

FILED
Court of Appeals
Division II
State of Washington
2/27/2019 10:21 AM

NO. 52409-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

SETH WILCOX,
Appellant.

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

The Honorable Michael H. Evans, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's instructions to the jury included an improper comment on the evidence in violation of the holding in *State v. Brush.1*, by providing that a "prolonged period of time" as it relates to the aggravating factors in RCW 9.94A.535 means "more than a few weeks."
2. The trial court denied Mr. Wilcox his Sixth Amendment right to present a defense when it limited his cross-examination of Ms. Barnard, thereby preventing him from presenting relevant impeachment evidence that is of high probative value as it relates to his defense at trial.
3. The trial court abused its discretion when it admitted speculative expert testimony into evidence during the state's case-in-chief and that was not helpful to the jury in determining any fact of consequence in Mr. Wilcox's trial.

Issues Presented on Appeal

1. Did the trial court improperly comment on the evidence in its instructions to the jury by defining a "prolonged period of time" as "more than a few weeks" when this instruction was held to be improper in *State v. Brush* and the comment likely

¹ 183 Wn.2d 550, 353 P.3d 213 (2015).

resulted in Mr. Wilcox receiving an exceptional sentence?

2. Did the trial court deny Mr. Wilcox his Sixth Amendment right to present a defense when it limited his cross-examination of Ms. Barnard by prohibiting him from introducing relevant impeachment evidence?
3. Did the trial court abuse its discretion when it admitted speculative expert testimony into evidence during the state's case-in-chief that evidence was not helpful to the jury because the expert had no personal knowledge of any of the facts in Mr. Wilcox's case and could only make generalized observations about adolescent behavior?

B. STATEMENT OF THE CASE

Substantive Facts

Seth Wilcox is the father of six children. RP 359-361. His four oldest children are the result of his 17 year, long-term relationship with Jamie Barnard. RP 199, 359. Mr. Wilcox's second oldest child is his daughter O.W., who was 15 years-old at the time of Mr. Wilcox's trial and 11 at the time of the alleged abuse. RP 199.

In August of 2013, Mr. Wilcox moved into a new home with

Cynthia Reynolds, who was his girlfriend and pregnant at the time. RP 133-34. Mr. Wilcox learned that Ms. Barnard was having financial difficulties and offered to take their four children into his home with Ms. Reynolds. RP 364-66. Ms. Barnard accepted this offer and the children came to live with Mr. Wilcox in the fall of 2013. RP 364.

In November of 2013 Ms. Barnard was homeless so Mr. Wilcox and Ms. Reynolds offered to let her stay at their home until she found her own housing. RP 201, 371-72. During the time Ms. Barnard lived in the home, she had a tense relationship with Ms. Reynolds. RP 373. This tension resulted in numerous confrontations between her and both Mr. Wilcox and Ms. Reynolds. RP 373, 377-79. During this time O.W. also began to exhibit changes in her behavior and became more aggressive and irritable. RP 136, 200-01. She also asked to start accompanying her father to work on some days like her older brother. RP 136-37, 386.

Upset on Christmas of 2013, O.W. ran up to her room when she did not receive a gift she wanted. RP 91-92. Mr. Wilcox came upstairs to comfort his daughter before eventually returning to his room to go to sleep. RP 92. O.W. testified at trial that her father

began to visit her at night following Christmas 2013. RP 94.

At trial, O.W. alleged that the next time Mr. Wilcox visited her he began to finger her vagina while laying in her bed. RP 95. She alleged there was a second incident where he fingered her again and touched her breasts. RP 97. The record also contains testimony alleging an incident where Mr. Wilcox removed her pants and began to lick her vagina. RP 98-99. Finally, she claimed that on another occasion she woke up and Mr. Wilcox's penis was in her hand. RP 99. She also claimed that Mr. Wilcox had kissed her on the lips one of the nights he took her to work. RP 90. These incidents were not disclosed until four years later in May of 2017 when O.W. sent Ms. Reynolds a Facebook message. RP 152.

