NO. 999643

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JACOB COX,

Respondent.

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

The Honorable John Lohrmann, Judge

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

TABLE OF AUTHORITIES (cont'd)

STATUTES AND OTHER AUTHORITIES

A. SUMMARY OF ANSWER

The Court of Appeals relied on well settled decisions by this Court in its opinion. The State cites no decision by this Court or the Court of Appeals that conflicts with the Court of Appeals opinion. Nor does it attempt to articulate why the Court of Appeals application of well settled law presents an issue of substantial public interest, much less worthy of this Court's review. Because the State's petition does not meet the criteria of RAP 13.4(b), this Court should deny review.

B. ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals opinion, relying on this Court's decision in *State v. Jones*, *infra*, to hold the Rape Shield Statute cannot exclude crucial defense evidence of events the same evening as the claimed rape, and the trial court's exclusion of that evidence violated the defendant's constitutional right to present a defense, warrant this Court's review? RAP 13.4(b)(1), (2), (4).

2. Does the Court of appeals opinion applying this Court's decision in *Levine v. Barry*, *infra*, to hold the defense may cross-examine the State's expert witness regarding hypotheticals

different than his own opinion, warrant this Court's review? RAP 13.4(b)(1), (2), (4)?

3. Does the Court of Appeals opinion applying this Court's decision in *State v. Underwood*, *infra*, to hold the defense offered a valid foundation for reputation evidence, warrant this Court's review? RAP 13.4(b)(1), (2), (4).

C. STATEMENT OF THE CASE

Respondent accepts and incorporates by reference the Facts from the Court of Appeals opinion. *State v. Cox*, 17 Wn. App. 2d 178, 183-85, 484 P.3d 529 (2021).

In sum, the complaining witness JR had a birthday party at her home. Mr. Cox was among the guests. JR became very intoxicated at the party. During the party she was uncharacteristically flirtatious with some guests. She sat on Mr. Cox's lap while wearing a knee-length dress. She laid her head on his shoulder. She spoke of choosing Mr. Cox if she were "into dudes" and of choosing another woman if she were "into girls." She urged guests to kiss one another. JR did not recall this behavior, although other guests did. After JR became so drunk she vomited, a friend helped her

into bed, tucking her in under the covers. Mr. Cox's fiancee was already asleep on top of the covers on the bed. RP 225-26, 233-38, 276, 285, 436-43, 472, 481, 489-90.

JR testified she had a "sex dream," then awoke to find Mr. Cox with his fingers in her vagina. She pushed him away, got out of bed, and left the room. RP 240-47.

Mr. Cox testified he fell asleep on top of the covers next to his fiancee, but awoke to JR touching his pelvis. He told her it was inappropriate. She got out of bed and left the room. He then woke his fiancee and they left the home. RP 582-84, 597-610. He denied he touched JR in any sexual way. RP 858-59.

No male DNA was found on JR's body. RP 686. DNA on JR's underpants matched her and Mr. Cox. The defense expert concluded the DNA also contained a third person's trace DNA, a male. The State's expert concluded this "trace" was an "artifact," not actually another person's DNA. RP 687-88, 692-94.

At trial, the defense wanted to admit evidence of JR sitting on Mr. Cox's lap and the expert's

conclusion of another male's DNA on the underpants to demonstrate how DNA could arrive there without sexual contact. RP 199-200, 362-72, 532-35. The court excluded any defense evidence that JR sat on Mr. Cox's lap or behaved in a flirtatious manner with him or others at the party as violating the Rape Shield Statute, irrelevant, and prejudicial. It also precluded the defense from cross-examining the State's DNA expert regarding the defense expert's conclusion that a third person's male DNA was also on the underpants. And it excluded evidence that Mr. Cox had good character for sexual morality. RPL 39-55, RP 199-200, 362-72, 532-35, 711-16, 725-69; CP 122, 125-26.

The Court of Appeals reversed the conviction, holding the trial court denied Mr. Cox his constitutional right to present a defense by excluding the flirtatious behavior the same night as the claimed rape. *Cox*, at 183-91. Because it considered two additional issues likely to recur on retrial, it also ruled the trial court abused its discretion prohibiting cross-examination of the State's expert, and excluding reputation evidence for an inadequate foundation. *Cox*, at 191-96.

D. ARGUMENT

THE STATE CITES NO CONFLICTING DECISIONS BY THE COURT OF APPEALS OR THE SUPREME COURT, RAP 13.4(b)(1), (2), AND FAILS TO ARTICULATE HOW THE COURT OF APPEALS OPINION PRESENTS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THIS COURT, RAP 13.4(b)(4).

