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No. 35792-9-III

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

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STATE OF WASHINGTON,

Respondent,

v.

DAHNDRE KAVAUGN WESTWOOD,

Appellant.

---

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

The Honorable Judge John Knodell

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APPELLANT'S OPENING BRIEF

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## **A. SUMMARY OF ARGUMENT**

Dahndre Westwood was convicted in adult court, following a jury trial, of three crimes that occurred when he was 14 years old: attempted first degree rape, first degree burglary, and first degree assault. The primary evidence against Mr. Westwood was his DNA found on fingerprint swabs taken from the victim, A.B., on the date of the incident. Mr. Westwood's defense was that it was not him in A.B.'s house, but rather, someone brought his DNA into A.B.'s house because it was transferred to gloves or clothing used in the crime.

Mr. Westwood now appeals his convictions, arguing his convictions should be reversed, because the trial court erred in rejecting a proposed amendment to the information and the corresponding plea agreement prior to trial, and the trial court erred in denying his motion for a mistrial based upon jurors discussing extrinsic DNA evidence, which was directly related to his defense. Mr. Westwood also argues the case should be reversed and remanded for resentencing because his convictions for both attempted first degree rape and first degree assault violate double jeopardy, or the attempted first degree rape and the first degree assault should be sentenced concurrently; the three offenses should have been considered same criminal conduct; and the trial court abused its discretion by failing to exercise its discretion to consider a sentence below the standard adult range based upon Mr. Westwood's age at the time of the crimes. He also preemptively objects to the imposition of appellate costs.

## **B. ASSIGNMENTS OF ERROR**

1. The trial court abused its discretion and violated constitutional separation of powers in rejecting the proposed amendment to the information reducing the charges and the corresponding plea agreement.
2. Mr. Westwood was denied his article I, section 22 and Sixth Amendment right to a fair and impartial jury, where the trial court denied his motion for a mistrial based upon jurors discussing extrinsic DNA evidence.
3. The trial erred by convicting Mr. Westwood of both attempted first degree rape and first degree assault, where the assault conviction merged with the attempted rape conviction, and entry of both convictions violated Mr. Westwood's double jeopardy rights.
4. The trial court erred by finding Mr. Westwood's three convictions were not same criminal conduct and in sentencing Mr. Westwood to consecutive sentences for attempted first degree rape and first degree assault.
5. The trial court abused its discretion in sentencing Mr. Westwood without considering mitigating circumstances related to his age at the time of the crimes.
6. An award of costs on appeal against Mr. Westwood would be improper, in the event that the State is the substantially prevailing party.

## **C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Issue 1: Whether the trial court abused its discretion and violated constitutional separation of powers in rejecting the proposed amendment to the information reducing the charges and the corresponding plea agreement.

Issue 2: Whether Mr. Westwood was denied his article I, section 22 and Sixth Amendment right to a fair and impartial jury, where the trial court denied his motion for a mistrial based upon jurors discussing extrinsic DNA evidence.

Issue 3: Whether the trial erred by convicting Mr. Westwood of both attempted first degree rape and first degree assault, where the assault conviction merged with the attempted rape conviction, and entry of both convictions violated Mr. Westwood's double jeopardy rights.

Issue 4: Whether the trial court erred by finding Mr. Westwood's three convictions were not same criminal conduct and in sentencing Mr. Westwood to consecutive sentences for attempted first degree rape and first degree assault.

Issue 5: Whether the trial court abused its discretion in sentencing Mr. Westwood without considering mitigating circumstances related to his age at the time of the crimes.

Issue 6: Whether this Court should deny costs against Mr. Westwood on appeal in the event the State is the substantially prevailing party.

#### **D. STATEMENT OF THE CASE**

In the early morning hours of December 6, 2012, A.B. was alone and awake in her home working on homework, talking on Skype, and texting with a friend. (RP 196-197).<sup>1</sup> She heard some unusual noises outside. (RP 197). Right after she heard a second noise she looked up and saw a male standing in the doorway of her hallway. (RP 198-199). The male was completely covered in clothing, except for his eyes. (RP 198, 245, 285, 320). The male had a knife in his right hand. (RP 198-199, 273).

A.B. yelled at the male to leave, and “[h]e said that it didn’t matter, that - - to put my laptop down, to get in my room.” (RP 198-199, 246-247). The male pushed A.B. towards her bedroom. (RP 199-200, 247).