O.W. lived with her father part of 2013 and 2014. In September and October 2013, O.W. shared her room with her younger sister, and later her mother, too. RP 85-88. O.W. recounted that after New Year's Eve 2014, her father made her kiss him and touched her inappropriately in the night several times a week during "Christmas" time. RP 90, 92, 95, 97. Ms. Reynolds recounted an incident in December 2013 where she thought she heard O.W.'s 3-year-old sister say, "that's what daddy and Cindy

do.” RP 141. Ms. Reynolds went upstairs but O.W. had gone to the bathroom and Mr. Wilcox said nothing had happened. O.W. testified that Mr. Wilcox was lying in bed with her but was not touching her before Ms. Reynolds came upstairs. RP 100, 118, 141-42. O.W. could only describe the time frame for these incidents as “Christmas”. RP 118.

The tension within Mr. Wilcox’s household culminated in Ms. Reynolds kicking the children out of the house around Christmas of 2014. RP 151. By that time, Ms. Barnard had moved out of the house and into her own residence. RP 201. The children moved back in with their mother, who moved them to South Dakota approximately six months after they had been kicked out. RP 220-21. Ms. Barnard did not inform Mr. Wilcox that they were moving to South Dakota. RP 221.

In May of 2017, O.W. contacted Ms. Reynolds through Facebook messenger and disclosed to her that Mr. Wilcox had sexually abused her on multiple occasions. RP 152. Ms. Reynolds reported O.W.’s accusations to law enforcement, and Mr. Wilcox was ultimately arrested. RP 153, 414.

Procedural Facts

The state charged Mr. Wilcox with two counts of Rape of a Child in the First Degree and three counts of Child Molestation in the First Degree. CP 19-21. The state also alleged two sentencing enhancements: that the crimes were aggravated domestic violence offenses and that they were part of an ongoing pattern of abuse of a child under 18 years of age. CP 21. The relevant jury instructions provided:

An “ongoing pattern of sexual abuse” means multiple incidents of abuse over a prolonged period of time. *The term “prolonged period of time” means more than a few weeks.*

CP 162 (Jury Instruction 24) (emphasis added). And:

To find that this crime is an aggravated domestic violence offense, each of the following two elements must be proved beyond a reasonable doubt:

- (1) That the victim and the defendant were family or household members; and
- (2) That the offense was part of an ongoing pattern of sexual abuse of the victim, manifested by multiple incidents over a prolonged period of time. An ongoing pattern of abuse means multiple incidents of abuse over a prolonged period of time. *The term prolonged period of time means more than a few weeks.*

If you find from the evidence that element (1) and (2) have been proved beyond a reasonable doubt, then it will be your duty to answer “yes” on the special verdict form. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to element (1) or (2), then it will be your duty to answer “no” on the special verdict form.

CP 163 (Jury Instruction 25) (emphasis added). Mr. Wilcox proceeded to a jury trial. CP 17-18.

During pretrial motions, Mr. Wilcox moved under ER 403 to have the trial court exclude testimony from Kristen Mendez, the state's expert witness on child abuse victims because the expert had not interviewed O.W. and was not involved in the case in any way. RP 47-51. Ms. Mendez is a social worker, child forensic interviewer. RP 295-96. Mendez never met O.W., never spoke with O.W. and testified generically about child sex abuse victims. RP 296-307. Mendez testimony related that O.W.'s behavior mirrored the behavior of a sexually abused child. RP 395-306.

Mendez however agreed that she had no information or ability to evaluate O.W.'s specific manifestations as a potential sex abuse victim. RP 307. Mendez also agreed that children who demonstrate the manifestations of a child sex abuser victim could also demonstrate those same manifestations for reasons unrelated to sexual abuse. RP 308-311. Mendez admitted that abrupt moves in residence, such as O.W.'s sudden move from Washington to South Dakota, can be traumatic for children and cause them to change their behavior. RP 309-10.

The trial court denied the motion to suppress Mendez's testimony. RP 58. The state's expert went testified that several behaviors O.W. displayed after Christmas of 2013 were consistent with behaviors of children who are victims of sexual abuse. RP 300-04. She also discussed the practice of "gifting" and how sexual predators give gifts to their victims in order to maintain their silence. The state previously presented through a different witness evidence that Mr. Wilcox frequently gave gifts to his children, including O.W. RP 137-38, 203, 303-04.

