FILED
Court of Appeals
Division III
State of Washington
7/15/2020 3:15 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
7/16/2020
BY SUSAN L. CARLSON
CLERK

Supreme Court No. 98786-6
Division III, No. 36396-1-III

IN THE
SUPREME COURT
OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THOMAS LEE BRAMBLEE,

Petitioner

PETITION FOR REVIEW FOLLOWING
APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Timothy B. Fennessy

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Thomas Lee Bramblee asks this Court to accept review of the Court of Appeals' decision that affirmed his conviction for attempted second degree rape of a child.

B. DECISION FOR WHICH REVIEW IS SOUGHT

The Court of Appeals, Division III, unpublished opinion, filed on June 16, 2020. A copy of this opinion is attached as "Appendix A."

C. ISSUES PRESENTED FOR REVIEW

Issue 1: Whether the trial court erred in denying the admission of Mr. Bramblee's exculpatory statement when such statement was an excited utterance and failure to allow admission was a violation of his constitutional right to present a defense. RAP 13.4(b)(3).

D. STATEMENT OF THE CASE

On May 3, 2016, Thomas Bramblee posted an ad on Craigslist in the Tacoma area personals section under the subsection for casual encounters. (1RP 82-85; State's Ex. 8). The ad stated he was "lookin for girls into incest roleplay" such as "mom son, aunt nephew, father daughter, cousin, brother older sister, brother younger sister." (1RP[1] 85; State's Ex. 8). The ad did not indicate an interest in children or sex with children. (1RP 82-85; State's Ex. 8).

A Washington State Patrol detective part of the Missing and Exploited Children Task Force (MECTF) was attending undercover chat school at the time she came upon Mr. Bramblee's ad. (1RP 76-82). She responded to the ad, posing as

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[1] "1RP" refers to Vols. I & II transcribed by Joe Wittstock and includes the court proceedings from 8/6/18, 8/7/18, 8/8/18, and 8/9/18.

"2RP" refers to a single volume transcribed by Amy Wilkins and includes the court proceedings from 4/20/18, 4/23/18, and 4/25/18.

"Kay C", the mother of a 12 year-old girl named "Anna." (1RP 88-89, 95; State's Ex. 9). The undercover detective explained she was not interested in roleplay, but was looking for someone who could have a relationship with her daughter that involved sexual experimentation. (1RP 91; State's Ex. 9). Mr. Bramblee and the undercover officer exchanged more information about themselves, with the detective using a story line she had developed about herself. (1RP 89-98).

Over about two months, the two exchanged several emails and text messages. (1RP 89-138; State's Exs. 9, 11, 12, 14). A lot of the messages centered around the two sharing information about their lives and themselves. (1RP 89-138; State's Exs. 9, 11, 12, 14). Towards the end, the messages asked whether "Anna" would be interested in certain sex acts, and inquired whether "Kay" would be interested in participating, too. (1RP 132-141).

On July 10, 2016, Mr. Bramblee agreed to meet with Anna and Kay at their alleged residence in Spokane. (1RP 132-141). Upon arriving he was arrested by law enforcement in the basement of the residence. (1RP 140-142).

The State charged Mr. Bramblee with a single count of attempted rape of a child in the second degree. (CP 11).

According to the record, Mr. Bramblee immediately had stated he was "here for the mother" when he was arrested. (2RP 18). Before trial, the State sought to keep out and the defense sought to bring into evidence this statement. (CP 52-53, 78, 85, 88; 2RP 6-8, 19-27). The trial court opined the statement was not admissible unless Mr. Bramblee was available to testify. (2RP 20-21). Defense counsel countered that declarant availability was not part of the equation because Mr.

Bramblee was seeking admission pursuant to an excited utterance exception, and not a state of mind exception. (2RP 21-22). The State took the position the statement was not an excited utterance at all, though the trial court seemed to be less certain. (2RP 25-26). After discussion with the parties, the court reserved on the ruling for more time to do research. (2RP 19-27).