When A.B. and the male got to her room, the male pushed her on her bed. (RP 200). As she was pleading with him to stop and screaming for help, the male

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<sup>1</sup> The report of proceedings consists of seven separate volumes. Five volumes, reported by Tom R. Bartunek, contain the jury trial, and are referred to herein as “RP.” Two volumes, transcribed by Amy Brittingham, contain various hearings, including sentencing, and are referred to herein as “RP” followed by the specific date of hearing.

told A.B. to shut up and take off her clothes, and threatened to kill her. (RP 200, 202-203). The male tried to take A.B.'s clothes off by force, but he was unsuccessful. (RP 204). He was only able to touch her leg under her pajama pants. (RP 204, 221-222, 255, 526).

A.B. fought back against the male, knocking away the knife when he was going for her throat. (RP 200). The knife nicked A.B.'s cheek during this process. (RP 200, 206, 211-212, 217; Pl.'s Ex. 8). The male was trying to choke and suffocate A.B., and had her body twisted on her bed. (RP 201, 211-212, 221). The male was hitting A.B. (RP 201). A.B. clawed at the male's hands. (RP 200, 219-220).

After some headlights passed by her bedroom, the male stopped and looked outside, told A.B. he would come back and kill her if she told anyone, and left her house. (RP 202-204, 232-233).

No gloves or knife were located at A.B.'s house after the male left. (RP 226-228, 322, 327). A.B. called 911. (RP 203-204, 224, 248).

Grant County Deputy Sheriff Rick Canterbury responded to A.B.'s 911 call. (RP 270-272). He obtained a verbal statement from A.B. (RP 273).

A.B. went to the hospital, where a sexual assault nurse examiner (SANE examiner) swabbed A.B.'s fingernails on her right and left hands, and swabbed the back of her right and left hands. (RP 207, 228, 230-232, 338, 341, 347, 371-372, 381, 390). The SANE examiner swabbed these areas because "[w]hen the

patient came in and gave her account of the events of the morning, she described very specifically striking her assailant multiple times with her hands, so as the SANE examiner, you would swab the areas that may have come into contact with the assailant.” (RP 341, 390). The SANE examiner also took an oral swab of A.B., in order to collect her DNA (deoxyribonucleic acid). (RP 341, 347, 359, 452). The swabs taken of A.B. were placed into a sealed box, which was picked up that same day by the Grant County Sheriff’s Office. (RP 191-195, 348-350).

In 2013, Anna Wilson, a forensic DNA scientist at the Washington State Patrol Crime Lab, examined the swabs taken of A.B. and found a DNA profile in the right fingerprint swabs, that contained a mixture consistent with two individuals, A.B. and an unknown male. (RP 449-450, 478).

In December 2014, a match was found between the unknown male DNA from A.B.’s right fingertip swabs and DNA from an individual named Dahndre Westwood. (CP 12). A search warrant was then issued to obtain a DNA sample from Mr. Westwood. (CP 12; RP 478). Detective Ryan Green of the Grant County Sheriff’s Office took cheek swabs from Mr. Westwood for purposes of collecting this sample. (CP 12; RP 446-447). Ms. Wilson examined the cheek swabs from Mr. Westwood and determined that he matched the male DNA profile obtained from A.B.’s right fingertip swabs. (RP 478-479).

Detective Green showed A.B. two photographs of Mr. Westwood, and according to him, A.B. identified Mr. Westwood as the assailant. (RP 528; Def.’s

Ex. 16, 17). Detective Green also interviewed Mr. Westwood, and he denied any involvement in the incident. (RP 528-529, 541).

The State charged Mr. Westwood with the following five counts for the December 2012 altercation involving A.B.: attempted first degree rape; first degree burglary; second degree assault; indecent liberties; and first degree assault. (CP 382-385; RP 579-580).<sup>2</sup> Mr. Westwood was 14 years old on the date of the altercation. (CP 6-16, 499-506, 594; RP 564).

The trial court determined Mr. Westwood was “[e]ligible for a public defender at no expense.” (CP 27-28).

Prior to trial, the State sought to amend the information to one count of indecent liberties, and then allow Mr. Westwood to plead guilty to that count, along with a third degree assault charge in a separate cause number. (RP (Sept. 18, 2017) 5). The State set forth its reasons for seeking this plea agreement, which consisted of a change in the legal framework since the case was originally charged:

The reason the State is looking for this - - is looking at this plea bargain, is because Mr. Westwood was fourteen at the time and given the recent case law coming out of our state Supreme Court, we think this is, given the youth we have to now apparently have to take into consideration and the fact that Mr. Westwood, under this conviction, would be under the thumb of the ISRB for the rest of his life because it is a 507 case, that this is a reasonable plea bargain.

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<sup>2</sup> Mr. Westwood was charged prior to his eighteenth birthday. (CP 1-5, 499-506). The State filed a motion for the juvenile court to decline jurisdiction, and the juvenile court granted the motion. (CP 499-506; RP (Jan. 8, 2018) 74).