Mr. Wilcox moved the trial court to allow him to present evidence that Ms. Barnard's current boyfriend is a registered sex offender and lived with her and the children at the time the allegations were made against Mr. Wilcox. RP 64-65. Mr. Wilcox sought to present evidence of the sex offender boyfriend to explain that Ms. Barnard did not want Mr. Wilcox to prevent her moving the children to South Dakota in secret and knew that if Mr. Wilcox was convicted of a sex offense, this would hurt his case in any future child custody dispute. RP 66-67. The trial court ultimately denied this motion and only allowed Mr. Wilcox to inquire whether Ms. Barnard knew the legal consequences of being a registered sex

offender without any follow-up questioning regarding Ms. Barnard's motives related to child custody issues. RP 247.

The jury found Mr. Wilcox guilty on all counts and answered affirmatively as to all special verdicts. CP 164-171. At sentencing, Mr. Wilcox requested a standard range sentence of 240 months. RP 570. The state requested an exceptional sentence of 480 months to life in prison based on the jury's special verdicts. RP 558-59. The trial court imposed an exceptional sentence of 375 months to life and entered findings of fact and conclusions of law to that effect. CP 197, 210; RP 575-76. Mr. Wilcox filed a timely notice of appeal. CP 204.

C. ARGUMENT

1. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY IMPERMISSIBLY CONTAINED A JUDICIAL COMMENT ON THE EVIDENCE WHICH DENIED MR. WILCOX HIS RIGHT TO A FAIR TRIAL, BY INSTRUCTING THE JURY THAT "A PROLONGED PERIOD OF TIME" MEANS "MORE THAN A FEW WEEKS"

A criminal defendant has a right to have a jury determine any fact that increases the penalty for a crime. *Brush*, 183 Wn.2d at 558 (citing *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159

L.Ed.2d 403 (2004)). The aggravating factors listed in RCW 9.94A.535 can increase the penalty for a crime, therefore defendants have a right to have a jury determine whether the state proved the existence of these factors beyond a reasonable doubt. RCW 9.94A.535; *State v. Lane*, 128 Wn. App. 535, 541, 116 P.3d 450 (2005) (citing *Blakely*, 542 U.S. at 301).

A trial court may impose a sentence outside the standard range if “the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.” RCW 9.94A.535(3)(g). It is also an aggravating factor if the crime is a domestic violence offense and “the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time.” RCW 9.94A.535(3)(h)(i).

The state alleged both of these aggravating factors during Mr. Wilcox’s trial. CP 21. When instructing the jury on these aggravating factors, the trial court included two instructions defining the term “prolonged period of time” as “more than a few weeks.” CP 162-63. This was an impermissible, prejudicial comment on the

evidence under *Brush*. *Brush*, 183 Wn.2d at 559-60.

The Washington State Constitution prohibits trial judges from commenting on evidence in a jury trial. *Brush*, 183 Wn.2d at 556 (citing Wash. Const. art. IV, § 16). When a jury instruction does not accurately state the law, and instead essentially resolves a contested factual issue, it constitutes an improper comment on the evidence. *Brush*, 183 Wn.2d at 557.

“[L]egal definitions should not be fashioned out of courts’ findings regarding legal sufficiency.” *Brush*, 183 Wn.2d at 558. This is because such findings are merely “whether the specific facts in that case were legally sufficient for the court to uphold” the jury’s finding. *Brush*, 183 Wn.2d at 558.

Brush is directly on point. There, a jury instruction informed a jury that sexual abuse for a “‘prolonged period of time’ ‘meant ‘more than a few weeks.’” *Brush*, 183 Wn.2d at 558 (internal quotation marks omitted) (quoting 11A WPIC 300.17, at 719). The Court in *Brush* reversed the convictions holding that this instruction is an improper judicial comment on the evidence because the instruction was based on an inaccurate interpretation of the law and because the evidence established that the abuse at

issue occurred over a two-month period, which directed the jury to find the aggravating factor rather than allowing the jury to determine the factor under its own consideration. *Brush*, 183 Wn.2d at 559-60. Consequently, the trial court's instruction there resolved a contested factual issue which the state could not show was not prejudicial. *Id.* Reversal is required unless the state meets the high burden to show the comment on the evidence was not prejudicial. *Brush*, 183 Wn.2d at 559-60. In *Brush* the state could not meet this burden.

In Mr. Wilcox's case, the trial court used the same impermissible language in two separate jury instructions by defining a "prolonged period of time" as "more than a few weeks" to support the aggravating factors alleged by the state. CP 162-63. The record only provides a vague timeline of the alleged incidents of abuse. O.W. testified that the first incident occurred sometime after Christmas of 2013 but could not specify when the other alleged incidents occurred or provide a date when the alleged abuse stopped. RP 118. As in *Brush*, the state presented evidence that the abuse occurred over a short period of time and the jury should have been left to determine if the aggravator had been proved

beyond a reasonable doubt without judicial comment on the issue.

