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Court of Appeals
Division III
State of Washington

No. 34346-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Michael Broussard,

Appellant.

Okanogan County Superior Court Cause No. 14-1-00216-3

The Honorable Judge Henry Rawson

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ISSUES AND ASSIGNMENTS OF ERROR 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS 4

ARGUMENT 9

I. The trial court violated Mr. Broussard's right to present a defense by prohibiting him from introducing critical evidence that was relevant and admissible. 9

A. The trial judge erroneously excluded as hearsay T.D.'s false statements that she was 18 and had graduated from high school, which were offered to show Mr. Broussard's reasonable belief that T.D. was at least 16. 9

B. The state cannot show beyond a reasonable doubt that the erroneous exclusion of evidence critical to the defense was harmless. 11

C. Because the trial court infringed Mr. Broussard's constitutional right to present a defense, review is de novo. 13

II. Defense counsel denied Mr. Broussard the effective assistance of counsel by unreasonably failing to object to testimony suggesting the defendant gave his young girlfriend a sexually transmitted disease. 16

III. The trial court should have excluded speculation implying that N.C. burned and cut herself because of her encounter with Mr. Broussard. 20

IV. Two of Mr. Broussard's convictions were entered in violation of his right to a unanimous verdict. 22

A. Because the state presented evidence of multiple acts to prove the molestation charge, the trial judge should have provided a unanimity instruction. 23

B. The conviction for furnishing liquor to a minor violated Mr. Broussard's right to a unanimous verdict because insufficient evidence supported one of the alternative means submitted to the jury. 25

V. The court miscalculated Mr. Broussard's offender score, because the rape and molestation charges should have scored as the same criminal conduct. 26

VI. If the state substantially prevails, the Court of Appeals should decline to award any appellate costs requested. 28

CONCLUSION 29

TABLE OF AUTHORITIES

FEDERAL CASES

Holmes v. S. Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) 9

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) 17

United States v. Lankford, 955 F.2d 1545 (11th Cir. 1992) 14

WASHINGTON CASES

Carson v. Fine, 123 Wn.2d 206, 867 P.2d 610 (1994) (*Carson* I) 18

City of Bellevue v. Lorang, 140 Wash.2d 19, 992 P.2d 496 (2000) 11

In re Restraint of Davis, 152 Wn.2d 647, 101 P.3d 1 (2004) 17, 19

Lenander v. Washington State Dep't of Ret. Sys., 186 Wn.2d 393, 377 P.3d 199 (2016) 13, 23

Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 230 P.3d 583 (2010) 10

State v. A.N.J., 168 Wn.2d 91, 225 P.3d 956 (2010) 16

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015) 29

State v. Burke, 163 Wash.2d 204, 181 P.3d 1 (2008) 12

State v. Carson, 184 Wn.2d 207, 357 P.3d 1064 (2015) (*Carson* II) 23

State v. Coleman, 159 Wn.2d 509, 150 P.3d 1126 (2007) 23, 24, 25

State v. Davis, 174 Wn. App. 623, 300 P.3d 465 (2013) (*Davis* II) 27

State v. Depaz, 165 Wash.2d 842, 204 P.3d 217 (2009) 14

State v. Dye, 178 Wn.2d 541, 309 P.3d 1192 (2013) 14, 15

State v. Elmore, 155 Wn.2d 758, 123 P.3d 72 (2005) 23

State v. Fisher, 185 Wn.2d 836, 374 P.3d 1185 (2016)..... 12

State v. Franklin, 180 Wn.2d 371, 325 P.3d 159 (2014) 9, 11, 13

State v. Garcia, 179 Wn.2d 828, 318 P.3d 266 (2014)..... 26

State v. Hayes, 164 Wn. App. 459, 262 P.3d 538 (2011) 25, 26

State v. Hudson, 150 Wash.App. 646, 208 P.3d 1236 (2009) 14

State v. Iniguez, 167 Wn.2d 273, 217 P.3d 768 (2009) 13, 14, 15

State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010) (*Jones* I)9, 10, 11, 12, 13, 14, 15

State v. Jones, 183 Wn.2d 327, 352 P.3d 776 (2015) (*Jones* II)..... 15, 19

State v. Lobe, 140 Wn. App. 897, 167 P.3d 627 (2007) 25

State v. Moultrie, 143 Wn. App. 387, 177 P.3d 776 (2008) 23

State v. Ortega-Martinez, 124 Wn.2d 702, 881 P.2d 231 (1994) 25

State v. Phuong, 174 Wn. App. 494, 299 P.3d 37 (2013)..... 27

State v. Porter, 133 Wn.2d 177, 942 P.2d 974 (1997)..... 27

State v. Posey, 161 Wn.2d 638, 167 P.3d 560 (2007)..... 13

State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004) 16

State v. Rodriquez, 187 Wn. App. 922, 352 P.3d 200 (2015), *review denied*, 184 Wn.2d 1011, 360 P.3d 817 (2015) 23, 24