(RP (Sept. 18, 2017) 5-6, 11).

The State argued the trial court is not bound by standard ranges, including the life sentence under the ISRB, and therefore, the State would take this risk if it proceeded to trial. (RP (Sept. 18, 2017) 6-7). The State further argued “here we have an agreement that he’s sentenced under 507 that he is to be not let out unless the parole board thinks its appropriate and that’s important.” (RP (Sept. 18, 2017) 7).

The State acknowledged there was not evidentiary problems on the original charges. (RP (Sept. 18, 2017) 10). A.B. was present at the hearing and told the trial court she was prepared to testify against Mr. Westwood. (RP (Sept. 18, 2017) 5, 8, 10-11). A.B. also submitted a written statement objecting to the plea agreement. (CP 78-79).

Mr. Westwood requested the trial court grant the State’s request to amend the information. (RP (Sept. 18, 2017) 7, 12-13).

The trial court denied the State’s request to amend the information, and the corresponding plea agreement. (CP 93; RP (Sept. 18, 2017) 9-12, 14). In making its ruling, the trial court considered the factors set forth in RCW 9.94A.450 and stated “[t]he prosecution was unable to identify any provision of RCW 9.94A.450 which would justify a plea to reduced charges.” (CP 93; RP (Sept. 18, 2017) 9-12, 14). Later, at sentencing, the trial court revisited this issue:

[L]et me just make a note of another thing, I don't know if you fellas are familiar with the recent case of State of Washington v. Ralphaeto Augustine (sp) out of Division III.

....

Well, this is a case that there was a juvenile - - there was a juvenile case, I think, it was out of Adams County, but Judge Dixson refused, even though the prosecutor had moved to dismiss the case, he declined to do it. There was a trial that followed and uh [sic] Judge Dixson convicted Ralphaeto of - - I forget what it was, it was some relatively minor offense. It goes up to the Court of Appeals and the Court of Appeals said that Judge Dixson didn't have the authority to deny the motion to dismiss. I have not fully digested this case, but it concerns me a little bit about this case because I, as a I recall, [defense counsel] and Mr. Westwood, I declined to allow the amendment of the information in this case to address a lot of the concerns that - - that [the State] is expressing today. I don't think Augustine controls this because Augustine was a juvenile case. It was filed in juvenile court and didn't, in this case, there's a statute that says I have to find - - I understand that I have to find the amendment to be in the interest of justice. But, that's another complicated issue that we're gonna throw into the mix.

(RP (Jan. 8, 2018) 102-103).

The case proceeded to a jury trial. (RP 18-676).

Mr. Westwood's defense was that it was not him in A.B.'s house, but rather, someone brought his DNA into A.B.'s house because it was transferred to gloves or clothing used in the crime. (RP 560-562, 629-632, 641).

On the second day of the jury trial, the trial court received a note from Juror Number 5, stating "Jury [sic] 7 and 8 were talking transfer [sic] DNA at the last break." (CP 378-379; RP 288). Mr. Westwood then moved for a mistrial. (RP 290-292). He argued there is one juror trying to influence another juror, and it was heard by a third juror. (RP 291-292). He argued "I don't know if any

curative instruction will either stifle the free communication[,]” and “I do know that the jurors’ deliberations are supposed to be based upon the experts’ testimony.” (RP 291).

With the agreement of the State and Mr. Westwood, the trial court questioned Juror Number 5. (RP 294-295, 297-300). The questioning was as follows:

[Trial court:] . . . You said you gave the bailiff a note?

[Juror Number 5:] Yes, sir.

[Trial court:] I want a little bit more details. Could you tell me about the discussion you heard between the jurors seven and eight?

[Juror Number 5:] [The bailiff] had taken some of us down for a smoke break during the first break.

. . . .

When we came back up, just as we walked in, they - - jurors seven and eight had started a conversation, and as I settled in and realized they were discussing - - he was explaining his knowledge of DNA transfer.

And I made the comment out loud, loud enough for everybody to hear it, that you’re not supposed to be talking about stuff, especially that’s in the trial or we’ve kind of already know is coming in the trial.

He turned back to me and said, I read about this before the trial, so I already know. And then proceeded to continue with the conversation. It was very obvious that the rest of the juror were uncomfortable.

[Trial court:] So there were a number of other jurors present at the time?

[Juror Number 5:] All of us were there.

[Trial court:] Could I see the note again? I want to see the note . . . this says it was jurors seven and eight; is that right?

. . . .

[Jurors] [e]ight and nine. Okay.

[Juror Number 5:] Eight and nine. Sorry.

[Trial court:] . . . Do you remember what [Juror Number 9] was saying, any details about what he was saying, what he knew about transfer DNA?