Later, the hearsay admissibility issue was readdressed by the trial court. (2RP 64-71). Defense counsel pointed to case law stating a declarant need not be available for hearsay to come in under the excited utterance exception. (2RP 65); *State v. Palomo*, 113 Wn.2d 789, 783 P.2d 575 (1989). However, the trial court instead relied upon the *State v. Ammlung* case, concluding that because in that case the declarant "was obviously attempting to get the statement into evidence to support her contention" and theory of the case, a defendant cannot create her "own unavailability by electing not to give evidence on her own behalf." (2RP 66) (citing *State v. Ammlung*, 31 Wn. App. 696, 644 P.2d 717 (1982)). The State agreed with defense counsel that availability of the declarant was not an issue, but rather maintained it did still not think the statement qualified under the excited utterance exception. (2RP 68). Ultimately, the trial court still ruled the statement was not admissible unless Mr. Bramblee was available to testify. (2RP 69-71).

A mistrial was granted in the first jury trial due to evidence that had not been previously provided to the defense. (2RP 135-137).

The case proceeded to a second jury trial. (1RP 26-208). Mr. Bramblee did not testify. (1RP 26-208).

A Washington State Patrol sergeant from the MECTF testified at trial. (1RP 27-65). He explained law enforcement was running an operation in Spokane in July 2016 to look for individuals who wanted sex with children. (1RP 50-60). The sergeant was present when Mr. Bramblee was arrested, but he was not involved in any online communications. (1RP 60, 62).

The undercover detective pretending to be "Kay" testified at trial. (1RP 76-177). The detective stated she was also participating in the Spokane operation in July 2016. (1RP 78-79). Her job was to pretend she was the mother to a 12-year-old girl named "Anna." (1RP 80, 95). The detective indicated she was using Craigslist to make contact with suspects. (1RP 80-81). She chose to respond to Mr. Bramblee's ad because it mentioned the words "incest" and "girls" and "younger." (1RP 85). The original ad stated:

> lookin for girls into incest roleplay—m4w (your place)
>
> Super horny and have fantasies about incest roleplay mom son, aunt nephew, father daughter, cousin, brother older sister, brother younger sister. I'm in my 20s lil heavy set not bad lookin and I WANT YOU!!! if you're getting wet thinkin about this message me send me pics and tell me what's going through your mind and if you have ANY fantasies let me know and I'll try to help you with them put FUN TIMES in the subject line

(1RP 85; State's Ex. 8) (emphasis in original removed). The undercover detective responded to this ad, stating she was the mother of a 12 year-old and she was interested in Mr. Bramblee's ad, but not role play, and if Mr. Bramblee was not interested she asked he not reply. (1RP 89; State's Ex. 9). Mr. Bramblee responded he did not understand what she meant. (1RP 90; State's Ex. 9). "Kay" responded, stating she had had an "incest experience" when she was young, and was looking for

the same type of situation for her daughter. (1RP 90; State's Ex. 9). Mr. Bramblee expressed concerns he was being "set up". (1RP 92; State's Ex. 9). "Kay" indicated she was fearful of law enforcement, too. (1RP 93; State's Ex. 9).

The communication between the two continued, with a focus on exchanging information about each other and no mention of "Anna" for almost 20 email messages. (1RP 93-98; State's Ex. 9). It was "Kay" who brought the subject of her daughter up again. (1RP 98; State's Ex. 9). Mr. Bramblee asked for pictures and he briefly inquired about how the situation would occur with "Anna." (1RP 98-99; State's Ex. 9). But then "Kay" and Mr. Bramblee spent the next several emails again discussing their lives. (1RP 99-100; State's Ex. 9). The undercover detective brought up "Anna" again, stating "I guess I need to know if your interested in a real relationship with Anna or if your just a role play kind of guy." (1RP 100; State's Ex. 9). Mr. Bramblee asked "Kay" to explain what she meant: "What do you mean role play or real relationship?" (1RP 101; State's Ex. 9). And a follow up message from Mr. Bramblee to "Kay" stated: "Just was wanting to be clear on what you meant and what the differences are of what you're talking about…." (1RP 101; State's Ex. 9). "Kay" never responded to this request for clarification. (1RP 101; State's Ex. 9).