State v. Saltarelli, 98 Wn. 2d 358, 655 P.2d 697 (1982) 18

State v. Samalia, 186 Wn.2d 262, 375 P.3d 1082 (2016) 13

State v. Saunders, 91 Wn.App. 575, 958 P.2d 364 (1998) 16

State v. Sinclair, 192 Wn.App. 380, 367 P.3d 612 (2016)..... 28

State v. Smith, 196 Wn. App. 224, 382 P.3d 721 (2016) 21

State v. Weldeselase, 191 Wn. App. 1024 (2015) (unpublished) 27

State v. West, 139 Wn.2d 37, 983 P.2d 617 (1999) 16

State v. Williams, 135 Wn.2d 365, 957 P.2d 216 (1998) 27, 28

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI 1

U.S. Const. Amend. XIV 1

Wash. Const. art. I, §21 ..... 2, 23

Wash. Const. art. I, §22 1

Wash. Const. art. I, §3 1

WASHINGTON STATUTES

RCW 66.44.270 26

RCW 9.94A.525 26

RCW 9.94A.589 ..... 24, 26, 27

RCW 9A.44.030 10

OTHER AUTHORITIES

1 J. WEINSTEIN & M. BERGER, EVIDENCE § 403 (1985) 18

ER 401 ..... 10, 17, 19, 20

ER 402 ..... 19, 20

ER 403 ..... 1, 18, 19, 20

ER 801 ..... 1, 10

ER 802 1

GR 34 29

RAP 2.5 23

www.courts.wa.gov/content/Briefs 14

ISSUES AND ASSIGNMENTS OF ERROR

1. The court violated Mr. Broussard's Sixth and Fourteenth Amendment right to present a defense.
2. The court violated Mr. Broussard's right to present a defense under Wash. Const. art. I, §§3 and 22.
3. The court misinterpreted ER 801 and ER 802.
4. The court violated Mr. Broussard's right to present a defense by excluding critical evidence that was relevant and admissible.
5. The court violated Mr. Broussard's right to present a defense by excluding Reece's testimony that she overheard the complaining witnesses tell Mr. Broussard she was 18 and had graduated high school.

> **ISSUE 1:** An accused person has a constitutional right to present relevant, admissible evidence necessary to the defense. Did the court violate Mr. Broussard's right to present a defense by excluding relevant, admissible evidence critical to his theory of the case?

6. Mr. Broussard was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
7. Mr. Broussard's attorney provided ineffective assistance of counsel by failing to object to inadmissible evidence.
8. Mr. Broussard's attorney provided ineffective assistance of counsel by failing to object to evidence that his client may have given a sexually transmitted disease to his young girlfriend.

> **ISSUE 2:** A defense attorney provides ineffective assistance by failing to object to inadmissible and prejudicial evidence absent a valid strategic reason. Did defense counsel provide ineffective assistance by failing to object to inadmissible testimony that prejudiced Mr. Broussard?

9. The court erred by admitting testimony implying that N.C. burned and cut herself because of her encounter with Mr. Broussard.
10. The court failed to properly apply ER 403 when overruling Mr. Broussard's objection to evidence implying that N.C. burned and cut herself because of her encounter with him.

ISSUE 3: Evidence is inadmissible if the danger of unfair prejudice substantially outweighs its probative value. Did the court err by admitting evidence implying that N.C. burned and cut herself because of her encounter with Mr. Broussard?

11. The molestation conviction violated Mr. Broussard's right to a unanimous verdict under Wash. Const. art. I, §21.
12. The trial court erred by failing to give a unanimity instruction for the molestation charge.

ISSUE 4: In a "multiple acts" case, the prosecution must clearly elect a particular act upon which to proceed, or the court must provide a unanimity instruction. Did the molestation conviction violate Mr. Broussard's right to a unanimous verdict?

13. The court erred by failing to instruct the jury that it had to unanimously agree on which means of furnishing liquor to a minor Mr. Broussard was guilty of.

ISSUE 5: The right to a unanimous verdict includes the right to jury unanimity regarding the means of commission. Did the court's failure to require unanimity as to means violate Mr. Broussard's right to a unanimous verdict on the furnishing liquor charge?

14. The sentencing court failed to properly calculate Mr. Broussard's offender score and standard range.
15. The court erred by scoring the rape and molestation convictions separately for sentencing purposes.
16. The trial court erred by sentencing Mr. Broussard with an offender score of three on each sex offense.

ISSUE 6: Multiple offenses score as the same criminal conduct if they occurred at the same time and place, against the same victim, and with the same criminal intent. Did the court err by scoring the rape and molestation charges separately?

17. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

ISSUE 7: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Michael Broussard is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

N.C. and T.D. were teenagers the summer of 2013. N.C. was 16 and T.D. was 15, and the two girls spent a lot of time together that summer in the Winthrop area. RP 30-31, 51

They went to a party celebrating the high school graduation of a friend. RP150, 168. Michael Broussard, a 26 year old who hadn't lived in town for very long, also attended the party. RP 31, 218-219, 245, 279. The party included people of many ages. RP 121, 280. Mr. Broussard acted as DJ for the party, and met N.C. and T.D. RP 54, 91, 122, 247-248. Both girls told him they were 18 years old. RP 248.