Under RAP 13.4(b), this Court will accept a petition for review "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 a published decision of the Court of Appeals; or
>
> ...
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The State claims review is warranted under these three grounds. Petition at 3. Yet it cites not a single conflicting decision by the Court of Appeals or Supreme Court. Petition at 3-20.

Nor does it articulate how the opinion below presents an issue of public interest, much less one so substantial as to call for this Court's review.

Cases suggest an issue of substantial public interest is one that involves a commonly repeated practice or application of law that will affect enormous numbers of similar cases. Thus this Court found an issue of substantial public interest

warranting review where the issue was whether every past divorce decree's escalation clause was void and required repayment of back child support payments. *In re Marriage of Ortiz*, 108 Wn.2d 643, 645-46, 740 P.2d 843 (1987). *See also*: *State v. Tingdale*, 117 Wn.2d 595, 597-99, 817 P.2d 850 (1991) (court clerk's practice of summarily excusing jurors before voir dire if the clerk believed the juror was acquainted with a defendant affected every jury trial in the county); *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (whether an elected prosecutor's general policy announcement was an *ex parte* communication would affect "every sentencing proceeding in Pierce County after November 26, 2001, where a DOSA sentence was or is at issue").

This case presents no issue of substantial public interest to warrant this Court's review.

1. THE COURT OF APPEALS OPINION RELIES ON THIS COURT'S WELL-SETTLED AND RECENT CONTROLLING DECISIONS ON THE CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE. THERE ARE NO CONFLICTING DECISIONS. RAP 13.4(b).

The Court of Appeals analyzed the constitutional right to present a defense from this Court's decisions in *State v. Orn*, 197 Wn.2d 343, 482 P.3d

913 (2021), and *State v. Jones*, 168 Wn.2d 713, 230 P.3d 476 (2010); and the Court of Appeals decisions of *State v. Duarte Vela*, 200 Wn. App. 306, 402 P.3d 281 (2017), *review denied*, 190 Wn.2d 1005 (2018), and *State v. Sheets*, 128 Wn. App. 149, 115 P.3d 1004 (2005), *review denied by State v. Porter*, 156 Wn.2d 1014 (2006). It reviewed this constitutional issue *de novo*, but also held it was an abuse of discretion. It concluded the error was not harmless beyond a reasonable doubt. Thus it reversed Mr. Cox's conviction on this issue. *Cox*, 17 Wn. App. at 186-91.

Jones is the controlling authority for this case. In *Jones*, the defendant was charged with raping his niece. He sought to testify that the sexual intercourse occurred within the context of a "nine-hour alcohol- and cocaine-fueled sex party" in which his niece and another woman danced and engaged in sex with him and two other men in return for money. 168 Wn.2d at 718. The trial court excluded this evidence on the grounds it violated the Rape Shield Statute. This Court held this exclusion violated Mr. Jones's Sixth Amendment right to present a defense. *Id.* at 719-21.

In *Jones*, this Court held the Rape Shield Statute did not apply. The statute only prohibits evidence of "past sexual behavior." "Jones's evidence refers not to past sexual conduct but to conduct on the night of the alleged rape." *Id.* at 723. As in *Jones*, the proffered evidence of JR's behavior here was "not to past sexual conduct"[1] but to conduct the same night as the alleged rape, within hours, at the same party. As in *Jones*, the Rape Shield Statute does not apply. There is no conflict.[2]

Unlike *Orn*, *supra*, this case turned entirely on the credibility of JR and Mr. Cox, and the significance of the DNA evidence. The defense offered an innocent explanation for the DNA, which the trial court excluded. This case involved nothing like the overwhelming evidence beyond the complaining witness's testimony in *Orn*. The error

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[1] As the Court of Appeals noted in *Sheets*, *supra*, there remains the separate issue whether "flirtatious" behavior is "sexual" behavior under the statute. 128 Wn. App. at 157.

[2] The State argues the Court of Appeals opinion conflicts with a dictionary definition of "contemporaneous." Petition at 5. Conflicts with a dictionary are not a ground for review. RAP 13.4(b).

was not harmless beyond a reasonable doubt.

The Court of Appeals opinion is entirely consistent with the well-settled cases on which it relies. The State fails to show how it conflicts with any decision by this Court or the Court of Appeals. It makes no suggestion of how it presents a substantial issue of public interest requiring this Court's review. Petition at 3-9. This Court should deny review. RAP 13.4(b).

Because this issue was dispositive, this Court should deny review of the remaining two issues.

2. THE COURT OF APPEALS OPINION REGARDING CROSS-EXAMINATION OF THE EXPERT WITNESS DOES NOT CONFLICT WITH ANY OTHER APPELLATE DECISIONS OR PRESENT AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST WARRANTING THIS COURT'S REVIEW. RAP 13.4(b).