Next, pictures were exchanged. (1RP 101-103; State's Ex. 9). "Kay" sent a picture of "Anna" to Mr. Bramblee, and he responded in turn with pictures of himself. (1RP 103; State's Ex. 9). He requested a picture of "Kay", which the undercover detective sent. (1RP 102-103). After a few more messages were exchanged, Mr. Bramblee shared with "Kay" that he has a huge heart that leads to him getting hurt and that he falls in love too easy and fast. (1RP 104; State's Ex. 9).

The detective reiterated she was seeking a relationship for “Anna” and not herself. (1RP 103-105; State’s Ex. 9).

Around May 20, 2016, the communication dropped off between the undercover detective and Mr. Bramblee for a few weeks. (1RP 106-109; State’s Ex. 9). The detective reinitiated contact with Mr. Bramblee on June 9, 2016. (1RP 108; State’s Ex. 9).

Mr. Bramblee reposted his Craigslist ad around July 5, 2016, with the exact same wording. (1RP 112-113; State’s Ex. 13). Again the undercover detective responded to Mr. Bramblee’s ad, indicating her interest in finding someone to have a sexual relationship with her 12 year-old daughter. (1RP 114-117; State’s Ex. 14).

The communication between Mr. Bramblee and the undercover detective then turned to text messages. (1RP 122-140; State’s Ex. 11). Eventually, Mr. Bramblee agreed to meet with “Kay” and “Anna” in person. (1RP 136-140; State’s Exs. 11 & 12). At that point Mr. Bramblee was arrested. (1RP 140).

On the stand, the undercover detective admitted Mr. Bramblee was seeking “roleplay” and “fantasy” in his Craigslist ad. (1RP 160). Mr. Bramblee shared a lot of personal details about his life with “Kay”. (1RP 162-165). He talked about camping, fishing, hunting, auto pros, racing, hiking, traveling, cars, and a bad gasket on his car. (1RP 162-164). He even gave information on his family—that his father had cancer and that his grandmother was not doing well because a close family member passed away. (1RP 162-165). The detective admitted Mr. Bramblee made some advances towards her during their communications, including one offer of a sex. (1RP 165, 168). The detective also acknowledged Mr. Bramblee never spoke

to anyone posing as “Anna” or communicated directly with her throughout the two months she and Mr. Bramblee were in contact prior to his arrest. (1RP 165).

A second detective—the one who arrested Mr. Bramblee—testified on the stand that Mr. Bramblee made a statement to him upon arrest. (1RP 188). That statement was never disclosed at trial. (1RP 188).

Defense witness Greg Ross testified he has known Mr. Bramblee his entire life and they are best friends. (1RP 206). Mr. Ross stated he conversed with Mr. Bramblee about a woman he had been communicating with online, and Mr. Ross advised Mr. Bramblee he should contact the police. (1RP 207).

The jury was instructed on the defense of entrapment:

> Entrapment is a defense to a charge of Attempted Child Rape in the Second Degree if the criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and the defendant was lured or induced to commit a crime that the defendant had not otherwise intended to commit.
>
> The defense is not established if the law enforcement officials did no more than afford the defendant an opportunity to commit a crime. The use of a reasonable amount of persuasion to overcome reluctance does not constitute entrapment.
>
> The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

(CP 139; 1RP 232).

The jury found Mr. Bramblee guilty of attempted rape of a child in the second degree. (CP 143; 1RP 279).

The Court of Appeals affirmed Mr. Bramblee's conviction, but remanded the case to reevaluate a community custody condition and possibly strike some legal financial obligations. *See* Appendix A. Mr. Bramblee now seeks review by this Court.

E. ARGUMENT

A petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Issue 1: Whether this Court should accept review under RAP 13.4(b)(3), because the trial court erred in denying the admission of Mr. Bramblee's exculpatory statement when such statement was an excited utterance and failure to allow admission was a violation of his constitutional right to present a defense.