Later, T.D. would deny talking to Mr. Broussard that night. RP 92. She would claim that she noticed Mr. Broussard, arguing with his girlfriend, Amanda Reece, about a sexually transmitted disease that Reece claimed she got from Mr. Broussard. RP 91-93. Amanda Reece would describe overhearing Mr. Broussard talking to both girls while playing music, and both girls telling him they were 18 years old. RP 220-226.

The next week, both girls went to their friend Brittany Mears's home. RP 86, 92, 147. They planned a sleepover which included a few girlfriends. RP 86-87. Mears's boyfriend, Brad Peters, came over and brought Mr. Broussard. RP 89-90, 149, 250. Both men were about the

same age and worked together. RP 31, 72-73. The men brought alcohol,[1] and T.D. gave them some money for it. RP 94, 153.

The group drank and talked and danced. RP 126, 154, 251-252. Five of them, including T.D. and N.C. and Mr. Broussard, laid together on a bed in a gazebo outside for a while. RP 98-99, 128-129, 252.

At some point, T.D. got into the shower fully dressed. RP 100, 130. N.C. joined her, and then so did Mr. Broussard, and then Peters and Mears. RP 45-46, 49, 100, 155, 174, 253, 270. The group of five kissed, took off some clothing, and touched each other in the shower. RP 47-49, 101, 156, 253. Mr. Broussard later said that he touched both T.D.'s and N.C.'s vaginas.[2] RP 47, 253-254, 271. He described the group as all touching each other, including N.C. and T.D. touching him sexually. RP 48, 254. Peters also touched all of the girls in the shower. RP 131-132, 254, 266. The group eventually got out of the shower. RP 254.

After the shower, Mr. Broussard was in a bedroom. T.D. either just went into the room, or was called to come in. RP 49, 102, 267. Both were on the bed, and when Mr. Broussard attempted intercourse, T.D. said no. He stopped, and she left the room. RP 50, 54, 56, 102, 272, 277, 281.

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[1] There was some disagreement at trial over whether the men brought the alcohol when they first arrived, or perhaps the girls had given them money and sent them back out for it. RP 4, 94-95, 153, 250.

[2] Both girls stated that Mr. Broussard had touched their genitals with his finger in the shower. RP 138, 157.

T.D. and N.C. called a friend for a ride and left the party around 5 am. RP 103, 104.

T.D. was already in counseling, and went to see her counselor the next day. RP 208-210. The evening took only half of the session and included little detail. RP 210-211. But during the session the next week, T.D. provided a fuller narrative. RP 211-212. The counselor eventually called the police, in October of 2013, and the police started an investigation. RP 20-21, 212-213.

Police didn't attempt to contact Michael Broussard until June of 2014. RP 27, 42. The state charged Mr. Broussard with child molestation in the third degree and rape of a child in the third degree as to T.D., assault in the fourth degree as to N.C., and furnishing liquor to minors. CP 111-113. No charges were filed against Peters.

The state called Justin Dod as a witness: he is T.D.'s older brother, and had attended high school with Peters. RP 72-73. Without defense objection, he characterized Peters as very interested in underage girls, even telling the jury a disgusting joke he'd heard Peters make on the subject. RP 77, 80.

When T.D. testified, she told the jury about her claim that Mr. Broussard and his girlfriend Reece were loudly arguing about Reece's assertion that Mr. Broussard had given her a sexually transmitted disease.

The defense did not object to this testimony, and the court did not give a limiting instruction. RP 91-94. T.D. also denied that she'd claimed to be older than her real age. RP 107.

Again without any limitation, the jury heard the same allegations from N.C. RP 151-152.

During its case-in-chief, the prosecutor asked T.D. to relay things that Reece had said to her after Mr. Broussard was charged. RP 108-109. The jury was told that Reece tried to persuade T.D. to not go forward with the case, and that after T.D. declined to do so, Reece would yell "slut!" at her at school. RP 108-109, 135. This evidence was admitted without any limiting instruction.

The state offered the testimony of N.C., as well as her mother. RP 144-195. Over objection, the prosecutor brought out that N.C.'s mother felt that her daughter may have started trying to harm herself, by both burning and cutting herself, soon after the evening at issue. RP 182-191.

Mr. Broussard admitted to his role in the sexual activity of the night. His defense was that he had been affirmatively told by T.D. that she was 18 years old. He offered the testimony of Reece, who had overheard the claim at the party the week before. RP 220-236. The court would not allow the testimony. The judge ruled that T.D.'s false claim of an older age was hearsay and therefore inadmissible. RP 232.

When Mr. Broussard testified, he was allowed to tell the jury that T.D. and N.C. had both claimed they were 18 years old. RP 248.

During the prosecutor's closing argument, he referred to Mr. Broussard's defense of a false claim regarding age as having no facts to support it multiple times. RP 343-347. The state characterized Mr. Broussard's defense as a request that the jury just take his word for it, as a concocted story, and as wholly fabricated. RP 363-372.