As in *Brush*, the instruction defining a “prolonged period of time” for a period less than one month, like the two-month time period in *Brush*, improperly resolved a contested factual issue which the state could not show was not prejudicial. *Brush*, 183 Wn.2d at 559-60. Reversal is required under *Brush*, because the state cannot meet the high burden to show the comment on the evidence was not prejudicial. *Brush*, 183 Wn.2d at 559-60.

This court should reverse his exceptional sentence and remand to the trial court for resentencing with instructions to impanel a jury for a determination of the aggravating factors should the state request another exceptional sentence. *Brush*, 183 Wn.2d at 561 (reversing the defendant’s sentence and remanding with instructions to impanel a jury for determination of whether there was a prolonged pattern of abuse).

2. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED THE STATE’S EXPERT WITNESS TO PROVIDE SPECULATIVE TESTIMONY ON BEHAVIOR CHANGES IN CHILDREN CAUSED BY SEXUAL ABUSE

Mendez never met O.W., never spoke with O.W., and

agreed that she had no information or ability to evaluate O.W.'s manifestations as a potential sex abuse victim. RP 296-307. She also admitted that she has interviewed children and that, at times, their stories of abuse "do not add up, which means they may not be telling the truth." RP 313.

An expert witness may testify if her "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue" in the case. ER 702. "Expert testimony is helpful if it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury." *State v. Richmond*, 3 Wn. App. 2d 423, 431, 415 P.3d 1208 (2018) (quoting *State v. Thomas*, 123 Wn.2d 771, 778, 98 P.3d 1258 (2004)). An expert's testimony is not helpful or relevant if it is based on speculation. *Richmond*, 3 Wn. App. 2d at 431 (citing *State v. Lewis*, 141 Wn. App. 367, 388-89, 166 P.3d 786 (2007)).

In *Richmond*, the Court of Appeals held that the trial court properly excluded expert testimony regarding the effects of methamphetamine on the victim because the proposed expert had not examined the victim and had no basis to know how methamphetamine would have affected him. *Richmond*, 3 Wn. App.

2d at 431. Furthermore, the court noted the fact that the expert testimony showed methamphetamine can have a wide range of effects on different individuals, therefore general testimony about its effects would not be helpful to the jury in determining any fact at issue in that case. *Richmond*, 3 Wn. App. 2d at 431-32.

The expert testimony admitted at Mr. Wilcox's trial is analogous to the evidence that was properly excluded in *Richmond*. The state's expert never met or interviewed O.W. and had no basis to know how she would react to any number of the life events O.W. was experiencing at the time she claims Mr. Wilcox abused her. RP 307. Furthermore, the expert's testimony shows that O.W.'s behavioral changes are seen in many children who do not experience sexual abuse. RP 308-10.

In this case Mendez testimony was equally as unhelpful to the jury as the testimony excluded in *Richmond*. Both the expert in *Richmond* and Mendez had no personal knowledge of the case or the individuals involved, and their testimony discussed generalities about adolescent behavior that can be attributed to numerous causes other than abuse. RP 309. The connection between the expert testimony offered in this case and O.W.'s behavior is too

attenuated to be helpful to the jury. The expert's testimony is not helpful in determining any fact at issue in Mr. Wilcox's trial because the behavioral changes O.W. exhibited could have been caused by any number of other issues she was facing at the time the alleged abuse took place. Because the expert does not have any personal knowledge of O.W.'s behavior, her testimony was speculative, and the trial court abused its discretion by admitting it. *Richmond*, 3 Wn. App. 2d at 431-32.

A trial court's decision to admit evidence is subject to a harmless error analysis. *State v. Hayward*, 152 Wn. App. 632, 651, 217 P.3d 354 (2009) (citing *State v. Guloy*, 104 Wn.2d 412, 432, 705 P.2d 1182 (1985)). "[T]he trial court's error is harmless 'if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.'" *Hayward*, 152 Wn. App. at 651 (citing *State v. Yates*, 161 Wn.2d 714, 764, 168 P.3d 359 (2007)).