Review by this Court is merited because the issue raises a significant question of law under the United States Constitution and the Washington Constitution, a defendant's right to present a defense. *See* U.S. Const. amend. VI; Wash. Const. art. I, §22; *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983); *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). RAP 13.4(b)(3).

Mr. Bramblee's constitutional right to present his defense was violated when the trial court would not allow admission of an exculpatory statement which supported his defense theory. (2RP 64-71). RAP 13.4(b)(3). Prior to trial Mr. Bramblee sought admission of an exculpatory statement he made to an arresting officer. (CP 52-53, 78, 85, 88; 2RP 6-8, 19-27, 64-71). Mr. Bramblee asserts the statement was admissible. The Court of Appeals acknowledged the trial court may have erred by not allowing admission of the statement but did not agree Mr. Bramblee's right to present a defense was hampered on the basis of harmless error. *See* Appendix A, pgs. 3-5. Mr. Bramblee has the state and federal constitutional right to present evidence in support of his defense and the conviction should be reversed and remanded for a new trial. RAP 13.4(b)(3).

Both the United States and Washington Constitutions guarantee the right to present a defense. U.S. Const. amend. VI; Wash. Const. art. I, §22; *Hudlow*, 99 Wn.2d at 14; *Darden*, 145 Wn.2d at 620. "At a minimum . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). "A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence." *State v. Jones,* 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (citing *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)).

Generally, as a matter of constitutional due process of law, a trial court must allow a defendant to present his defense theory of the case, including through cross examination, so long as the law and evidence support it. *State v. Ginn*, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005); *Darden*, 145 Wn.2d at 620-21.

Claims that the constitutional right to present a defense has been violated are reviewed de novo. *Jones*, 168 Wn.2d at 719. A trial court's decision to exclude evidence is reviewed for an abuse of discretion. *City of Kennewick v. Day*, 142 Wn.2d 1, 5, 11 P.3d 304 (2000). "An abuse of discretion occurs if 'discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Id*. (quoting *State v. McDonald*, 138 Wn.2d 680, 696, 981 P.2d 446 (1999)). To review whether a trial court's ruling violated the constitutional right to present a defense, this Court reviews "whether the evidence satisfied evidence rule strictures." *State v. Farnworth*, 199 Wn. App. 185, 206, 398 P.3d 1172 (2017), *reversed on other grounds*, 192 Wn.2d 468, 430 P.3d 1127 (2018). "An erroneous evidentiary ruling that violates the defendant's constitutional rights . . . is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt." *State v. Franklin*, 180 Wn.2d 371, 377 n.2, 325 P.3d 159, 162 (2014).

Whether a statement is hearsay is reviewed de novo. *State v. Gonzalez-Gonzalez*, 193 Wn. App. 683, 689, 370 P.3d 989 (2016).

Hearsay is an out of court statement offered to prove the truth of the matter asserted. ER 801(c). Hearsay is inadmissible unless an exception or exclusion applies. ER 802.

Pursuant to ER 804, hearsay is admissible under limited circumstances when a declarant is "unavailable" as a witness. ER 804. In general five types of hearsay are admissible if a declarant is "unavailable" per the rule: (1) former testimony, (2) statements under belief of impending death, (3) statements against interest, (4) statements of personal or family history, and (5) statements offered due to forfeiture by wrongdoing. ER 804(b). None of those exceptions apply in this case.

Hearsay is also admissible pursuant to numerous exceptions laid out under ER 803(a)(1)-(23). These exceptions allow admission of hearsay "even though the declarant is available as a witness." ER 803(a). An excited utterance is admissible if it is a statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." ER 803(a)(2). The courts have recognized a three-part test for determining whether a statement qualifies as an excited utterance:

> First, a startling event or condition must have occurred. Second, the statement must have been made while the declarant was under the stress or excitement caused by the startling event or condition. Third, the statement must relate to the startling event or condition…. Often, the key determination is whether the statement was made while the declarant was still under the influence of the event to the extent that the statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.