The court did not instruct the jury that they must be unanimous as to the means of the child molestation charge. CP 39-66. The jury could not agree on a verdict for the charge relating to whether Mr. Broussard assaulted N.C., but did convict him of both sex offenses against T.D. The jury also returned a verdict of guilty on the charge of furnishing liquor to minors. CP 37-38.

The state alleged that the two offenses against T.D. were not the same course of conduct. RP 392-394, 417. The court agreed, and counted them separately against Mr. Broussard. RP 413-415, 418-419, 422-425.

After sentencing, Mr. Broussard timely appealed. CP 1-17.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. BROUSSARD'S RIGHT TO PRESENT A DEFENSE BY PROHIBITING HIM FROM INTRODUCING CRITICAL EVIDENCE THAT WAS RELEVANT AND ADMISSIBLE.

Mr. Broussard had the burden of proving that "he reasonably believed that [T.D.] was at least sixteen years of age… based upon [her] declarations as to age." CP 47, 50. He testified that T.D. told him she was 18 and had graduated high school. RP 264. Reece overheard this statement, but the court excluded her testimony as hearsay. RP 220-236.

Mr. Broussard did not offer for their truth T.D.'s statements misrepresenting her age and falsely claiming that she'd graduated. He was not seeking to show that she was 18, or that she had graduated from high school.

Rather, the statements were offered to show his reasonable belief that T.D. was at least 16 based on her own declaration about her age. CP 47, 50; RP 220-236. By excluding the evidence, the trial court violated Mr. Broussard's constitutional right to present a defense.

A. The trial judge erroneously excluded as hearsay T.D.'s false statements that she was 18 and had graduated from high school, which were offered to show Mr. Broussard's reasonable belief that T.D. was at least 16.

An accused person has a constitutional right to present a defense. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (*Jones* I); *State*

v. Franklin, 180 Wn.2d 371, 378, 325 P.3d 159 (2014).[3] Here, the trial judge violated this constitutional right by excluding Reece's testimony that she'd overheard T.D. misrepresenting her age to Mr. Broussard.

The right to present a defense includes the right to introduce relevant[4] and admissible evidence. *Jones* I, 168 Wn.2d at 720. If relevant and otherwise admissible, evidence may only be excluded if the state proves that it is "so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Id.* No state interest is compelling enough to prevent evidence that is of high probative value to the defense. *Id.*

Here, Mr. Broussard's entire defense rested on his claim that T.D. had misrepresented her age, and that he had reasonably believed she was over 16. CP 47, 50; RP 350-362; *see* RCW 9A.44.030(2) (outlining affirmative defense). He sought to corroborate his own account with Reece's testimony that she, too, had heard T.D. misrepresent her age and falsely claim that she had graduated from high school. RP 220-236.

This evidence was not hearsay, because it was not offered for its truth. *See* ER 801. Instead, it was offered to show that Mr. Broussard

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[3] This right is rooted in the Sixth and Fourteenth Amendments. *See Holmes v. S. Carolina*, 547 U.S. 319, 325, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).

[4] Evidence is relevant if it has any tendency to prove a material fact. ER 401. The threshold to admit relevant evidence is low; even minimally relevant evidence is admissible. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

reasonably believed T.D. to be at least 16, based on her declarations as to her age. CP 47, 50; *see* RCW 9A.44.030(2).

The evidence was relevant under ER 401, because it had a tendency to prove a material fact—that T.D. misrepresented her age to Mr. Broussard. ER 401; RCW 9A.44.030(2). It was admissible because Reece "ha[d] personal knowledge of the matter;" she was standing nearby and overheard T.D.'s statement. RP 220-236; *see* ER 602.

Furthermore, Reece's testimony was not "marginally relevant evidence;" instead it was "evidence of extremely high probative value." *Jones* I, 168 Wn.2d at 721. It went directly to Mr. Broussard's defense.

Accordingly, "[s]ince no State interest can possibly be compelling enough to preclude [its] introduction…, the trial court violated the Sixth Amendment when it barred [the] evidence." *Id.*

B. The state cannot show beyond a reasonable doubt that the erroneous exclusion of evidence critical to the defense was harmless.

Violation of the right to present a defense requires reversal, unless the state can establish harmlessness beyond a reasonable doubt. *Franklin**Error! Bookmark not defined.***, 180 Wn.2d at 382. The state cannot show harmlessness here.

To overcome the presumption of prejudice, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely

academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). The error here cannot be described as trivial because it severely undermined Mr. Broussard's entire defense. It may well have affected the verdict. *Id.*

The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wash.2d 204, 222, 181 P.3d 1 (2008). Here, the state cannot prove beyond a reasonable doubt that "any reasonable jury would have reached the same result without the error." *Jones* I, 168 Wn.2d at 724.

Mr. Broussard's entire defense rested on T.D.'s misrepresentation of her age. CP 47, 50; RP 350-362. With Reece's critical testimony excluded, his account of events was wholly uncorroborated.[5] Jurors who concluded that he fabricated the exchange with T.D. may well have had a reasonable doubt if Reece had confirmed his testimony.