The expert testimony admitted in this case was not minor in relation to the overall evidence offered against Mr. Wilcox. The state's case against Mr. Wilcox relied entirely on witness testimony. The outcome of the trial depended heavily on how the jury

perceived the testimony of Ms. Reynolds and Ms. Barnard. The state used Mendez to create its case for abuse by attributing O.W.'s behavior to the alleged abuse. Without Mendez's testimony, the jury had only the parent's biased testimony. RP 138-39, 200-02, 298-304.

Credibility was of the utmost important in Mr. Wilcox's trial considering the state's reliance on witness testimony in this case, and the admission of the expert testimony was not harmless. It bolstered the credibility of both Ms. Barnard and Ms. Reynolds. Furthermore, it was offered as substantive evidence suggesting O.W.'s behavioral changes were inevitably the product of sexual abuse by Mr. Wilcox. The state's expert had no basis to offer this evidence and because of its generic speculative nature, it was not helpful to the jury in deciding the case against Wilcox. In sum, the trial court abused its discretion in admitting Mendez' testimony, and the error was not harmless. Accordingly, this court should reverse the convictions and remanded for a new trial where the expert's testimony will be excluded from evidence in accord with *Richmond*, 3 Wn. App. 2d 423.

3. THE TRIAL COURT DENIED MR. WILCOX HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WHEN IT LIMITED HIS CROSS-EXAMINATION OF JAMIE BARNARD AND HER KNOWLEDGE OF REGISTRATION REQUIREMENTS FOR CONVICTED SEX OFFENDERS DESPITE THE FACT THAT SHE HAD BEEN LIVING WITH ONE FOR FIVE YEARS AT THE TIME O.W. MADE THE ALLEGATIONS AGAINST MR. WILCOX, AND HAD A MOTIVE TO FABRICATE THE ABUSE TO GAIN UNFETTERED CUSTODY OF HER CHILDREN

Barnard secretly took her children to South Dakota without informing their father, Mr. Wilcox. Mr. Wilcox sought to demonstrate that Barnard had a motive to lie about the sexual abuse to obtain unfettered custody of O.W. and her other children with Wilcox. RP 66-67, 220-21.

Criminal defendants have a constitutional right to present a defense under the Sixth Amendment to the United States Constitution. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). A defendant's right to examine witnesses against them and offer testimony in their own defense "is basic to our system of jurisprudence." *Jones*, 168 Wn.2d at 720 (citing *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297

(1973)).

To determine whether a defendant has been denied their right to present a defense, courts employ a three-part test. *State v. Horn*, 3 Wn. App. 2d 302, 310, 415 P.3d 1225 (2018). First, the evidence the defendant seeks to admit must be at least minimally relevant. *Horn*, 3 Wn. App. 2d at 310. Relevant evidence is evidence having “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Impeachment evidence is relevant if it (1) tends to cast doubt on the credibility of the person being impeached, and (2) the credibility of the person being impeached is a fact of consequence in the action.” *Horn*, 3 Wn. App. 2d at 313 (citing *State v. Allen S.*, 98 Wn. App. 452, 459-60, 989 P.2d 1222 (1999)). This prong of the test is reviewed for an abuse of discretion. *Horn*, 3 Wn. App. 2d at 311.

If the court finds that the evidence is relevant, it moves to the second and third prongs of the test. These prongs are reviewed de novo. *Horn*, 3 Wn. App. 2d at 311. In the second prong, the burden shifts to the state to prove that the evidence is “so prejudicial as to

disrupt the fairness of the fact-finding process at trial.” *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). The final prong involves the trial court balancing any prejudicial evidence against the defendant’s need to have the evidence presented to the fact-finder. *Horn*, 3 Wn. App. 2d at 310. If the defendant’s need to present the evidence outweighs the prejudice, it must be presented to the fact-finder. *Jones*, 168 Wn.2d at 720.

In *Jones*, the court reversed the defendant’s rape conviction because the trial court excluded testimony that the victim had consensual sex with him and two other men on the night of the alleged rape. *Jones*, 168 Wn.2d at 721. The court held that this evidence was of high probative value because it constituted “[the defendant’s] entire defense.” *Jones*, 168 Wn.2d at 721. The court reversed the conviction because “no state interest can possibly be compelling enough to preclude the introduction of evidence of high probative value” and that doing so violated a defendant’s Sixth Amendment right to present a defense. *Jones*, 168 Wn.2d at 721.