[Juror Number 5:] Yes. He basically said that it was impossible.

[Trial court:] That it was impossible?

[Juror Number 5:] That it was impossible for - - his high point was, and he actually demonstrated, touched one, as the lawyers have been, touched one, touched another, and says, well, you can't do that, because DNA is inside a cell, and all I transferred were cells, so they can't pick up.

....

Everybody was in the room.

(RP 297-299).

Mr. Westwood renewed his motion for a mistrial, arguing “[m]y theory of the case, and my expert would contradict that, it is very possible, there’s been studies done that transfer DNA exists.” (RP 300-301, 399-410, 440).

The trial court questioned Juror Number 9:

[Trial court:] Okay . . . it’s been reported to me that you had a conversation with one or more of the other jurors about something that may come up in this case; is that true?

[Juror Number 9:] I don’t know. Are you referring to DNA?

[Trial court:] Yeah.

[Juror Number 9:] Yeah, I just was telling them a little bit of what I’ve read and just incidental.

[Trial court:] Okay. Which juror or jurors did you have this discussion with?

[Juror Number 9:] Oh, I don’t remember. It was just general.

[Trial court:] Do you remember how many jurors were there when you had the conversation?

[Juror Number 9:] Maybe half a dozen, maybe.

[Trial court:] Did it happen here in the jury room?

[Juror Number 9:] Yeah.

[Trial court:] And you were jury telling folks about what you’d read about DNA?

[Juror Number 9:] Yeah, just a little bit. I even forget what I said.

[Trial court:] Okay. You don’t remember exactly what you said?

[Juror Number 9:] No. It was just in the past I’ve read a little bit from a place called The Forensics Institute.

....

And they have some interesting . . . research, and I found it interesting . . . I just said that it was interesting research.

. . . .

And that's about all I said. And that - - and that during this trial, it will . . . be interesting.

[Trial court:] Okay. But you don't remember exactly what you said about this?

[Juror Number 9:] No, I don't remember that.

[Trial court:] Do you remember expressing any kind of opinion about what the evidence is or what the evidence may be?

[Juror Number 9:] No.

(RP 307-308).

After this questioning, the trial court dismissed Juror Number 9 from the jury.

(RP 308-312).

The trial court also dismissed Juror Number 8 from the jury. (RP 427-428).

In response to Mr. Westwood's motion for a mistrial, the State requested the trial court question each individual juror, based upon *State v. Jefferson*, 199 Wn. App. 772, 401 P.3d 805 (2017). (RP 304-305, 405-407, 409-410). Mr. Westwood objected to this process. (RP 407-408). The trial court agreed to question each individual juror, asking the following questions:

[W]e'll ask them if they heard any - - if they've heard any conversation or had any information about anything that they've heard in the evidence or that they think might be coming up in the evidence. And simply, are they going to be able to set that aside in order to - - and simply decide this on the basis of the evidence that they hear?

(RP 414).

The trial court asked each individual juror these questions. (RP 415-440). Juror Number One stated “I know two days ago there was a conversation in the jury room about just general DNA talk, but nothing about this case.” (RP 416-417). Juror Number Three stated she heard a brief conversation about DNA in the jury room. (RP 420-421). Juror Number Five stated “honest, the only juror in that room who probably was listening and taking it to heart is juror number eight . . . [e]verybody else was shutting down.” (RP 423-424). Juror Number Six said she thinks somebody mentioned something about DNA, “but I wasn’t really listening . . . .” (RP 424-425).

The juror who replaced Juror Number Nine stated the two dismissed jurors, numbers Eight and Nine, “had just kind of started talking about DNA evidence and things they had seen . . . [,]” but did not really remember what was said. (RP 429, 445). Juror Number Eleven stated he heard a “very vague” conversation about DNA, and he “wasn’t even really paying attention . . . I tuned out and went to the other side of the room.” (RP 432-433). Juror Number Twelve stated dismissed Juror Number Nine spoke about DNA outside the courtroom: “he just was talking to the room in general, and he was talking about the DNA and what his belief was about DNA . . . I chose to get on my phone and look at Facebook, so I wouldn’t pay attention.” (RP 436).

The juror who replaced Juror Number Eight stated the two dismissed jurors, Number Eight and Nine, had “a conversation about not specifically about

this case, but just DNA in general . . . [t]here was just talk about whether DNA - - something about being in the cell.” (RP 438-439, 445). She stated that everyone was present within hearing range of this conversation. (RP 439).

All of the jurors that stated they had heard a conversation regarding DNA outside of the courtroom stated they understood that this case must be decided based on the evidence they hear in court. (RP 417-418, 421-422, 424-426, 429-430, 433, 437-440).

