Supreme Court No. 94333-8
COA No. 33018-4-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT MIDDLEWORTH,

Petitioner.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WALLA WALLA COUNTY

PETITION FOR REVIEW

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Mr. Middleworth was the appellant in COA No. 33018-4-III.

B. COURT OF APPEALS DECISION

The Court of Appeals denied the relief sought by Mr. Middleworth seeking post-conviction DNA testing, under RCW 10.73.170.

C. ISSUES PRESENTED ON REVIEW

1. Was Mr. Middleworth entitled to "viral" DNA testing of the swabs of alleged Herpes lesions on his penis under the DNA testing statute, RCW 10.73.170, to provide "significant new information" and demonstrate his innocence on a "more probable than not" basis, by showing he was not the transmitter of the Herpes to the child victim?

2. Did the Court of Appeals wrongly deny viral DNA testing by ruling that (a) whether the lesions were Herpetic, or (b) were an outbreak of Herpes 1 versus 2; would not be "significant new information" that would therefore demonstrate his innocence on a "more probable than not" basis, to thus meet the standards of RCW 10.73.170?

3. Did the Court wrongly deny viral DNA testing by ruling that testing to determine the viral strain of the Herpes, to see if it matched the strain in B., is not testing that is "publicly available" and "generally accepted in the medical community" or that "someone is available to perform the analysis on viral DNA from Mr. Middleworth's and B.D.'s

herpes," and that therefore the standards of RCW 10.73.170 are not met -- where in fact, the statute does not require a showing as to evidentiary matters such as the foregoing, but grants relief where the results of the testing, which are presumed to be favorable, would show Mr. Middleworth was innocent?

D. STATEMENT OF THE CASE

In August 2010, Robert Middleworth lived with his girlfriend Kristina Davis, and her four-year-old daughter, B. RP 546-49, 567-68, 939.[1] Mr. Middleworth worked long shifts driving a dairy truck. RP 556-57, 940. On one occasion Ms. Davis ran out for 10 to 15 minutes; but otherwise, B. was never left in Mr. Middleworth's care. RP 555-56, 562-63, 566, 939.

In late September, after B. had turned five years old, she began complaining of pain in her "potty." RP 552-53. Mr. Middleworth told Ms. Davis she should take B. to the emergency room. RP 553, 559-62. Ms. Davis elected to wait until the next day, September 21, to seek medical attention. RP 559-61, 941-42. Rachel Marsh, a nurse practitioner, examined B. on September 21 and believed B. had

[1] The transcript references herein are to the transferred record of Mr. Middleworth's direct appeal from his convictions in COA No. 30850-2-III, which will be referred to herein by page number, e.g., "RP 123." The facts are also set forth in the Court of Appeals opinion in the present case, at pp. 1-6. The Court refers to B. as B.D.

experienced some sort of vaginal trauma. RP 751-54. B. told the nurse that her mother's boyfriend had laid her down when she was watching television. RP 754-55, 758. But Ms. Davis told the nurse she wasn't sure how anything could have happened because B. was with her all the time. RP 756.

B. was referred to a pediatrician, Joseph Wren, and Child Protective Services (CPS) was contacted. RP 671, 673, 756. After B. was sent to Spokane for further attention, Dr. Joel Edminster also found trauma to her vaginal area. VI RP 804-06. She was diagnosed with Herpes and bacterial vaginosis. RP 714-15, RP 806-09. Dr. Edminster did not test B. to determine what type of the Herpes virus she had. RP 810-11.

Antibody tests showed that Mr. Middleworth had Herpes simplex 1 (generally found orally) and 2 (generally found genitally), and showed that his initial exposure had not occurred recently. Exhibit 3 (attached); RP 708-12, 717, 720-21, RP 779-81. The tests, however, also did not show that Mr. Middleworth had a recent outbreak. RP 719-21. Witnesses testified that at least 80 percent of the general population has Herpes simplex 1; a somewhat lower percentage might have simplex two. RP 721, 811. Ms. Davis testified she had experienced cold sores, with the most recent outbreak arising before she dated Mr. Middleworth. RP 437.

The State charged Mr. Middleworth with rape of a child in the first degree (RCW 9A.44.073) and child molestation in the first degree (RCW 9A.44.083). CP 10. After several trials, a third trial was held in April 2012. B. claimed, and her mother told her, that Mr. Middleworth had sex with her by putting his fingers in her "private spots." RP 583-84, 588. B. also said he removed her clothes and she saw his private parts, which she had never stated before. RP 584-85, 589-90, 597-98, 647; see RP 400-01. Mr. Middleworth testified in his own defense and denied he touched B. on her private parts or exposed himself to her. RP 938-48.

Well into the State's case-in-chief, it was revealed to the defense that B. made comments to a Department of Social and Health Services employee and her foster mother that potentially identified her step-grandfather, Brian P., as the source of her trauma. RP 638-39, 766-70, 900-03, 906-12, 898-99 (B. stayed overnight at her grandparents after moving in with Mr. Middleworth).

The jury convicted Mr. Middleworth on both counts, and he appealed. CP 1087-88. The Court of Appeals affirmed. State v. Middleworth, 179 Wn. App. 1025, review denied, 180 Wn.2d 1025 (2014). Subsequently, Mr. Middleworth moved for preservation of evidence and PCR DNA testing of the swabs taken during his rape kit examination. The trial court denied the motion and the Washington

Appellate Project was appointed to represent Mr. Middleworth. The Court of Appeals, in the decision as to which review is sought herein, affirmed the Superior Court's denial of the requests. Attachment A (Decision of February 28, 2017).