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[5] Indeed, the exclusion of Reece's account forced Mr. Broussard to testify so he could raise his affirmative defense. Had Reece been permitted to tell the jury what she'd overheard, Mr. Broussard may have been able to raise his defense without taking the stand, relying on her testimony and his own statements to police. *See, e.g., State v. Fisher*, 185 Wn.2d 836, 850-52, 374 P.3d 1185 (2016).

Furthermore, the prosecutor repeatedly emphasized in closing that his testimony was uncorroborated, and that T.D. had denied making the statements. RP 333-349, 363-373.

The trial court violated Mr. Broussard's constitutional right to present a defense. *Jones* I, 168 Wn.2d at 720. The state cannot show that the error was harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382. Mr. Broussard's convictions must be reversed. *Id.*

C. Because the trial court infringed Mr. Broussard's constitutional right to present a defense, review is *de novo*.

Appellate courts review constitutional issues *de novo. Lenander v. Washington State Dep't of Ret. Sys.*, 186 Wn.2d 393, 403, 377 P.3d 199 (2016); *State v. Samalia*, 186 Wn.2d 262, 269, 375 P.3d 1082 (2016). When a trial court makes a discretionary decision alleged to violate a constitutional right, review is *de novo. Jones* I, 168 Wn.2d at 719; *State v. Iniguez*, 167 Wn.2d 273, 281, 217 P.3d 768 (2009).

Thus, for example, the *Jones* I court reviewed *de novo* a discretionary decision excluding evidence under the rape shield statute because the defendant argued a violation of his constitutional right to present a defense. *Jones* I, 168 Wn.2d at 719.[6] Similarly, the *Iniguez* court

[6] Generally, the exclusion of evidence under that statute is reviewed for an abuse of discretion. *State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007).

reviewed *de novo* the trial judge's discretionary decisions denying a severance motion and granting a continuance, because the defendant argued a violation of his constitutional right to a speedy trial. *Iniguez*, 167 Wn.2d at 280-281. That court specifically pointed out that review would have been for abuse of discretion had not the defendant argued a constitutional violation. *Id*.

Although evidentiary rulings are ordinarily reviewed for an abuse of discretion,[7] review is *de novo* where such a ruling violates a constitutional right. *Id.; Jones* I, 168 Wn.2d at 719.[8] Here, as in *Jones* I, Mr. Broussard alleges a violation of his constitutional right to present a defense. Review is therefore *de novo*. *Jones* I, 168 Wn.2d at 719.

The Supreme Court's decision in *Dye* does not compel a different result. *See State v. Dye*, 178 Wn.2d 541, 309 P.3d 1192 (2013). Although the *Dye* court indicated that merely alleging a violation of the "right to a fair trial does not change the standard of review," it did so without citing *Iniguez* or *Jones* I. *Id.,* at 548. In fact, the petitioner in *Dye* did not ask the

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[7] A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wash.2d 842, 858, 204 P.3d 217 (2009). This includes reliance on unsupported facts, application of the wrong legal standard, or taking an erroneous view of the law. *State v. Hudson*, 150 Wash.App. 646, 652, 208 P.3d 1236 (2009).

[8] *See also United States v. Lankford*, 955 F.2d 1545, 1548 (11th Cir. 1992).

court to apply a *de novo* standard. *See Dye*, Petition for Review[9] and Supplemental Brief.[10] As the *Dye* court noted, the petitioner "present[ed] no reason for us to depart from [an abuse-of-discretion standard]." *Id.*[11]

There is no indication that the *Dye* court intended to overrule *Iniguez* and *Jones* I or the long line of cases requiring *de novo* review of constitutional issues. This is especially true given the absence of any briefing addressing the appropriate standard of review in *Dye*.

The Court of Appeals should review Mr. Broussard's constitutional claims *de novo*, even if they stem from discretionary decisions. *Jones* I, 168 Wn.2d at 719; *Iniguez*, 167 Wn.2d at 281.

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[9] Available at http://www.courts.wa.gov/content/Briefs/A08/879290%20prv.pdf (last accessed 11/7/16).

[10] Available at http://www.courts.wa.gov/content/Briefs/A08/879290%20petitioner's%20supplemental%20brief.pdf (last accessed 11/7/16).

[11] By contrast, the Respondent did argue for application of an abuse-of-discretion standard. *See Dye*, Respondent's Supplemental Brief, pp 8-9, 17-18, available at http://www.courts.wa.gov/content/Briefs/A08/879290%20respondent's%20supplemental%20brief.pdf (last accessed 11/7/16).

II. DEFENSE COUNSEL DENIED MR. BROUSSARD THE EFFECTIVE ASSISTANCE OF COUNSEL BY UNREASONABLY FAILING TO OBJECT TO TESTIMONY SUGGESTING THE DEFENDANT GAVE HIS YOUNG GIRLFRIEND A SEXUALLY TRANSMITTED DISEASE.[12]

Defense counsel did not object when T.D. and N.C. testified that they overheard Reece claiming that Mr. Broussard had given her an STD. RP 91-93, 150-152. Counsel had not moved *in limine* to exclude this evidence. Because this evidence was irrelevant and highly prejudicial, and because there was no strategic reason for its admission, Mr. Broussard was deprived of the effective assistance of counsel.