Four jurors stated they had not heard any conversation between jurors regarding DNA. (RP 418-419, 422-423, 425-426, 430-431).

After this questioning of each individual juror, the trial court declined to grant a mistrial. (RP 440).

At the jury trial, witnesses testified consistent with the facts stated above. (RP 191-573). In addition, A.B. testified that after she saw the male in her house, he immediately told her to put down her laptop and get into her room. (RP 245-247). She testified:

[Defense counsel:] Well, didn't he tell you to grab – put down your laptop and get into your room immediately?

[A.B.:] Yes.

[Defense counsel:] Ok. So that took a few minutes?

[A.B.:] No. It was him standing in my doorway and me seeing him and telling him how the fuck did you get in here, get the fuck out. And him saying it didn't matter, put your laptop down, get in your room, and just all of a sudden being in front of me and then pushing me towards my room.

[Defense counsel:] So after that conversation, did he immediately push you towards your room?

[A.B.:] When he was right in front of me, yes.

[Defense counsel:] Other than what you just conveyed, what else was said, anything between you and him, the assailant?

[A.B.:] I kept telling him to get the hell out of my house, and he was telling me to get in my room and take off my clothes.

(RP 246-247).

A.B. testified that when the male pushed her towards her bedroom, she was unable to grab anything, stating “[i]t just happened so quick.” (RP 200).

When asked to estimate how long the altercation was, A.B. testified “I didn’t even know that it only took about a half hour for all of it. I don’t know. It felt like an eternity.” (RP 247). She testified she sent a text message at 4:35 a.m., and right after that she heard another noise, looked up, and saw the male. (RP 248). She testified it was approximately 5:00 a.m. when she called 911. (RP 248).

A.B. testified the male had gloves on when he came into the house. (RP 222-223, 525). She testified she tore the gloves off of him: “I could feel his skin - his bare skin when I was digging my nails and I was ripping at the fabric of the gloves.” (RP 226, 250-251, 525).

A.B. testified that Detective Green showed her two photographs of Mr. Westwood, and that “I told him I was pretty sure that it was him, because of the eyes.” (RP 242-245; Def.’s Ex. 16, 17).

Deputy Canterbury testified A.B. told him the male asked her, “[d]o you want it the hard way or the easy way?” and “[d]o you want to quit breathing

forever?” (RP 276). He testified A.B. told him the suspect took her to one of the bedrooms in the house. (RP 276).

Ms. Wilson testified that Mr. Westwood matched the male DNA profile obtained from A.B.’s right fingertip swabs “and the estimated probability of selecting an unrelated individual at random from the U.S. population with a matching profile is one in 20 quadrillion.” (RP 478-479).

Ms. Wilson testified she was familiar with the concept of touch and transfer DNA, and she explained both concepts to the jury. (RP 481, 493-495).<sup>3</sup> She opined that Mr. Westwood’s DNA profile obtained from A.B.’s right fingertip swabs is not consistent with touch DNA, based upon the quantity of Mr. Westwood’s DNA cells present. (RP 484-485, 488-489).

Ms. Wilson testified that secondary transfer of DNA can place someone at the scene of a crime, even if they are not present. (RP 495). She testified that it is possible that if a “person is not there, but through secondary transfer, he or she may be the main or only contributor of DNA.” (RP 495).

Mr. Westwood’s mother Paula Tyus testified Mr. Westwood was living with her on the date of the incident. (RP 563-564). She testified that Mr. Westwood frequently had friends come over to their house, including to sleep, bathe, and change clothes. (RP 567-568). Ms. Tyus testified a couple of Mr.

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<sup>3</sup> Defense counsel obtained a DNA expert. (CP 33-40, 433-440). The defense expert was present for Ms. Wilson’s testimony, and afterwards defense counsel decided not to call him as a witness, because he was able to elicit the necessary testimony from Ms. Wilson. (CP 433-439; RP 485, 502-503).

Westwood's friends would stay over more frequently than the rest, and they would wear Mr. Westwood's clothing outside of the house. (RP 569-570). She testified she did not wash clothes every day, but rather, "[m]aybe twice a week." (RP 570-572).

The jury found Mr. Westwood guilty of attempted first degree rape<sup>4</sup>; first degree burglary<sup>5</sup>; second degree assault; and first degree assault. (CP 423, 426, 428-429; RP 661-663, 668-670, 672-676). The jury found Mr. Westwood not guilty of indecent liberties. (CP 425; 665-668).

At sentencing, the trial court dismissed the second degree assault charge, based on double jeopardy, and entered a sentence on the following three convictions: attempted first degree rape; first degree burglary; and first degree assault. (CP 594-616; RP (Jan. 8, 2018) 36-37).