E. ARGUMENT

(1). DNA testing under RCW 10.73.170 is warranted where Mr. Middleworth showed that PCR DNA testing would provide "significant new information" that would demonstrate his innocence on a more probable than not basis.

(a). Review is warranted. The Court of Appeals decision is in conflict with this Court's decision in State v. Crumpton, 181 Wn. 2d 252, 260-62, 332 P.3d 448 (2014) (a trial court must presume that DNA results would be favorable to a defendant), and review is therefore warranted under RAP 13.4(b)(1). Further, the scope and meaning of the post-conviction DNA testing statute is a matter of substantial public importance. RAP 13.4(b)(4).

(b). The statute demands DNA testing in this circumstance. RCW 10.73.170(1) allows a convicted person currently serving a prison sentence to file a motion requesting DNA testing with the court that entered the judgment of conviction. The person requesting testing must satisfy both procedural and substantive requirements. RCW 10.73.170(2), (3). Motions brought under the statute must state the basis for the request,

explain the relevance of the DNA evidence sought, and comply with applicable court rules. RCW 10.73.170(2)(a)-(c).

Under RCW 10.73.170(2)(a)(iii), a convicted person may seek DNA testing on the ground that it would demonstrate innocence on a more probable than not basis. Since it was amended in 2005, RCW 10.73.170 authorizes post-conviction DNA testing if the results could "provide significant new information" that would likely exonerate the movant. Laws of 2005, ch. 5, § 1(2)(iii). This requirement of "significant new information" has been held to encompass evidence available due to post-trial improvements in DNA testing technology, regardless of whether that DNA testing could or could not have been performed then. State v. Riofta, 166 Wn. 2d 358, 361-62, 209 P.3d 467 (2009).[2]

Mr. Middleworth's motion filed February 19, 2014, correctly stated that the nurse, who performed a "rape kit" on him, took swabs of lesions in his genital area that were sent for testing, but which were never tested. Motion for post-conviction DNA testing, at pp. 1-2. As Mr. Middleworth explained in his motion and his later "PRP," appealing from

[2] As it existed from 2000 through 2004, RCW 10.73.170 allowed postconviction DNA testing only when the defendant was deprived of the opportunity to use DNA test results as exculpatory evidence, either because of an adverse court ruling or because the DNA technology was insufficiently developed to test the DNA evidence in the case. See Laws of 2000, ch. 92, § 1 (allowing DNA testing "if DNA evidence was not admitted because the court ruled DNA testing did not meet acceptable scientific standards or DNA testing technology was not sufficiently developed to test the DNA evidence in the case").

the denial of his motion, the swab evidence would be *relevant* because PCR DNA testing would reveal whether the swabs were a manifestation of an active Herpes infection and whether he had transmitted Herpes to the complainant. Motion, at pp. 3-5; Petition, at pp. 4-7.

Swabs were taken of B.'s vaginal area for herpes testing at Sacred Heart. RP 204-06, 213, 806-07. If the movant satisfies the procedural requirements, as here, the trial court must grant the motion if it concludes the movant has shown the required "likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." RCW 10.73.170(3). Regarding the Court of Appeals notation that the State argued that the statute refers only to the testing of human DNA, not viral DNA, see Decision at p. 7 note 5, the plain language of RCW 10.73.170 indicates that post-conviction testing may be sought where "DNA testing now requested" would provide the requisite information. RCW 10.73.170(2)(a)(iii), (b). Additionally, WSPCL's ability to perform the requested DNA testing in its own facility is not a limiting consideration. Mr. Middleworth has requested that the swabs be preserved. See COA briefing describing "Relief Sought," at p. 1, and Mr. Middleworth's Motion. The Crime Laboratory has the capacity to contract with outside testing providers and outside providers frequently test evidence. See, e.g., State v. Gentry, 183 Wn.2d 749, 755-56, 356 P.3d 714 (2015).

Finally, the testing is available. The courts have recognized the existence of testing to determine the particular strain of a Herpes virus. See Thermogen, Inc. V. Chou, No. 98 C 1230, 1998 WL 325197, at * 1 (N.D. Ill. June 8, 1998). The testing and extraction of viral DNA is generally recognized as technologically available. See Sanofi-Aventis Deutschland GMBH v. Genentech, Inc., 2011 WL 839411 (at p. 9) (N.D. Cal. 2011) (cited pursuant to GR 14.1(b) and Fed. R. App. P. 32.1(a)). And the viral DNA of the HIV virus has been used to identify the virus that infected a victim as the same HIV virus allegedly injected. State v. Schmidt, 699 So.2d 448, 453-55 (La.App. 3 Cir. 1997) (DNA test methodology used by expert to compare HIV virus taken from HIV patient and victim satisfied the Daubert criteria for admissibility of expert testimony).