The record shows that Ms. Barnard removed Mr. Wilcox’s children from the state without informing him and without any legal authorization to do so. RP 221. Mr. Wilcox’s defense at trial was

that the allegations against him were fabricated to counter the fact that Ms. Barnard had illegally removed the children from Washington State and that this factor would weigh against her in a custody dispute. RP 244-46. Mr. Wilcox planned to demonstrate for the jury that Ms. Barnard knew the consequences of a conviction and actively desired for Mr. Wilcox to be convicted of sex crimes despite lacking evidence to support an actual prosecution. The trial court denied him that opportunity when it excluded this evidence from cross-examination.

The evidence of Ms. Barnard's motive to fabricate for child custody reasons was relevant to Mr. Wilcox's case, because credibility was an issue. The evidence was highly valuable to Mr. Wilcox and did not in any manner prejudice the state. Although the record is not entirely clear on this point, it does appear that the trial court found the evidence at least minimally relevant and that Mr. Wilcox had an interest in presenting it to the jury. The trial court allowed defense counsel to ask Ms. Barnard whether she knew the legal requirements for registered sex offenders. RP 246.

Barnard was allowed to respond that she did not, but Wilcox was not allowed to impeach this false testimony with evidence that

she had been dating and living with a registered sex offender for over five years. RP 246-47. The trial court reasoned that the evidence “may be probative, but the prejudicial value outweighs it. We’re not going there.” RP 247.

A balancing of the competing interests in this case demonstrates that the evidence should have been admitted for the jury’s consideration. Mr. Wilcox’s interest in admitting the evidence is to present his true theory of the case. The state’s case against him is based entirely on witness testimony and credibility. There was no physical evidence of any rape or molestation presented at trial. The credibility of every testifying witness was crucial to the trial, and Mr. Wilcox was prohibited from effectively impeaching Ms. Barnard. As in *Jones*, evidence that Ms. Barnard influenced O.W. to fabricate the allegations against him is of high probative value because it makes up his entire defense. Under current case law, no state interest can outweigh evidence of this kind. *Jones*, 168 Wn.2d at 721.

A constitutional error is only harmless if the court is convinced beyond a reasonable doubt that “any reasonable jury would have reached the same result without the error.” *Jones*, 168

Wn.2d at 724. In *Jones*, the court reversed and held that the error was not harmless even though the defendant's version of events was contradicted by other evidence and was not corroborated by other witnesses because a reasonable jury could reach a different conclusion having heard two completely different versions of events. *Jones*, 168 Wn.2d at 724. As in *Jones*, the trial court in Mr. Wilcox's case deprived him of his right to present a defense, therefore his conviction must be reversed, and the case remanded for a new trial. *Jones*, 168 Wn.2d at 725.

D. CONCLUSION

The trial court improperly commented on the evidence in its instructions to the jury when it defined "a prolonged period of time" as "more than a few weeks." Under *Brush*, this definition constitutes a judicial comment on the evidence in violation of art. IV, § 16 of the Washington State Constitution. This comment likely prejudiced Mr. Wilcox and resulted in him receiving an exceptional sentence. Additionally, the trial court denied Mr. Wilcox his right to present a defense when it limited his cross-examination of Ms. Barnard and prohibited him from effectively impeaching her credibility on cross-examination. Finally, the trial court abused its discretion by admitting

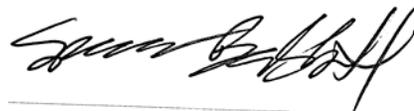
speculative expert testimony into evidence and this evidence likely affected the outcome of Mr. Wilcox's trial. This court should reverse Mr. Wilcox's convictions and remand the case for a new trial. In the alternative, this court should reverse Mr. Wilcox's exceptional sentence and remand for resentencing with instructions to impanel a jury if the state requests another exceptional sentence.

DATED this 27th day of February 2019.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Cowlitz County Prosecutor's Office appeals@co.cowlitz.wa.us and Seth Wilcox/DOC#408935, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326 a true copy of the document to which this certificate is affixed on February 27, 2019. Service was made by electronically to the prosecutor and Seth Wilcox by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

LAW OFFICES OF LISE ELLNER

February 27, 2019 - 10:21 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52409-1
Appellate Court Case Title: State of Washington, Respondent v Seth John Wilcox, Appellant
Superior Court Case Number: 17-1-00938-2

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