Mr. Westwood argued his three convictions should be considered same criminal conduct. (CP 445, 455-457; RP (Jan. 8, 2018) 41-44). He argued the first degree burglary and the first degree assault were committed in order to further the attempted first degree rape. (RP (Jan. 8, 2018) 41-44). Mr. Westwood argued he cited case law that was not specifically overruled by *State v.*

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<sup>4</sup> The jury also returned a special verdict for attempted first degree rape, finding unanimously that Mr. Westwood "used or threatened to use a deadly weapon" and "feloniously entered in to the building where [A.B.] was situated[.]" (CP 424; 663-665).

<sup>5</sup> The jury also returned a special verdict for first degree burglary, finding unanimously that Mr. Westwood "assaulted a person[.]" and not unanimously that Mr. Westwood "was armed with a deadly weapon[.]" (CP 427; RP 670-672).

*Chenoweth*, 185 Wn.2d 218, 370 P.3d 6 (2016). (CP 445, 455-457; RP (Jan. 8, 2018) 41-42).

The State argued that each of the three convictions should be counted separately as current convictions in Mr. Westwood’s offender score. (CP 479-483; RP (Jan. 8, 2018) 37-). The State argued the first degree burglary should count separately under the burglary anti-merger statute. (CP 479-482; RP (Jan. 8, 2018) 38-40). The State further argued the attempted first degree rape and the first degree assault should not be considered same criminal conduct, because “[u]nder *State v. Chenoweth*, 185 Wn.2d 218, 370 P.3d 6 (2016) the court looks to the mens rea in the statutes in determining different intents[,]” and the crimes have different statutory mens rea. (CP 482-483, 487-488; RP (Jan. 8, 2018) 37-41, 46-47).

The trial court ruled that Mr. Westwood’s three convictions were not same criminal conduct:

I’m going to adopt the State’s interpretation of Chenoweth. This is something that I think that’s gonna have to be taken up probably to the Supreme Court again. It doesn’t make any sense to me, but I’m gonna find that the three counts do not encompass the same criminal conduct. I’m not gonna address the question of the anti-merger statute because I think under this analysis I don’t need to.

(RP (Jan. 8, 2018) 47).

Mr. Westwood also requested the trial court impose a mitigated exceptional sentence below the standard range, based on his youthfulness at the time of the crimes, citing *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409

(2017) and *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015). (CP 445, 460-461; RP (Jan. 8, 2018) 48, 71-83, 84-86, 93-99). Mr. Westwood submitted personal background information for the trial court in support of a mitigated sentence. (CP 462-465; RP (Jan. 8, 2018) 82). He also submitted educational evaluations, a chemical dependency assessment, and a court order finding him competent to proceed in a separate juvenile court matter. (CP 508-531; RP (Jan. 8, 2018) 82). Mr. Westwood also provided the trial court with the prescription medications he was taking while incarcerated. (CP 555-556; RP (Jan. 8, 2018) 93-99).

The State agreed the trial court had discretion to impose a mitigated exceptional sentence below the standard range based on Mr. Westwood's age, but argued such a sentence was not appropriate here. (CP 487-506; RP (Jan. 8, 2018) 84, 86-92).

The trial court questioned its authority to depart from a standard range sentence based solely on Mr. Westwood's age at the time of the offenses. (RP (Jan. 8, 2018) 71-72, 74-75, 77-78, 80-81, 88, 91-93, 100-102). After hearing argument from the parties, the trial court stated the following, before taking a recess to review *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017):

[Trial court:] Okay, I need - - I need to read Houston-Sconiers one more time because frankly, my impression is that Houston-Sconiers doesn't say that the sentencing reform act just doesn't apply to juveniles. I may be wrong about that. I think if the SRA does I'm concerned about what - - what we would say that would be a mitigating factor here and whether I would not need some sort

of - - if [defense counsel's] assessment is true, would I need some sort of expert opinion about Mr. Westwood's mental state to support a mitigating sentencing?

[The State:] I would point out if you look at Houston-Sconiers, the - - they were sentenced to mandatory firearm enhancements.

[Trial court:] Yeah.

[The State:] That's basically all they were sentenced to and the Court said, you can go below that, which the SRA says those are mandatory - - -

[Trial court:] Yeah.

[The State:] Notwithstanding any other law, etc. So, and again, I don't like Houston-Sconiers but that's what it says.

[Trial court:] I think you'd have - - I mean the Supreme Court really did not express themselves well. This is supposed to be a landmark, kind of a beacon to the rest of us and it's very difficult to understand. Isn't it?

[The State:] Yeah.