As the dissent points out, the Washington state DNA testing statute is modeled after the federal Innocence Protection Act, 18 U.S.C. § 3600(a)(5). Dissent, at p. 3; see Decision, at p. 11. When a state statute that is largely patterned after a federal provision omits language contained in the federal statute, this is a clear indication that the Legislature intended to not adopt the portion of the federal statute. Bird-Johnson Corp. v. Dana Corp., 119 Wn.2d 423, 427-28, 833 P.2d 375 (1992). The Washington state statute does not contain the provision in 18 U.S.C. § 3600(a),

subsection 5, that [t]he proposed DNA testing is reasonable in scope, uses scientifically sound methods, and is consistent with accepted forensic practices." Mr. Middleworth, further, contends that the requested viral DNA testing is entirely sound. For example, in the context of evidence in criminal trials, viral DNA testing has been accepted under the federal Daubert expert scientific evidence standards. State v. Schmidt, supra, 699 So.2d at 453-54 (allowing evidence regarding "the comparison of viral DNA, rather than human DNA" under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 587–89, 113 S.Ct. 2786, 2794, 125 L.Ed.2d 469 (1993)).

Therefore, the testing need not be widely "publicly available" in a sense that it is a routine part of state crime laboratories, nor must the testing be such that it is generally accepted in the scientific community, as the Court of Appeals held in this case. Decision, at pp. 10-11.[3]

As the dissent pointed out, these are evidentiary considerations and matters to be determined after the statutory standards – based on a presumption the results would be favorable – are met, which they are her in Mr. Middleworth's case. See Dissent, at pp. 1-4.

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[3] Thus, contrary to the Court's statement that it need not decide whether the Washington statute authorizes the testing of viral DNA in addition to human DNA, the Court at this section dismissed the dissent's reliance on Crumpton's requirement that courts presume test results would be favorable to the defense, by stating that Crumpton involved "conventional human DNA testing." Decision, at p. 11; Dissent, at p. 3-4.

(c). PCR DNA testing would provide significant new information that would demonstrate Mr. Middleworth's innocence on a more probable than not basis. The trial court abused its discretion when it denied Mr. Middleworth's motion under the reasoning that there is no reasonable means to test the "DNA of the Herpes virus" and/or that it was unlikely that any evidence of an exculpatory nature would be discovered. (Order denying motion, February 9, 2015).[4]

The trial court was incorrect. DNA sequencing can reveal differences in virus strains, including of Herpes 2, for purposes of studying "transmission between individuals." Kaneko, et al., Discrimination of Herpes Simplex Virus Type 2 Strains by Nucleotide Sequence Variations, 780 Journal of Clinical Microbiology, at 780-84 (Feb. 2008) (http://jcm.asm.org/content/46/2/780.full.pdf+html).

More importantly, Mr. Middleworth argues that PCR DNA testing of the swabs would additionally reveal whether the lesions that were swabbed were a manifestation of an active Herpes infection. Appendix A (Motion, at pp. 3-5); Appendix B (Petition, at pp. 4-7). This testing would provide significant new information. RCW 10.73.170(3) provides:

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[4] In its response to the motion, the State had asserted that it was "unsure for what purpose the defendant is requesting the testing." Response to Defendant's Motion. In its response to Mr. Middleworth's subsequent petition, the State critiqued, as false, the argument that "a lab can tell by DNA testing of the virus whether the virus in one person had previously passed through another person." Respondent's Brief, at p. 6.

> The court shall grant a motion requesting DNA testing [if] the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.

RCW 10.73.170(3). Importantly, the court is required to presume that the results of the requested DNA testing would be favorable. State v. Crumpton, 181 Wn. 2d 252, 260-62, 332 P.3d 448 (2014) (a trial court must presume that DNA results would be favorable to a defendant when determining if DNA test would demonstrate his innocence on a more probable than not basis). Here, the trial evidence indicated several important matters pertinent to this standard of RCW 10.73.170:

(1). The record of trial confirms that swabs were taken from Mr. Middleworth's lesions, indicating that nurse Alysa Reynolds of St. Mary's Medical Center took multiple swabs in the presence of law enforcement officers, and the kit was then handed over to the officers. Mr. Middleworth avers that the kit is in the possession of the Walla Walla County Prosecutor, the College Place Police Department, or the Crime Laboratory. RP 776-84 (testimony of College Place Police Department Lieutenant Robert Dutton); RP 790-97 (testimony of Reynolds).

(2). The medical experts concluded that the complainant was suffering from a primary Herpes infection, meaning that her visible symptoms reflected a recent transmission of Herpes vaginitis. RP 699-703

(testimony of Dr. Joseph Wren regarding the detected Herpes, which was not determined as to whether it was Herpes 1 or Herpes 2)).

(3). Additionally, Dr. Wren correctly reviewed the testing evidence regarding the defendant. Exhibit 3. In consultation with pathologists at ARUP, the medical reference laboratory of Adventist Health Medical Group, Dr. Wren concluded that the antibody "IgG," or "Immunoglobulin G" tests of Mr. Middleworth's drawn blood indicated that he had been infected with both Herpes 1 and Herpes 2 at some point "in the past." RP 711-12; 718-19; Exhibit 3.[5]

(4). Crucially, Dr. Wren testified that laboratory testing for Herpes includes growing a culture from a swab or scraping to test for the virus or bacteria, and the "next growth standard would be in the age of genetics and now that we know PCR testing, preliminary chain reaction." RP 713-14. Although Mr. Middleworth's testing was for *antibodies*, a PCR DNA test would reveal both whether the defendant's lesions showed he was suffering from an outbreak of Herpes, and whether it was Herpes 1 or 2. RP 713-14, 723-24. As the doctor testified,

> What that does is it actually takes a sample and it spins it down and it takes the DNA from that and they are

[5] In contrast, Dr. Wren testified that Mr. Middleworth was tested for Herpes simplex by testing for "IgM AB" antibodies. RP 719-20. This reveals if the person is suffering from a recent outbreak, and Mr. Middleworth's test results for this were negative. RP 719-21; see also RP 817 (RP 812-15 (Dr. Joel Edminster of Spokane Sacred Heart Hospital, testifying that the IgM test shows no active Herpes).