State v. Pavlik, 165 Wn. App. 645, 654, 268 P.3d 986 (2011) (citations & internal quotations omitted). "The excited utterance exception allows for a statement to be admitted without any showing that the declarant is unavailable as a witness." *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). The "hearsay exception for excited utterances, which rests upon circumstantial reliability . . . does not require a

showing of unavailability." *State v. Palomo*, 113 Wn.2d 789, 797, 783 P.2d 575 (1989).

In *State v. Pavlik*, the defendant made exculpatory statements after shooting a person in and act the defendant claimed was self-defense. 165 Wn. App. at 647-648. The defendant wanted admission at trial of statements he immediately made to law enforcement at the scene, wherein he stated he had been acting in self-defense. *Id*. at 648. Therein, the Court agreed a trial judge could have found one of the defendant's statements[2] qualified as an excited utterance; but ultimately the Court did not reverse due to harmless error. *Id*.

The *Pavlik* Court also explained there is no "self-serving" hearsay rule that bars otherwise admissible statements. *Pavlik*, 165 Wn. App. at 653.

The case of *State v. Ammlung*, 31 Wn. App. 696, 644 P.2d 717 (1982), involved a similar situation. 31 Wn. App. 696, 644 P.2d 717 (1982). There, the defendant made statements at the time of her arrest. *Id*. at 702-703. The statement was one she made to an officer, and she wanted the statement admitted at trial via the officer's testimony, though she herself was apparently unwilling to testify. *Id*. at 703. She sought admission of the hearsay via two means: (1) that the hearsay statement was against her penal interest and therefore admissible pursuant to ER 804(3)[3], and the statement was probative of her state of mind at the time of the arrest pursuant to the hearsay exceptions under ER 803(a)(3). *Id*. at 703. The court

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[2] For reasons not relevant to this appeal, the Court in *Pavlik* refused to address all of the defendant's statements and only reviewed one statement on appeal. *Id*. at 651.

[3] ER 804(3) appears to have been a prior version from the rules published in 1979.

rejected both claims. *Id*. First, the court stated the hearsay exception pursuant to 804(3), statement against penal interest, was not admissible because the declarant had to be unavailable for that hearsay exception to apply. *Id*. at 703. The court declared the defendant could not create her unavailability by "electing not to give evidence on her own behalf." *Id*. at 703. Second, the court found the hearsay inadmissible pursuant to ER 803(a)(3) because the defendant's state of mind was not at issue. *Id*. at 703.

Ultimately, it was *Ammlung* which the trial court in this case erroneously relied upon and misinterpreted. (2RP 65-66). The trial court concluded Mr. Bramblee could not create unavailability by refusing to testify, and thus no hearsay exception applied to allow admissibility. (2RP 65-66). This decision was manifestly unreasonable, and was based on untenable grounds and for untenable reasons. ER 802 provides hearsay is not admissible "except as provided by these rules…." ER 802. Any exception which allows hearsay admissibility is permissible. ER 802. Mr. Bramblee did not seek admission of the hearsay statement pursuant to ER 804, but rather, he sought admission of the hearsay statement pursuant to ER 803(a)(2), the excited utterance exception.

The trial court applied the wrong analysis by stating self-created unavailability of the declarant barred admission of the hearsay. (2RP 65-66). The trial court abused its discretion by so ruling, because ER 803 does not require a finding of unavailability of the declarant in order for the hearsay exceptions under ER 803(a)(1) through (23) to apply. ER 803(a) specifically notes the types of statements which are exceptions "even though the declarant is available as a

witness"—which does not mean the declarant must be unavailable as a witness. ER 803(a). If a declarant were required to be unavailable under ER 803, the rule would so state just as such a requirement is set forth under ER 804. Moreover, our Washington State Supreme Court recognized ER 803 does not require the declarant to be unavailable, either. *Chapin*, 118 Wn.2d at 686; *Palomo*, 113 Wn.2d at 797. Here, the Court of Appeals, Division III, acknowledged the trial court "erred when it excluded Mr. Bramblee's statement on the grounds that he did not testify." *See* Appendix A, pg. 4.