The Court of Appeals held the trial court abused its discretion when it prevented defense counsel from cross-examining the State's DNA expert regarding his analysis as compared with the defense expert's analysis. *Cox*, 17 Wn. App. 2d at 191-93.

The State cites no authority with which this decision conflicts. Indeed, the decision is entirely consistent with *State v. Darden*, 145 Wn.2d 612, 41 P.3d 1189 (2002), which the State cites. Petition at 9.

> A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. ... Abuse exists when the trial court's exercise of discretion is "manifestly unreasonable or based upon untenable grounds or reasons." ... [T]he more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters.

Darden, 145 Wn.2d at 619. The Court of Appeals here applied the abuse of discretion standard. It concluded limiting cross-examination of the DNA expert as to the foundation for his opinion, as compared to the defense expert's opinion, was an untenable ruling of law on a crucial factual issue.

> It has long been recognized that expert witnesses, by nature, are different from fact witnesses. While theories propounded on direct examination should be based on facts already established, such is not the case for cross-examination. On the contrary, an expert witness may be cross-examined with hypotheticals yet unsupported by the evidence that go to the opponent's theory of the case. *Levine v. Barry*, 114 Wash. 623, 627, 195 P. 1003 (1921).

Cox, 17 Wn. App. 2d at 193. The State cites no authority to the contrary. Petition at 9-12.

Since the Court of Appeals reversed the conviction on the previous issue, prejudice was not separately required on this issue. Petition at 12.

The Court of Appeals addressed this issue because it was likely to recur upon retrial. *Cox*, at 191.

Again, the State makes no suggestion of how this issue is of substantial public interest. RAP 13.4(b)(4).

This Court should deny review.

3. THE COURT OF APPEALS OPINION ON DEFENDANT'S REPUTATION FOR SEXUAL MORALITY DOES NOT CONFLICT WITH OTHER DECISIONS BY THIS COURT OR THE COURT OF APPEALS. RAP 13.4(b).

As with the issue of expert cross-examination, the Court of Appeals addressed this issue only because it is likely to recur upon retrial. *Cox*, at 191. Thus review by this Court will have no effect on the outcome.

The State claims the Court of Appeals "erred" by holding the trial court abused its discretion. Petition at 19. Ironically, it quotes the trial court's comments inviting the Court of Appeals "to take another look at that and give us some more guidance if at all possible." Petition at 17. The Court of Appeals has done so. *Cox*, at 193-96.

The State observes that Division Three differs from Division One's decision in *State v. Jackson*, 46 Wn. App. 360, 730 P.2d 1361 (1986), regarding

the relevance of reputation evidence for sexual morality. *Jackson*, however, involved a charge of statutory rape. Division One reasoned that one's sexual contact with children would always be kept secret and never logically arise to one's reputation in the community. The State argues

> there should be a hard distinction between cases involving character analysis in cases wherein a defendant is charged sexual molestation or rape of *children*, as opposed to sexual assault prosecutions where the involved parties are both adults.

Petition at 16 (emphasis original). The Court of Appeals opinion does not conflict with this position.

This case involves alleged sexual contact between two adults who knew each other well enough for one to sit on the other's lap and lie on the same bed. JR alleged Mr. Cox penetrated her while she lay in, he on, the same bed with Mr. Cox's fiancee. An adult's sexual wanderings are far more likely to rise to the level of community reputation. Division Three recognizes this relevance, and notes it is the majority position among courts across the country. *Cox*, at 194-95.

The State further complains that the defense

laid an inadequate foundation to admit the character evidence here for good sexual morality. Petition at 18-20. But the Court of Appeals relied on this Court's opinion in *State v. Underwood*, 35 Wash. 558, 572, 77 P. 863 (1904), and noted: "The State does not cite any authority for its position, nor does it attempt to distinguish the holding in *Underwood*." *Cox*, at 196.

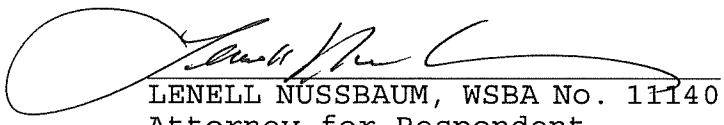
The State yet again fails to cite any authority for its position, or any distinction from *Underwood*. Petition at 12-20.

E. CONCLUSION

The Court of Appeals opinion in this case is controlled by well settled decisions by this Court. The State has not cited any conflicting authority, nor does it articulate how it presents an issue of substantial public interest that should be reviewed by this Court. This Court should deny review. RAP 13.4(b).

DATED this 21st day of July, 2021.

Respectfully submitted,



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