> able to identify because they can chop that up into small pieces and figure out what organism it is or what virus it is and they can identify what it is with the preliminary chain reaction [PCR].

RP 714. However, Mr. Middleworth's test was done solely by blood testing for antibodies – the trial record indicates that there was no testing – much less PCR DNA testing -- of the swab evidence that was collected.

This is pivotal. In addition to Dr. Wren, other witnesses made clear that the transmission of Herpes to the complainant would require an active outbreak on Mr. Middleworth's part. RP 725 (Dr. Wren); RP 812-15 (Dr. Joel Edminster). And importantly, although the Court of Appeals notes that Dr. Edminster also stated that is "possible" to transmit the Herpes virus while a person is asymptomatic, Decision at p. 8 (citing RP 208), the State's emphasized evidence at trial as a whole relied on the theory that the sores or lesions were the physical proof of sexual conduct by the defendant with B., shown by transmission of Herpes by that particular lesion condition – this was the basis of the State's attempt to persuade the jury that the case was proved by the circumstances. RP 974-80 (State's closing argument). Alysa Reynolds, the nurse who examined Mr. Middleworth, was permitted to testify that she believed that the lesions on his person that she observed represented an active outbreak of Herpes. RP 794-98. But Dr. Wren admitted that the sores that Reynolds

stated she observed could not necessarily be Herpes at all. RP 723-24 (Dr. Wren, agreeing that there are other causes of such lesions). The case in great part turned on this dispute - the Court of Appeals reasoned erroneously when it stated that showing that the Lesions were not Herpetic would not provide significant new information, Decision, at p. 8; in the context of the case, it would.

In this circumstances, it is materially significant under RCW 10.73.170 that the swabs taken from those lesions were collected – yet, without explanation - never tested. RP 785-86. PCR DNA testing of the swabs would show that Mr. Middleworth was not suffering from a current active outbreak of Herpes, and would also show that Mr. Middleworth was likely suffering an outbreak of the far more highly common form of Herpes in the form of Herpes 1. On either of these bases, this would be significant new information. Mr. Middleworth also disagrees strongly with the reasoning of the Court of Appeals that the type of Herpes present in the Lesions – whether it was type 1, or type 2 – would not provide significant new information. Decision, at pp. 9-10. As the Court stated, Herpes 2 was the more likely source of B.'s genital herpes because type 2 is most commonly manifested genitally. Decision, at pp. 9-10. If Mr. Middleworth's lesions were Type 1, this would demonstrate innocence in

a case where the child implicated another male family member as the person who engaged in the sexual touching.

Mr. Middleworth has demonstrated that the trial court abused its discretion in denying his motion. The statute requires a trial court to grant a motion for post-conviction testing when the results would, in combination with the other evidence, raise a reasonable probability the movant was not the perpetrator. Riofta, at 367-68. This standard is supported by the federal DNA testing statute, 18 U.S.C. § 3600(a). The Washington statute was drafted to qualify Washington for federal funding under the Justice For All Act of 2004, and in order to qualify for funding under the Act, Washington must provide post-conviction DNA testing "in a manner comparable to" the federal post-conviction DNA testing outlined in 18 U.S.C. § 3600(a). Pub.L. No. 108–405, 118 Stat. at 2285. Under the federal statute, an inmate can obtain such testing by showing, *inter alia*, that it "may produce new material evidence" that would "support a theory" of innocence and "raise a reasonable probability that the applicant did not commit the offense." 18 U.S.C. § 3600(a)(6), (8)(A), (B).

That standard is met in this case. In making that determination, this Court can consider the minimal nature of the child's testimony. See, e.g., State v. Riofta, 166 Wn.2d at 358, 367 (court considers significance of helpful DNA results in the light of all evidence in case). To determine

the probability that a person could demonstrate his innocence with the aid of favorable DNA test results, courts must consider the evidence produced at trial along with any newly discovered evidence and the impact that an exculpatory DNA test could have in light of the evidence. United States v. Fasono, No. CRIM. 3:04–CR–34–WHB, 2008 WL 2954974, *7 (S.D.Miss. July 29, 2008) (assessing impact of potential DNA results in light of "the other evidence produced at trial").

The presence of Herpes infection was the basis upon which the State pursued conviction by the jury - in a case where the testimonial evidence from the complainant B. was thin at best. See Part B., supra; see RP 974-980 (State's closing argument). The court should have granted Mr. Middleworth's post-conviction motion.

F. CONCLUSION

This Court should accept review and reverse the order denying Mr. Middleworth's motion for preservation of evidence and PCR DNA testing.

DATED this 23 day of March, 2017.

