough* and *DeVincentis* were limited to how the appellant groomed the victims to gain access and compliance in his plan to abuse them. The same body of access factors were dispositive in *Gresham* (*Scherner*)[14] and *Slocum*, decided after *DeVincentis*, yet applying the rule the same way.[15] *See* App. Br. at 40-43, 46-52. The cases cited by the State apply it the same way: a common scheme or plan to gain access to the children abused.[16]

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[14] The Court considered the similarity in "the implementation of the crime," i.e., how he accomplished it. He gained trust of the children's families, went to their beds while adults were asleep, both while traveling and in his home. The court did not otherwise specify what details it found similar -- perhaps because Scherner confessed. 173 Wn.2d at 415-16, 422-23.

[15] *See also State v. Carleton*, 82 Wn. App. 680, 919 P.2d 128 (1996), an earlier case also distinguishing prior acts by the method of obtaining access to the victims.

[16] *State v. Kennealy*, 151 Wn. App. 861, 888-89, 214 P.3d 200 (2009); *State v. Sexsmith*, 138 Wn. App. 497, 502-07, 157 P.3d 901 (2007). Unlike *Sexsmith*, here there were no videos or photos of the defendant committing his offenses.

b. *The Court Abused Its Discretion.*

Interpreting ER 404(b) is an issue this court reviews de novo. The trial court's misinterpretation of how to apply ER 404(b) is an abuse of discretion. *State v. Gunderson*, 181 Wn.2d 916, 921-22, 337 P.3d 1090 (2014).

The State acknowledges but makes excuses for some of the court's erroneous findings of fact ("scrivener's error"). Other erroneous finding it simply argues are not prejudicial. Resp. Br. at 34-35. It reinterprets the court's findings, rejecting the court's use of the word "access," claiming it really meant a plan or scheme to isolate each girl. Resp. Br. at 35-36. But there was no evidence he had any plan or scheme to isolate Alisha, only that her sister left her alone with him. App. Br. at 44-45.

The similarities the State argues are so vital were, in fact, erroneous and not similar.[17] The fact of a family relationship does not make the

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[17] The trial court cited "prepubescent victims." RP 246. But Alisha was not prepubescent. Her periods began when she was 9, and her breasts were significantly developed by her 12th or 13th birthday. Ex. 1-B at 57; 1-E at 23. The prosecutor argued from these facts. RP 1274.

evidence admissible as a common scheme or plan.[18] When viewed together instead of individually, the prejudice of the many erroneous findings is clear. They do not support the court's conclusions of law, and so require reversal. App. Br. at 43-46.

c. *The Error was Prejudicial.*

Without Alisha's testimony, Jesci's testimony faced multiple challenges. Despite claims of sexual intercourse multiple times a week over a period of years, including repeated use of dildos for simultaneous penetration of vagina and anus, her hymen remained completely intact. RP 898-99; Ex. 25 at 5. There was no physical evidence to support her claims of repeated bruising, belts around her neck, or carving initials in her pubis.

The trial court cited "prepubescent victims." RP 246. But Alisha was not prepubescent. She began her periods when she was nine, and her breasts were significantly developed by her 12th or 13th birthday. Ex. 1-B at 57; 1-E at 23. The prosecutor argued from these facts. RP 1274.

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[18] *See Slocum*, 183 Wn. App. at 442 (court admitted evidence of some prior acts against victim's mother, but excluded as too different acts against an aunt).

Appellant respectfully asks this court to "scrupulously appl[y]" ER 404(b) in this case, as was done in *DeVincentis*, *Slocum*, and *Carleton*, and as recently reaffirmed in *Gunderson*, 181 Wn.2d at 925. Doing so requires reversing the convictions.