(RP (Jan. 8, 2018) 92-93).

The trial court declined Mr. Westwood's request for a mitigated exceptional sentence below the standard range, based on his youthfulness at the time of the crimes. (RP (Jan. 8, 2018) 100-102). The trial court first found "I understand that some kids at age fourteen may have a substantially diminished ability to appreciate the wrongfulness of their conduct . . . ." (RP (Jan. 8, 2018) 100). The trial court then found there is no specific information in this case justifying an exceptional sentence downward, stating "we don't have any - - we have no evidence whatsoever as to the degree that Mr. Westwood may or may not have been able to appreciate the wrongfulness of his conduct." (RP (Jan. 8, 2018) 100-102).

The trial court also found there is no basis in the law for imposing a mitigated sentence:

I re-read the case at issue here and I'm sorry, Houston-Sconiers, I'm not sure that I agree with [the State's] interpretation . . . of this case. I understand how age may indeed lead to maybe, may cause or may be a factor to consider that in concluding Mr. Westwood was, or any given juvenile was under these circumstances was unable to appreciate the wrongfulness of the conduct. But, there's no - - - but I don't - - - but I see that - - - I think that if that - - - if the Supreme Court had meant the SRA just doesn't apply to anybody under eighteen, I think they'd have said that and I think if they would have said that they would have given me some alternative. *Because, if it's true, that a mitigated sentence is appropriate, then I have to have some basis for imposing still a determine sentence here and there is no basis. There's no basis given on the law.*

The legislature passed this, you know, passed this statute and the Supreme Court does not have the power to simply declare it, I think that - - - declare that unconstitutional, but I think if they're gonna do that, they have to do so clearly so that we all know what's going on and I think they have to supply us with some alternative here.

(RP (Jan. 8, 2018) 101) (emphasis added).

On the attempted first degree rape conviction, the trial court imposed an indeterminate sentence of life, with a minimum term of 105 months, pursuant to RCW 9.94A.507. (CP 595, 599-600; RP (Jan. 8, 2018) 104-105; RP (Jan. 30, 2018) 118-120).<sup>6</sup> On the first degree assault conviction, the trial court imposed a sentence of 108 months. (CP 599; RP (Jan. 8, 2018) 105). The trial court ordered

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<sup>6</sup> The trial court sentenced Mr. Westwood on January 8, 2018, and entered a Judgment and Sentence on that date. (CP 557-581; RP (Jan. 8, 2018) 35-109). The trial court later entered an amended Judgment and Sentence. (CP 594-616; RP (Jan. 30, 2018) 118-120). The amended Judgment and Sentence is on appeal here. (CP 623-624).

the sentence on the attempted first degree rape conviction and the sentence on the first degree assault conviction to be served consecutively, because they are both serious violent offenses, for a term of confinement of 213 months. (CP 599; RP (Jan. 8, 2018) 48, 104-105). The trial court also imposed a sentence of 47.5 months on the first degree burglary, to run concurrently. (CP 599; RP (Jan. 8, 2018) 105).

The trial court also imposed lifetime community custody. (CP 600; RP (Jan. 30, 2018) 118-120).

The trial court imposed \$800 in mandatory legal financial obligations. (CP 602-603; RP (Jan. 8, 2018) 107). The trial court made no inquiry at sentencing into Mr. Westwood's ability to pay legal financial obligations. (RP (Jan. 8, 2018) 107; RP (Jan. 30, 2018) 118-120).

The amended felony judgment and sentence contains the following boilerplate language: “[a]n award of costs on appeal against the defendant may be added to the total financial obligations.” (CP 604).

Mr. Westwood appealed. (CP 623-624). The trial court entered an Order of Indigency, granting Mr. Westwood a right to review at public expense. (CP 587-592).

## **E. ARGUMENT**

### **Issue 1: Whether the trial court abused its discretion and violated constitutional separation of powers in rejecting the proposed amendment to the information reducing the charges and the corresponding plea agreement.**

The State sought to amend the information in exchange for Mr. Westwood pleading guilty to the amended charges. The trial court rejected the proposed amendment, concluding the amendment was not in the interest of justice. The trial court abused its discretion in rejecting the proposed amendment and corresponding plea agreement. In addition, the trial court's rejection of the State's proposed amendment to the information and the corresponding plea agreement violated constitutional separation of powers. Therefore, Mr. Westwood's convictions should be reversed.