Respectfully submitted,

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Attachment A

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

STATE OF WASHINGTON, Respondent, v. ROBERT JAMES MIDDLEWORTH JR., Appellant.	)	No. 33018-4-III UNPUBLISHED OPINION

SIDDOWAY, J. — After this court affirmed Robert Middleworth's convictions for first degree child rape and first degree child molestation, he filed a motion in superior court for postconviction testing of viral DNA[1] collected from his genital lesions during the police investigation. The court denied his motion on several grounds. We affirm the superior court on the basis that Mr. Middleworth fails to demonstrate that the DNA testing he requests would provide significant new information or be likely to demonstrate innocence on a more probable than not basis.

FACTS AND PROCEDURAL BACKGROUND

Beginning in August 2010, Robert Middleworth lived with a girlfriend and her five-year-old daughter, B.D.[2] About September 17, 2010, B.D. began complaining that it hurt to go to the bathroom. On September 21, B.D.'s mother took her to the doctor.

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[1] Deoxyribonucleic acid.

[2] Initials are used to protect the identity of the child victim. *See* General Order of Division III, *In re Use of Initials or Pseudonyms for Child Victims or Child Witnesses.* (Wash. Ct. App.), http://www.courts.wa.gov/appellate_trial_courts/.

When the pediatric nurse practitioner who initially examined B.D. observed infection and possible genital trauma and asked B.D. how her bottom got sore, B.D. answered that "Rob" had laid her down on the floor. Report of Proceedings (RP) at 758.[3] The nurse practitioner did not question B.D. further about Rob but did consult with her colleague, Dr. Joseph Wren, a child abuse specialist, and reported what she had seen and heard to Child Protective Services (CPS), which immediately commenced an investigation. Following Dr. Wren's examination of B.D., a further examination by Dr. Joel Edminster, and cultures and testing, B.D. was diagnosed with a herpes infection in her genital area, bacterial vaginosis, and a urinary tract infection. Tests were not conducted to determine what type of the herpes simplex virus (type 1 or type 2) B.D. had. Herpes 1 is typically an oral virus, whereas herpes 2 typically affects the genitals.

On September 29, after Mr. Middleworth was placed under arrest, he submitted to collection of a rape kit by a nurse, Alysa Reynolds, at the emergency room of St. Mary's Medical Center. In the course of collecting the rape kit, Ms. Reynolds physically examined Mr. Middleworth and observed two lesions on his penis. She took swabs of the two lesions that she included in the rape kit. Upon completing her examination and collection, she sealed the rape kit and turned it over with a chain of custody form to the

[3] All references to the report of proceedings are to the February 7, 2011 volume that includes hearings on pretrial motions and Mr. Middleworth's three trials.

College Place Police Department.

The rape kit was forwarded by the police department to the Washington State Patrol Crime Lab, but was never opened by laboratory personnel. During pretrial motions, the prosecutor represented to the court that no human DNA analysis was performed by the crime lab because there was no perpetrator DNA collected from B.D. or the scene of the alleged rape and molestation (such as bodily fluid or hair) to which the specimens in the rape kit could be compared. A College Place police officer testified at trial that the state crime lab does not test for pathogens or diseases.

Two weeks after collection of the rape kit from Mr. Middleworth, the State obtained a search warrant to take an additional blood draw from him, to be tested for herpes. The blood draw was also taken at St. Mary's, although it was sent to a medical laboratory, rather than the crime lab, for testing. The report received from the medical laboratory indicated that Mr. Middleworth had antibodies for both types of the herpes simplex virus, establishing that both were in his system.[4] As Dr. Wren explained at trial, "you never get rid of herpes, it stays with you for life." RP at 713.

The State charged Mr. Middleworth with first degree rape of a child and first

[4] The test also showed that Mr. Middleworth had low levels of immunoglobulin M—an antibody produced when someone is initially exposed to the virus or at the beginning of an outbreak. This indicated that he had not contracted herpes recently. It did not necessarily indicate that he had not had an active outbreak recently, because the antibody levels do not always increase with every recurrent outbreak.

degree child molestation. At trial, B.D. testified that Mr. Middleworth had put his finger in her "private spots" "a lot" and a videotaped interview of B.D. by a CPS investigator was played for the jury. RP at 583-84. Dr. Wren and Dr. Edminster testified to matters observed in their physical examinations of B.D. that were consistent with sexual assault. Finally, the State presented the evidence that B.D. was diagnosed with genital herpes, that Mr. Middleworth had tested positive for herpes, and that the most likely manner in which B.D. would have contracted genital herpes was genital to genital contact. Both physicians testified that genital herpes is not something that they would expect to see in a five year old. As Dr. Wren explained, "[G]enital herpes is not something that is passed casually by toilet seats or—it is passed by sexual contact and we would not expect a five year old to be sexually active." RP at 706. A jury found Mr. Middleworth guilty as charged. He appealed.

This court substantially affirmed Mr. Middleworth's judgment in an opinion filed on February 6, 2014, reversing only an order awarding restitution for the State's expert witness fees. *See State v. Middleworth*, No. 30850-2-III (Wash. Ct. App. Feb. 6, 2014) (unpublished), https://www.courts.wa.gov/opinions/pdf/308502.unp.pdf, *review denied*, 180 Wn.2d 1025, 328 P.3d 902 (2014), *cert. denied*, ___ U.S. ___, 135 S. Ct. 464, 190 L. Ed. 2d 348 (2014).