To obtain relief on an ineffective assistance claim, a defendant must show "that (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor work prejudiced him." *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010). Although courts apply "a strong presumption that defense counsel's conduct is not deficient," a defendant rebuts that presumption if "no conceivable legitimate tactic explain[s] counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Defense counsel provides ineffective assistance by failing to object to inadmissible evidence absent a valid strategic reason. *State v.*

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[12] Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a)(3). Review is *de novo*. *State v. Jones*, 183 Wn.2d 327, 338, 352 P.3d 776 (2015) (*Jones* II).

Saunders, 91 Wn.App. 575, 578, 958 P.2d 364 (1998). Counsel may also render ineffective assistance by failing to move *in limine* to exclude irrelevant and prejudicial evidence. *See State v. West*, 139 Wn.2d 37, 40, 983 P.2d 617 (1999).

Here, defense counsel should have objected when the state introduced evidence suggesting Mr. Broussard gave his young girlfriend an STD prior to his encounter with T.D.

To be obtain relief, Mr. Broussard must show that (1) defense counsel's failure to object fell below prevailing professional norms, (2) the trial court would likely have sustained a timely objection, and (3) the defendant had a reasonable probability of obtaining a more favorable trial result absent the challenged evidence. *In re Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (*Davis* I). A "reasonable probability" is one "'sufficient to undermine confidence in the outcome.'" *Davis* I, 152 Wn.2d at 673 (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

All three requirements are met here. First, counsel's performance was deficient. No conceivable tactical consideration explains the failure to move *in limine* to exclude the STD evidence or to object when the topic arose during testimony.

Second, the trial court would have sustained an objection to the testimony, because it was irrelevant under ER 401 and ER 402. Evidence is not relevant unless it has "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. The STD evidence had no tendency to make any material fact more or less probable.

Furthermore, the evidence should have been excluded because "its probative value [was] substantially outweighed by the danger of unfair prejudice." ER 403. Even were it somehow relevant, the trial court would have sustained a timely objection under ER 403. The potential for unfair prejudice substantially outweighed whatever probative value the STD evidence may have had. *See State v. Saltarelli*, 98 Wn. 2d 358, 362, 655 P.2d 697 (1982).

"[E]vidence may be unfairly prejudicial under rule 403 if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or 'triggers other mainsprings of human action.'" *Carson v. Fine*, 123 Wn.2d 206, 223, 867 P.2d 610 (1994) (*Carson* I) (quoting 1 J. WEINSTEIN & M. BERGER, EVIDENCE § 403[03], at 403–36 (1985)).

Mr. Broussard's alleged transmission of an STD to Reece without her knowledge plainly tended to make him appear contemptible, to arouse sympathy for T.D. (who may have been placed at risk by his actions), and to provoke the jury's "instinct to punish." *Carson* I, 123 Wn.2d at 223. Even assuming the state could have articulated some basis for its relevance, the court would have granted a timely motion to exclude the testimony, or sustained a timely objection to it under ER 403. But defense counsel made no such motion, and did not object even when the prosecutor delved into the topic in depth. RP 91-93, 150-152.

Counsel should have sought an order *in limine* excluding the evidence outside the presence of the jury. Counsel should also have objected when the topic came up during testimony. Had defense counsel performed competently, he could have prevented the jury from hearing irrelevant and unfairly prejudicial testimony. ER 401, ER 402, ER 403.

Furthermore, absent this prejudicial testimony, Mr. Broussard had a reasonable probability of obtaining a more favorable result. The testimony tended to evoke sympathy for T.D. and to provoke a strong negative emotional reaction among the jurors.

There is a reasonable probability that counsel's errors affected the outcome of the trial. *Jones* II, 183 Wn.2d at 344. Confidence in the

outcome is undermined. *Davis* I, 152 Wn.2d at 673. Mr. Broussard's convictions must be reversed. *Jones* II, 183 Wn.2d at 345.

III. THE TRIAL COURT SHOULD HAVE EXCLUDED SPECULATION IMPLYING THAT N.C. BURNED AND CUT HERSELF BECAUSE OF HER ENCOUNTER WITH MR. BROUSSARD.

Evidence that is irrelevant or unfairly prejudicial must be excluded. ER 401, ER 402, ER 403. Here, defense counsel objected when N.C.'s mother implied that N.C. began harming herself because of her encounter with Mr. Broussard. RP 182-192. The evidence should have been excluded under ER 402 and ER 403.

First, the evidence did not have "any tendency to make the existence" of a material fact "more probable." ER 401. It was therefore irrelevant. ER 401.

N.C. did not testify that she'd even considered harming herself, much less that any self-harm related to Mr. Broussard. RP 144-178. Her mother did not have any direct knowledge that N.C. had harmed herself, or that any self-harm resulted from N.C.'s interaction with Mr. Broussard. Nor did the state present expert testimony regarding a link between encounters of the type N.C. described and self-harm. Under these circumstances, the evidence should have been excluded under ER 402.