Mr. Bramblee's statement at the time of arrest that he was "here for the mother" should have been admissible as an excited utterance exception to the hearsay rules. ER 803(a)(2). The statement was made during a startling event when Mr. Bramblee was being arrested, Mr. Bramblee was obviously under the stress or excitement of being arrested, and the statement was made in relation to the startling event of arrest. *Pavlik*, 165 Wn. App. at 654 (setting forth 3 part excited utterance test). The trial court should have found this hearsay exception applied and allowed the arresting officer to testify as to the statement. (2RP 64-71).

Finally, the trial court's failure to allow admission of the statement affected Mr. Bramblee's constitutional right to present his defense. And contrary to Division III's opinion, this error was not harmless beyond a reasonable doubt. *See* Appendix A, pgs. 4-5. Mr. Bramblee sought admission of the statement before trial, and the statement was one which would have supported his theory of the case that he was not there to actually commit the crime of second degree rape of a child; rather he was there in answer to a role play and fantasy ad he had placed online, and to meet

"Kay." (1RP 258-259, 262-264). Mr. Bramblee flirted with "Kay" and made advances towards her, shared personal information about his family and himself with "Kay", and never actually communicated with the fictitious "Anna." (1RP 162-165, 168, 262-264). The statement that he was "there for the mother" would have supported his defense theory that he was not pursuing a physical relationship with a child, and that he was entrapped because he was lured or enduced by law enforcement to commit a crime. (CP 139; 1RP 232). Because the trial court's exclusion of the excited utterance was erroneous and violated Mr. Bramblee's right to present his whole defense case, the error is presumed prejudicial and the State cannot show it was harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 377 n.2. The Court of Appeals should have reversed and remanded for a new trial.

Mr. Bramblee had the right to put evidence before the jury that might influence its determination of guilt. *See Ritchie*, 480 U.S. at 56. This Court's *de novo* review of the constitutional error in this case should result in a new trial. *See Jones*, 168 Wn.2d at 719.

Mr. Bramblee respectfully requests this matter be reversed and remanded for a new trial so he can exercise his constitutionally protected right to fully present his defense.

E. CONCLUSION

Mr. Bramblee was denied his right to present evidence in his defense and he respectfully requests this Court accept review, reverse his conviction, and remand for a new trial.

Respectfully submitted this 15th day of July, 2020.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
Plaintiff/Respondent	)	COA No. 36396-1-III
vs.	)	
	)	
THOMAS L. BRAMBLEE,	)	PROOF OF SERVICE
	)	
Defendant/Appellant	)	
	)	

I, Laura M. Chuang, of counsel to the assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on July 15, 2020, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the attached Petition for Review to:

Thomas Lee Bramblee DOC #409990
Coyote Ridge Corrections Center D-A31
PO Box 769
Connell, WA 99326

Having obtained prior permission from the Spokane County Prosecutor's Office, I also served the Respondent State of Washington at SCPAappeals@SpokaneCounty.org using the Washington State Appellate Courts' Portal.

Dated this 15th day of July, 2020.

/s/ Laura M. Chuang
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APPENDIX A

FILED
JUNE 16, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. THOMAS LEE BRAMBLEE, also known as THOMAS BRAMBLEE, Appellant.	))))))))))	No. 36396-1-III UNPUBLISHED OPINION

KORSMO, J. — Thomas Bramblee appeals his conviction for attempted second degree rape of a child. He argues the trial court erred by excluding an exculpatory statement, imposing a community custody condition, and imposing unauthorized legal financial obligations (LFOs). We affirm the conviction, but remand to the trial court to re-evaluate a community custody condition and possibly strike the LFOs.