Within a couple of weeks of the filing of this court's opinion, Mr. Middleworth moved in superior court, pro se, for postconviction DNA testing under RCW 10.73.170.

Specifically, he sought "PCR testing" of the swabs taken of his penile lesions, arguing that it could show that he could not have transmitted herpes to B.D. Resp't's Br., App'x D. Polymerase chain reaction, or "PCR," involves copying a short segment of DNA millions of times, a process known as amplification. It is particularly useful for testing degraded DNA samples or samples with low levels of DNA. *State v. Bander*, 150 Wn. App. 690, 700, 208 P.3d 1242 (2009).

Mr. Middleworth's pro se motion argued that (1) the rape kit was collected from him for the purpose of testing by the state crime lab, (2) the prosecutor misrepresented to the trial court that the reason the state crime lab did not test the viral DNA collected from his lesions was because it lacked the ability to perform PCR analysis to identify the herpes virus, (3) B.D.'s mother or father could have transmitted herpes to her, and (4) the failure to perform PCR analysis on the swabs deprived him of exculpatory evidence. Resp't's Br., App'x D. The State opposed the motion on the basis that the purpose for which Mr. Middleworth was requesting DNA testing was not clear. It also provided correspondence from the Washington State Patrol Crime Lab manager confirming that the state lab does not conduct virus or bacteria analysis.

The superior court denied Mr. Middleworth's motion for DNA testing on several bases. Substantively, it ruled that "[t]here is no reasonable means available to test the DNA of the herpes virus," and "it is unlikely that, even if the virus were able to be tested

for DNA evidence, any evidence of an exculpatory nature would be discovered." Resp't's Br., App'x F. Mr. Middleworth appeals.

ANALYSIS

"[A]s a response to developing technology, postconviction DNA testing has been widely accepted as a way to ensure an innocent person is not in jail," even though "[t]here is no constitutional right to DNA testing." *State v. Crumpton*, 181 Wn.2d 252, 258, 332 P.3d 448 (2014). "RCW 10.73.170 provides a mechanism under Washington law for individuals to seek DNA testing in order to establish their innocence." *Id.*

Under RCW 10.73.170(1),

> A person convicted of a felony in a Washington state court who currently is serving a term of imprisonment may submit to the court that entered the judgment of conviction a verified written motion requesting DNA testing, with a copy of the motion provided to the state office of public defense.

The motion must state that "[t]he DNA testing now requested would . . . provide significant new information" and explain "why DNA evidence is material to the identity of the perpetrator of . . . the crime." RCW 10.73.170(2)(a)(iii), (b). The motion shall be granted if "the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." RCW 10.73.170(3). When deciding whether it is likely the DNA evidence would demonstrate innocence, the trial court considers all the evidence from trial and assumes the DNA test would return an exculpatory result. *Crumpton*, 181 Wn.2d at 260.

We review a trial court's decision on a motion for postconviction DNA testing for abuse of discretion. *State v. Thompson*, 173 Wn.2d 865, 870, 271 P.3d 204 (2012). We may affirm a lower court's ruling on any grounds adequately supported in the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Mr. Middleworth is represented by counsel at this stage of the proceedings, and on appeal his briefing explains three respects in which he contends PCR analysis of the viral DNA collected from his genital lesions would provide significant new information demonstrating probable innocence. He now argues it would show (1) whether the lesions were the result of the herpes virus at all, (2) assuming the lesions were herpetic, whether they were the result of herpes 1 or 2, and (3) whether the particular strain of herpes in his system matched the strain in B.D.'s system. Even if we give Mr. Middleworth the benefit of this improved articulation of his argument, and assume without agreeing, that RCW 10.73.170 applies to the testing of viral DNA,[5] Mr. Middleworth has not made the showing required by the statute.

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[5] The State argues that RCW 10.73.170 should be construed to authorize only orders for the testing of human DNA, not viral DNA, and points out in this connection that under RCW 10.73.170(5), "DNA testing ordered under this section shall be performed by the Washington state patrol crime laboratory." RCW 10.73.170(5). According to testimony at trial and the State's opposition to Mr. Middleworth's motion in superior court, the state patrol crime lab does not conduct viral DNA analysis. We defer these arguments to another day, since this appeal can be resolved on the basis of Mr. Middleworth's failure to make the showing required to obtain any court-ordered DNA testing.

1. Showing that the Lesions were Not Herpetic Does Not Provide Significant New Information

Nurse Reynolds testified that Mr. Middleworth's penile lesions "had the appearance of sores that very likely could have come from a sexually transmitted disease" but acknowledged that she could not say, from their appearance, that they were herpetic. RP at 793. Mr. Middleworth argues that if PCR analysis of the viral DNA she collected showed that the lesions were not herpetic, he could not have transmitted the virus to B.D.

His argument is premised on a misunderstanding that herpes can only be transmitted when an individual is experiencing lesions. He cites to one excerpt of Dr. Wren's testimony that appears in isolation to support his argument,[6] but other testimony establishes that herpes can be transmitted even when the host is asymptomatic:

> Q Is it possible to transmit the herpes virus while being asymptomatic?
> A Yes.