Second, even if the testimony had some minimal relevance, it should have been excluded as unduly prejudicial. ER 403 prohibits the

admission of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403.

Here, the evidence had little or no probative value. Nothing established a link between N.C.'s mother's observations of the cigarette burns, the knives, or the scissors and Mr. Broussard. Any connection to the case was based on speculation.

The evidence was also unfairly prejudicial. Its admission allowed jurors to speculate that Mr. Broussard caused N.C. to start hurting herself. This likely produced revulsion and animosity against him and sympathy for his accusers. Some jurors—especially those who voted to convict on the assault charge—may well have taken the evidence as proof that Mr. Broussard is a bad person, and inferred guilt on the remaining charges because of his character or criminal propensity.

The erroneous admission of evidence is prejudicial and requires reversal "unless, within reasonable probability, [it] did not materially affect the outcome of the trial." *State v. Smith*, 196 Wn. App. 224, ___, 382 P.3d 721 (2016). The error here requires reversal.

The erroneously admitted evidence implied that N.C. started burning and cutting herself as a result of her encounter with Mr. Broussard. RP 182-192. The evidence appealed to the jury's passions, and was so prejudicial that it likely had a material effect on the verdict.

Without testimony on this emotional subject, some jurors may well have credited Mr. Broussard's testimony that T.D. misrepresented her age to him. On the other hand, by speculating on the meaning of the irrelevant evidence, some jurors may have become so prejudiced against Mr. Broussard they refused to believe his testimony.

Mr. Broussard's convictions must be reversed. *Id.* The case must be remanded with instructions to exclude the evidence upon retrial.

IV. TWO OF MR. BROUSSARD'S CONVICTIONS WERE ENTERED IN VIOLATION OF HIS RIGHT TO A UNANIMOUS VERDICT.

The state introduced evidence that Mr. Broussard had non-penetrative sexual contact with T.D. in the shower and on the bed. The prosecutor did not make a clear election when asking the jury to convict Mr. Broussard of molestation. RP 333-350, 363-373. Jurors did not receive a unanimity instruction. CP 39-66. The molestation conviction was entered in violation of Mr. Broussard's right to a unanimous verdict.

The jury was instructed on two alternative means of furnishing liquor to a minor. The state presented insufficient evidence to prove the second alternative. The conviction for furnishing liquor violated Mr. Broussard's right to juror unanimity as to the means of committing the crime.

A. Because the state presented evidence of multiple acts to prove the molestation charge, the trial judge should have provided a unanimity instruction.

An accused person has a state constitutional right to a unanimous jury verdict.[13] Art. I, § 21; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005). Jurors must unanimously agree that the accused person committed the charged criminal act. *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007).

Where the prosecution introduces evidence of multiple acts to support a single charge, the state must "'clearly'" identify the basis for the charge. *State v. Carson*, 184 Wn.2d 207, 227, 357 P.3d 1064 (2015) (*Carson* II) (citations omitted). If the prosecutor does not clearly elect a single act, the court must provide a unanimity instruction as to that charge. *Coleman*, 159 Wn.2d at 511. This requirement "protect[s] a criminal defendant's right to a unanimous verdict based on an act proved beyond a reasonable doubt." *Id.*

A unanimity instruction is not required where multiple acts are part of a continuing course of conduct. *See, e.g., State v. Rodriquez*, 187 Wn. App. 922, 937, 352 P.3d 200 (2015), *review denied*, 184 Wn.2d 1011, 360 P.3d 817 (2015). Here, the court found that there were two separate

[13] A violation of the right to a unanimous verdict may be raised for the first time on appeal. *See, e.g., State v. Moultrie*, 143 Wn. App. 387, 392, 177 P.3d 776 (2008); RAP 2.5(a)(3). As with all constitutional errors, the error is reviewed *de novo*. *Lenander*, 186 Wn.2d at 403.

encounters, divided by time and location. RP 422-425.[14] One took place in the shower; the other occurred in a bedroom. Although penetration occurred only in the shower, other non-penetrative sexual contact occurred at both locations.

The court did not give a unanimity instruction. CP 39-66. Because the molestation charge involved multiple acts, reversal is required unless the prosecutor made a clear election. *Coleman*, 159 Wn.2d at 511.

The state failed to make a clear election. In closing, the prosecutor did not tell jurors they could only convict Mr. Broussard of molestation for activity that took place on the bed. Nor did the prosecutor explain that they could not convict Mr. Broussard for sexual contact that occurred in the shower.

Under these circumstances, the lack of a unanimity instruction violated Mr. Broussard's right to a unanimous verdict on the molestation charge. Some jurors may have voted to convict based on sexual contact occurring in the shower. Others may have decided to convict based on sexual contact that occurred on the bed.

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[14] The court's finding related to a same criminal conduct determination at sentencing. Although not identical, the same criminal conduct standard overlaps significantly with the standard for determining if multiple acts are part of a continuing course of conduct. Compare RCW 9.94A.589(1)(a) with *Rodriquez*, 187 Wn. App. at 937.