Detective Kristl Pohl, part of a Washington State Patrol Task Force investigating child sex offenses, examined Craigslist advertisements that suggested interest in sexual activities with minors. She responded to a Craigslist advertisement posted by Mr. Bramblee that sought individuals interested in parent-child or siblings incest roleplay. Detective Pohl posed as a mother with a 12-year-old daughter named "Anna." The detective conversed with Bramblee to determine whether he wanted to have sex with

"Anna," a minor. While Mr. Bramblee feared police involvement, he eventually agreed to have sex with "Anna." Mr. Bramblee described the sexual acts he planned to perform on "Anna" and brought a condom to the house where he was to meet the mother and child.

Mr. Bramblee travelled to the house and officers arrested him. During his arrest, Mr. Bramblee made a statement that he was there for the mother (Detective Pohl). During a search, officers found a condom on Bramblee.

The trial court did not allow Mr. Bramblee to offer the statement that he went to the house only for the mother because Bramblee did not intend to testify. The court never determined whether the statement constituted an excited utterance.

A jury ultimately convicted Mr. Bramblee of attempted second degree child rape. The court imposed a low end standard range sentence. The LFOs included a $500 victim compensation fee, $200 criminal filing fee, and a $100 DNA collection fee. The court also imposed interest on the LFOs. Mr. Bramblee's community custody conditions included a requirement that he "not access social media sites to include chat forums, dating sites, or solicit sex on the Internet."

Mr. Bramblee timely appealed his conviction. A panel considered his appeal without hearing oral argument.

ANALYSIS

The appeal presents three issues, which we address in the following order: (1) the excluded statement, (2) the noted community custody condition, and (3) LFOs.

Excluded Statement

Under both the Sixth Amendment to the United States Constitution and art. I § 22 of the Washington Constitution, a defendant is entitled to present evidence in support of his defense. *State v. Strizheus*, 163 Wn. App. 820, 829-830, 262 P.3d 100 (2011). That right, however, does not include a right to present irrelevant or inadmissible evidence. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). As the proponent of the evidence, the defendant bears the burden of establishing relevance and materiality. *State v. Pacheco*, 107 Wn.2d 59, 67, 726 P.2d 981 (1986).

Trial court decisions to admit or exclude evidence are entitled to great deference and will be overturned only for manifest abuse of discretion. *State v. Luvene*, 127 Wn.2d 690, 706-707, 903 P.2d 960 (1995). Discretion is abused where it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A court also abuses its discretion when it applies the wrong legal standard. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). We will only reverse for evidentiary error if the appellant demonstrates that the error likely affected the trial outcome. *State v. Barry*, 183 Wn.2d 297, 313, 352 P.3d 161 (2015).

Trial errors can be harmless. Error of constitutional magnitude is harmless if it is proved to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Evidentiary error is harmless if, within reasonable probability, it did not materially affect the verdict. *State v. Zwicker*, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986).

The admission of an excited utterance is not dependent on whether the declarant is available as a witness. *State v. Ohlson*, 162 Wn.2d 1, 8, 168 P.3d 1273 (2007). A statement qualifies as an excited utterance under ER 803(2) if "(1) a startling event occurred, (2) the declarant made the statement while under the stress or excitement of the event, and (3) the statement relates to the event." *State v. Magers*, 164 Wn.2d 174, 187-188, 189 P.3d 126 (2008). Hearsay that is self-serving still may be admissible under ER 803. *State v. Pavlik*, 165 Wn. App. 645, 655-656, 268 P.3d 986 (2011).

The trial court erred when it excluded Mr. Bramblee's statement on the grounds that he did not testify. The declarant's availability is immaterial for ER 803. *Ohlson*, 162 Wn.2d at 8. Since the court did not analyze the statement, we are not in a position to determine whether the statement constituted an excited utterance.

Any error in excluding the statement was harmless. The exclusion of the statement did not deprive Mr. Bramblee of the opportunity to present his defense. He called a witness in support of an entrapment defense and otherwise challenged the State's

evidence against him. The court's decision to exclude the statement constituted, at most, an evidentiary error.