4. EXCLUDING JESCI'S STATEMENTS OF PRIOR ABUSE WAS PREJUDICIAL ERROR.

The parties and court discussed the defense proposal to admit the evidence that Jesci told her mother John Burke molested her at age 5. Counsel proposed admitting it through her mother, RP 277-79, or through Torr Lindberg, to whom she gave details, including that Burke moved out when her mother learned of the abuse. RP 121-36, 290. The court found the nurse's report included that John abused Jesci 11 years earlier. RP 292-93; Ex. 25 at 3.[19] This evidence is properly before this court. ER 103.

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[19] Jesci volunteered that the sexual abuse "has happened to her before with her mother's previous husband John Burks." When asked about what happened with John, "[s]he said, 'Everything.' She said he would have her watch porn before they had sex and that it would happen on the couch and he would go as far as he could given that she was five years old. She also talked to me about how she would go to school saying that he was going to kill her." Ex. 25 at 2-3.

The standard of review for the right to present a defense is de novo. App. Br. at 60-61; *State v. Jones*, 168 Wn.2d 713, 720, 230 P.2d 576 (2010) (decided since *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997); Resp. Br. at 48).

The evidence was relevant. ER 402.

> All facts which support a reasonable inference on a contested matter and any circumstance whereby an alleged fact may be proved or disproved are relevant. Any circumstance is relevant which reasonably tends to establish the theory of a party or to qualify or disprove the testimony of his adversary.

Ladley v. St. Paul Fire & Marine Ins. Co., 73 Wn.2d 928, 934, 442 P.2d 893 (1968). Where a case stands or falls on the jury's belief of a particular witness, credibility and motive is subject to close scrutiny.[20] This is especially true in sex crimes. *State v. Peterson*, 2 Wn. App. 464, 466-67, 469 P.2d 980 (1970).

The State argues the ER 404(b) evidence was "particularly relevant" because there was no other evidence to corroborate Jesci's credibility. Resp. Br. at 42-43. It thus agrees her credibility was

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[20] *State v. Darden*, 145 Wn.2d 612, 41 P.3d 1189 (2002); *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980); *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

crucial, making evidence challenging that credibility extremely relevant. Thus appellant had a constitutional right to confront her and test her credibility, both by cross-examination and presenting independent evidence of these statements.

The State argues the probative value of the evidence depends on whether the prior abuse occurred, and curiously questions whether Jesci remembered the abuse when she reported it to the nurse. Resp. Br. at 50; Ex. 25 at 2-3. But the evidence that she made this report is relevant whether the abuse occurred or not. It demonstrates her willingness to report an event as a personal experience, then decide from her mother's influence that she had not actually experienced it. App. Br. at 16-17. This evidence goes directly to her credibility.

5. IMPOSING COSTS WITHOUT AN INDIVIDUALIZED ASSESSMENT OF MR. SCHNEIDER'S ABILITY TO PAY WAS NOT INVITED ERROR.

The State's novel concept that the defense invited the court to impose costs without considering his ability to pay after he will have served over 23 years in prison fails. The court

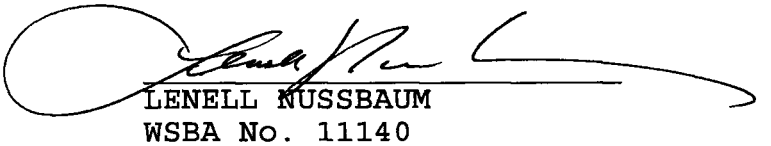
learned of his indigence at the sentencing hearing. RP 1349-50; CP 56-66. *State v. Leonard*, ___ Wn.2d ___, 358 P.3d 1167 (S.Ct. No. 90897-4, 10/8/2015) (despite no objection below, case remanded for court to conduct individualized assessment, per *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), of ability to pay).

C. CONCLUSION

For the reasons stated above and in the Brief of Appellant, this Court should reverse these convictions.

DATED this 30th day of November, 2015.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on this date I mailed a copy of the Reply Brief of Appellant, postage prepaid, to the following individual, postage prepaid, addressed as indicated:

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I declare under penalty of perjury under the laws of the State of Washington that the above statement is true and correct to the best of my knowledge.

Nov. 30, 2015 - Seattle, WA
Date and Place

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