The absence of a unanimity instruction and the state's failure to elect violated Mr. Broussard's state constitutional right to a unanimous verdict. *Coleman,* 159 Wn.2d at 511. The violation requires reversal of the molestation conviction. *Id.* The charge must be remanded for a new trial. *Id*.

B. The conviction for furnishing liquor to a minor violated Mr. Broussard's right to a unanimous verdict because insufficient evidence supported one of the alternative means submitted to the jury.

An accused person has a constitutional right to jury unanimity on the means of committing the charged crime. *State v. Lobe*, 140 Wn. App. 897, 903-905, 167 P.3d 627 (2007). A particularized expression of unanimity (in the form of a special verdict) is required unless there is sufficient evidence to support each alternative means submitted to the jury. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-708, 881 P.2d 231 (1994).

Accordingly, when the court instructs the jury regarding alternative means of committing an offense and does not require an expression of unanimity, reversal is required unless the state produced substantial evidence in support of each of the alternative means. *State v. Hayes*, 164 Wn. App. 459, 473, 262 P.3d 538 (2011).

Mr. Broussard was charged with furnishing liquor to a minor, which can be committed by two alternative means. CP 112-113; RCW 66.44.270(1). These include giving alcohol to a minor and allowing a minor to consume alcohol "on any premises under his or her control." RCW 66.44.270(1).

Here, the court instructed on both alternatives. CP 53, 54. However, the evidence was insufficient to convict Mr. Broussard under the second alternative. The evidence didn't prove beyond a reasonable doubt that Mr. Broussard had control over the premises where the party took place.

Because of this, the conviction must be reversed. *Hayes*, 164 Wn. App. at 473. If the case is retried, the court may not instruct on the second alternative means. *See, e.g., State v. Garcia*, 179 Wn.2d 828, 844, 318 P.3d 266 (2014).

V. THE COURT MISCALCULATED MR. BROUSSARD'S OFFENDER SCORE, BECAUSE THE RAPE AND MOLESTATION CHARGES SHOULD HAVE SCORED AS THE SAME CRIMINAL CONDUCT.

A sentencing court must determine the defendant's offender score pursuant to RCW 9.94A.525. The sentencing judge must determine how multiple current offenses are to be scored. Offenses that comprise the "same criminal conduct" are "counted as one crime. RCW 9.94A.589(1)(a). "Same criminal conduct" means "two or more crimes

that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).

Simultaneity is not required for a finding of same criminal conduct. *State v. Williams*, 135 Wn.2d 365, 368, 957 P.2d 216 (1998); *State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997). Here, the two offenses occurred within a very brief period. RP 101-103.

The offenses need not occur in the same room of a house. *State v. Davis*, 174 Wn. App. 623, 644, 300 P.3d 465 (2013) (*Davis* II). Instead, it is sufficient if the crimes occur "within a short distance of each other." *State v. Weldeselase*, 191 Wn. App. 1024 (2015) (unpublished) (citing *Davis* II). Here, the molestation and the rape took place in the same house, within a short distance of each other.

The phrase "same criminal intent" does not refer to a crime's *mens rea*. *State v. Phuong*, 174 Wn. App. 494, 546-47, 299 P.3d 37 (2013). Instead, courts consider how intimately related the crimes are, the overall criminal objective, and whether one crime furthered the other. *Id.* Multiple offenses that are part of a common scheme or plan should be considered to have the same criminal intent for purposes of RCW 9.94A.589(1)(a). That is, the overall criminal objective is to accomplish the scheme or plan.

Mr. Broussard's two convictions satisfy the same criminal conduct test. They took place at the same time, in the same place, and with the same victim. They involved the same overall objective: to engage in sexual activity with T.D.

The sentencing court should have scored the two offenses together as the same criminal conduct. Mr. Broussard's sentence must be vacated and the case remanded for a new sentencing hearing with an offender score of zero. *Williams*, 135 Wn.2d at 369.

VI. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016).[15]

Appellate costs are "indisputably" discretionary in nature. *Id.*, at 388. The concerns identified by the Supreme Court in *Blazina* apply with

[15] Division II's commissioner has indicated that Division II will follow *Sinclair*.

equal force to this court's discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Mr. Broussard indigent at the end of the proceedings in superior court. CP 18. That status is unlikely to change, especially with the addition of two felony sex offenses and imposition of a 26-month prison term. CP 23, 27. The *Blazina* court indicated that courts should "seriously question" the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

For the foregoing reasons, Mr. Broussard's convictions must be reversed and the case remanded for a new trial. In the alternative, the sentence must be vacated and the case remanded for resentencing with an offender score of zero. If Respondent substantially prevails, the court should decline to impose appellate costs.

Respectfully submitted on December 30, 2016,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Michael Broussard, DOC #389308
Coyote Ridge Corrections Center
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Connell, WA 99326

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Okanogan County Prosecuting Attorney
ksloan@co.okanogan.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 30, 2016.

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