RP at 208 (examination of Dr. Joel Edminster at Mr. Middleworth's first trial). Mr. Middleworth has failed to show that an individual can only transmit herpes when he or

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[6] Q Okay. Now, you were talking about how herpes gets spread and if it is the herpes virus, whether it is on the mouth or on the genitals, it would have to be transferred from the person who has an active lesion—
A Uh-huh.
Q —and put into the person who is a recipient; correct?
A Correct.

RP at 725 (testimony of Dr. Joseph Wren on cross-examination).

she has lesions. Evidence that Mr. Middleworth's lesions were due to something other than herpes would not establish that he had not transmitted the virus to B.D.[7]

2. *Whether the Lesion was an Outbreak of Herpes 1 or 2 is Insignificant*

PCR analysis of the viral DNA could determine whether Mr. Middleworth's lesions, if herpetic, were herpes 1 or 2. But he fails to explain how this information would be helpful. B.D. was tested for herpes, but her test did not determine whether she had herpes 1 or herpes 2. B.D.'s herpes was genital—the most common place for herpes

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[7] Research of reliable sources outside the record indicates that herpes is only transmittable when active, but that it can be active without symptoms appearing. Gregory J. Mertz, *Asymptomatic Shedding of Herpes Simplex Virus 1 and 2: Implications for Prevention of Transmission*, 198 J. INFECTION DISEASES STUD. 1098 (2008) [https://perma.cc/2MRT-EGJ8]. In fact, herpes is more commonly transmitted during a process called asymptomatic viral shedding than during a period where an individual has visible herpes lesions. *Id.* Consequently, Mr. Middleworth is incorrect when he claims that if his lesions were not herpetic he could not have transmitted herpes to B.D. He is, however, correct that herpes cannot be transmitted if the virus is not active—when there are no symptoms *and* when asymptomatic viral shedding is not occurring. *Herpes Signs and Symptoms*, AM. SEXUAL HEALTH ASS'N, http://www.ashasexualhealth.org/stdsstis/herpes/signs-symptoms/ (last visited Feb. 13, 2016).

Mr. Middleworth has not provided any evidence that publicly available PCR analysis can determine whether herpes is inactive. And if there is, it could only establish that he was not contagious on the date the swabs were taken—September 29, 2010. B.D. testified that it had been more than one day since Mr. Middleworth had touched her when her mother took her to the hospital, which was on September 21, 2010. Assuming Mr. Middleworth touched B.D. as late as September 20 (a generous date, considering the fact that B.D. was already exhibiting symptoms by then), nine days would have passed between the touching and the swabs being taken. Unless Mr. Middleworth can show that the status of his herpes on September 29 would be identical to the status of his herpes during the time period he was accused of molesting or raping B.D., the status of the virus on September 29 is insignificant. Testimony at trial reflects that a herpes "flare-up" can resolve itself within several days to a little over a week. RP at 817.

2 to present—but the two strains of herpes have become intermixed due to sexual practices, so the location of her herpes is not determinative. Without knowing whether B.D. had herpes 1 or 2, a test that shows Mr. Middleworth potentially only had one active strain would not eliminate him as a source of transmission.

3. *Testing Would Not Demonstrate Innocence Where Mr. Middleworth Has Not Shown it is Available*

Finally, Mr. Middleworth suggests that PCR analysis of viral DNA can reveal genetic differences in strains of the herpes virus such that it would be possible to determine whether his strain of herpes matched the strain in B.D. In support of his claim he cites to Hisatoshi Kaneko et al., *Discrimination of Herpes Simplex Virus Type 2 Strains by Nucleotide Sequence Variations*, 46 J. CLINICAL MICROBIOLOGY 780 (2008).[8] In that article, researchers from Fukushima and Kawasaki, Japan, analyzed the DNA of herpes viruses taken from 36 Japanese individuals and found areas with enough genetic diversity to distinguish between strains, and potentially determine whether a strain originated from the same outbreak. The article recommended a database to compare and contrast samples of the viruses on an international level. However, while the technology that can analyze herpes DNA in this way evidently exists and was available to the microbiologists and medical researchers in Japan who performed the study, Mr. Middleworth has failed to show that this technology is publicly available, that it is

[8] http://jcm.asm.org/content/46/2/780.full.pdf+html.

generally accepted in the medical community, or that someone is available to perform the analysis on viral DNA from Mr. Middleton's and B.D.'s herpes.[9] From the article, the technology appears only to have been in developmental stages.

The dissent suggests that we ignore the holding of *Crumpton* if we fail to presume that research microbiologists are available somewhere, at some price, to sequence and compare the viral DNA of Mr. Middleworth's and B.D.'s herpes to see if they match. But in *Crumpton*, the Supreme Court was reviewing the denial of a motion that sought conventional human DNA testing from the state crime lab. Nothing in *Crumpton* suggests that a trial court presented with a motion for DNA testing under RCW 10.73.170 is required to presume that somewhere in the world there are researchers in advanced laboratories capable of applying cutting edge technology that could potentially be exculpatory. In this connection, it is informative to look to the federal Innocence Protection Act, 18 U.S.C. § 3600, which was the "driving force" behind amendments to RCW 10.73.170 in 2005. *Crumpton*, 181 Wn.2d at 266 (Stephens, J., dissenting). It provides that to obtain a court order for postconviction testing, the proposed testing must be "reasonable in scope, use[ ] scientifically sound methods, and [be] consistent with accepted forensic practices." 18 U.S.C. § 3600(a)(5).