Admission of the statement would not have changed the trial outcome. Evidence before the jury included Mr. Bramblee's communication in which he expressed his desire to engage in sexual acts with "Anna." He arrived at the sting house with condoms as part of his plans to engage in sex with the fictitious minor. Meanwhile, Mr. Bramblee's statement during arrest did not align with his previous conversation where he agreed not to have sex with the mother, only the minor. The statement likely constituted an attempted alibi. We are convinced that admitting the statement would not change the trial outcome in light of all the other evidence.

If the court erred in excluding the statement, the error was harmless.

Community Custody Condition

Mr. Bramblee next argues that the court erred by imposing a requirement that he "not access social media sites to include chat forums, dating sites, or solicit sex on the Internet" during his term of community custody. There was no discussion concerning the necessity of this broad limitation. We therefore remand for the court to consider the scope of this condition.

A defendant's rights during community custody are subject to infringements authorized by the Sentencing Reform Act of 1981, ch. 9.94A RCW. *State v. Ross*, 129 Wn.2d 279, 287, 916 P.2d 405 (1996). Restrictions placed on a defendant's conduct

must be reasonably related to the offense for which the defendant was convicted. RCW 9.94A.030(10); *State v. Johnson*, 4 Wn. App. 2d 352, 358, 421 P.3d 969 (2018). In the absence of a timely objection in the trial court, we will not entertain on appeal a challenge to the factual basis for a crime-related condition. *State v. Casimiro*, 8 Wn. App. 2d 245, 249, 438 P.3d 137 (2019). However, a constitutional challenge to an overly broad condition can be considered on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

A condition is unconstitutionally overbroad when it infringes on a defendant's right to free speech or free association beyond what the State may legitimately regulate. *State v. Riles*, 135 Wn.2d 326, 346, 957 P.2d 655 (1998), *overruled on other grounds* by *State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010). The trial court must establish on the record that the condition is narrowly drafted to achieve the State's interest and that there is no other reasonable alternative to prevent undesired conduct related to the convicted offense. *State v. DeLeon*, 11Wn. App. 2d. 837, 840-841, 456 P.3d 405 (2020). Restrictions on social media use may violate an individual's First Amendment rights. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732, 198 L. Ed. 2d 273 (2017).

The trial court did not provide any analysis on the record regarding the social media restriction. We cannot determine whether the condition unnecessarily restricts Mr. Bramblee from legitimate First Amendment activities that are unrelated to the State's interest in preventing him from soliciting sex with minors. We remand this matter to the

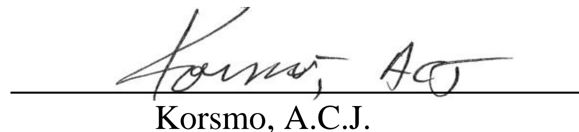
trial court to perform the appropriate overbreadth analysis before imposing any social media restriction on Mr. Bramblee.

Legal Financial Obligations

Lastly, Mr. Bramblee challenges the $200 criminal filing fee and a provision imposing interest on his LFOs due to his indigency. The trial court may not impose discretionary LFOs on indigent defendants. *State v. Ramirez*, 191 Wn.2d 732, 750, 426 P.3d 714 (2018). Since we are remanding for reconsideration of the community custody condition, the trial court should strike the interest provision and, if Mr. Bramblee is indigent, strike the filing fee.

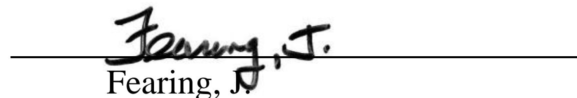
Affirmed and remanded.

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.

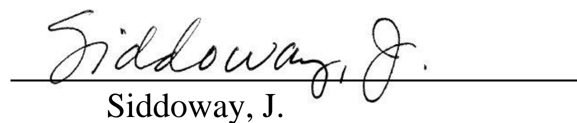


Korsmo, A.C.J.

WE CONCUR:



Fearing, J.



Siddoway, J.

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July 15, 2020 - 3:15 PM

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Appellate Court Case Title:	State of Washington v. Thomas Lee Bramblee
Superior Court Case Number:	16-1-02629-1

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