[9] The parties have not briefed whether, and on what basis, B.D. could be required to provide a sample of the viral DNA from her herpes.

Without further information that the testing he seeks is even available to be ordered, Mr. Middleworth has not shown that an order would produce significant new information or more probably than not demonstrate his innocence. Accordingly, the trial court did not abuse its discretion when it denied Mr. Middleworth's motion for postconviction DNA testing.

Costs on Appeal

Mr. Middleworth asks this court to deny the State appellate costs if he is unsuccessful on appeal. Having reviewed his report and argument, the panel exercises its authority under RAP 14.2 and denies costs to the State.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

I CONCUR:

Korsmo, J.

No. 33018-4-III

LAWRENCE-BERREY, A.C.J. (dissenting) — Following two mistrials, a third jury convicted Robert Middleworth of first degree child rape and first degree child molestation.

Conflicting statements by B.D. implicated both Mr. Middleworth and B.D.'s step-grandfather as the source of her trauma. B.D.'s statements implicating her step-grandfather were unknown to defense counsel until the third trial was well underway.

The only physical evidence linking B.D.'s trauma with Mr. Middleworth was that they both had herpes simplex 1 and simplex 2. Perhaps because of the late disclosure of B.D.'s statements implicating her step-grandfather, defense counsel did not consider obtaining an order requiring the step-grandfather to submit to herpes testing.

In closing arguments, the State emphasized the herpes link between B.D. and Mr. Middleworth. This link was a significant factor in Mr. Middleworth's convictions.

The record establishes that 80 percent of the general population has herpes simplex 1 and a somewhat lower percentage has herpes simplex 2. For this reason, the herpes "link" implicates a substantial portion of the general population.

When deciding whether it is likely the deoxyribonucleic acid (DNA) evidence would demonstrate innocence, the trial court considers all the evidence from trial and assumes the DNA test would return an exculpatory result. *State v. Crumpton*, 181 Wn.2d 252, 260, 332 P.3d 448 (2014). The trial court was therefore required to assume that viral DNA tests would show that Mr. Middleworth's and B.D.'s viral DNA strains are different. If their viral DNA strains are different, this would exclude Mr. Middleworth as the source of B.D.'s herpes. This would mean that B.D. had sexual contact with a person other than Mr. Middleworth. It is highly unlikely that B.D., a five-year-old girl, had sexual contact with more than one person. Mr. Middleworth has therefore demonstrated that the requested DNA tests would provide significant new evidence to demonstrate his innocence on a more probable than not basis. This meets the statutory standards. RCW 10.73.170(2)(a)(iii), (2)(b), (3). The trial court, therefore, abused its discretion when it determined that the legal standards were not met.

The majority does not inquire whether the statutory standards have been met, but instead focuses on evidentiary issues extraneous to the statutory language. The majority notes that Mr. Middleworth has failed to show that viral DNA testing is publicly available, that viral DNA testing is generally accepted in the scientific community, and that someone is available to perform the requested viral DNA analysis. But these evidentiary inquiries are not part of our analysis at this stage. Rather, at this stage, we inquire only if the statutory standards have been met. *See Crumpton*, 181 Wn.2d at 263

(Meeting the statutory standard "affects only whether the DNA will be tested . . . . [It] is simply the first step on the journey for a new trial.").

The majority argues that evidentiary issues are properly considered prior to ordering DNA testing. In its argument, the majority cites a similar federal statute, 18 U.S.C. § 3600(a)(5). That statute directs trial courts to consider various evidentiary issues, such as those considered by the majority, before ordering postconviction testing. But RCW 10.73.170 omits this language that appears in § 3600(a)(5). When a state statute that is largely patterned after a federal statute omits language contained in the federal statute, it is a clear indication that the state legislature intended not to adopt the omitted portion of the federal statute. *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 427-28, 833 P.2d 375 (1992). For this reason, the majority's cite to 18 U.S.C. § 3600(a)(5) supports the narrow statutory inquiry made in *Crumpton*.[1]

The closer question (which the majority avoids) is whether RCW 10.73.170 should be construed as limited to *human* DNA testing. I would answer this question in the negative because there is nothing in the statute that limits its application to human DNA testing. The purpose of RCW 10.73.170 is to allow advances in DNA technology

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[1] If viral DNA testing is not available, Mr. Middleworth will not receive a new trial. If viral DNA testing is available and performed, and the results do not warrant a motion for a new trial, Mr. Middleworth will not receive a new trial.

If, however, the results warrant requesting a new trial, the State can move to exclude the DNA test results. The trial court would then preside over a formal hearing so an adequate record for appeal can be made. The majority's holding, which requires an applicant to establish the admissibility of DNA test results *prior to* the results, puts the cart before the horse.

to set innocent people free. *Crumpton*, 181 Wn.2d at 258. Construing RCW 10.73.170 broadly so as not to limit it to human DNA testing best fulfills this purpose.

Because the record establishes that favorable viral DNA tests would provide significant new information that would demonstrate Mr. Middleworth's probable innocence, I dissent.

Lawrence-Berrey, A.C.J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ROBERT MIDDLEWORTH, Appellant.	)))))))))	COA NO. 33018-4-III

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