A prosecutor is permitted, by statute, to enter into plea agreements with criminal defendants. RCW 9.94A.421. "In certain circumstances, a plea agreement with a defendant in exchange for a plea of guilty to a charge or charges that may not fully describe the nature of his or her criminal conduct may be necessary and in the public interest." RCW 9.94A.450(2). Such situations may include the following:

- (a) Evidentiary problems which make conviction on the original charges doubtful;
- (b) The defendant's willingness to cooperate in the investigation or prosecution of others whose criminal conduct is more serious or represents a greater public threat;
- (c) A request by the victim when it is not the result of pressure from the defendant;

- (d) The discovery of facts which mitigate the seriousness of the defendant's conduct;
- (e) The correction of errors in the initial charging decision;
- (f) The defendant's history with respect to criminal activity;
- (g) The nature and seriousness of the offense or offenses charged;
- (h) The probable effect on witnesses.

RCW 9.94A.450(2).

A trial court is not bound by a plea agreement, and may reject a plea agreement if it is not “consistent with the interests of justice and with the prosecuting standards.” RCW 9.94A.431(1).

The trial court’s authority to refuse or deny a plea bargain also includes the right to refuse the dismissal or amendment of the charges. *State v. Haner*, 95 Wn.2d 858, 864, 631 P.2d 381 (1981). A trial court may refuse to allow amendment of the charges where the public interest would not be served by the amendment. *Id.* at 862-65; *see also State v. Lazcano*, No. 32228-9-III, 2017 WL 1030735, at \*9-11 (Wash. Ct. App. Mar. 16, 2017).<sup>7</sup> A trial court’s ruling refusing the allow amendment of the charges is reviewed for an abuse of discretion. *Haner*, 95 Wn.2d at 861.

Here, the State sought to amend the information to one count of indecent liberties, and allow Mr. Westwood to plead guilty to that count, along with a third degree assault charge in a separate cause number. (RP (Sept. 18, 2017) 5). The

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<sup>7</sup> This case is cited as persuasive authority only. *See* GR 14.1(a) (authorizes citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

plea agreement would then be that Mr. Westwood would be sentenced under RCW 9.94A.507. (RP (Sept. 18, 2017) 7); *see also* RCW 9.94A.507 (indeterminate sentencing for sex offenders). The State sought this amendment and corresponding plea agreement because given Mr. Westwood's age at the time the crimes were committed, the trial court would not be bound by a standard range sentence, and the State would take this risk if it proceeded to trial. (RP (Sept. 18, 2017) 7). The trial court denied the State's request, stating "[t]he prosecution was unable to identify any provision of RCW 9.94A.450 which would justify a plea to reduced charges[,]” and “I understand that I have to find the amendment to be in the interest of justice.” (CP 93; RP (Sept. 18, 2017) 9-12, 14; RP (Jan. 8, 2018) 102-103).

The trial court abused its discretion in rejecting the proposed amendment to the information reducing the charges and the corresponding plea agreement. The proposed amendment to the information was consistent with interests of justice. *See* RCW 9.94A.431(1). It would have avoided subjecting A.B. to a lengthy jury trial, while still ensuring a plea agreement to an indeterminate sentence with lifetime supervision. *See* RP (Sept. 18, 2017) 7; *see also* RCW 9.94A.507.

In addition, the trial court's rejection of the proposed amendment to the information and the corresponding plea agreement violated the constitutional separation of powers. A claimed violation of the constitutional separation of

powers may be raised for the first time on appeal.<sup>8</sup> *State v. Agustin*, 1 Wn. App. 2d 911, 916, 407 P.3d 1155 (2018).

The separation of powers doctrine is meant to defuse and limit power by spreading it among the three branches: judicial, executive, and legislative. *State v. Rice*, 174 Wn.2d 884, 900-01, 279 P.3d 849 (2012). The doctrine is a fundamental principle of America’s constitutional system and “forms the basis of our state government.” *Id.* at 900. “The division of governmental authority into separate branches is especially important within the criminal justice system, given the substantial liberty interests at stake and the need for numerous checks against corruption, abuses of power, and other injustices.” *Id.* at 901 (citations omitted). The legislature defines crimes and punishments, the executive branch collects evidence and seeks prosecution of the crimes, and the judiciary confirms guilt and imposes an appropriate sentence. *Id.* (citations omitted).

“The legislature has acknowledged by statute that prosecuting attorneys have broad charging discretion, notwithstanding seemingly mandatory filing language in the very same section.” *Id.* at 898 (citing RCW 9.94A.411(1)) (other citation omitted). In *Rice*, our Supreme Court found that legislative language stating that prosecutors “shall” file special allegations of sexual motivation in certain criminal cases was directory, not mandatory, because “the challenged

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<sup>8</sup> The trial court did mention *State v. Agustin* at sentencing, finding it did not control the result here. (RP (Jan. 8, 2018) 102-103). Mr. Westwood now argues on appeal that *State v. Agustin* applies here and a separation of powers violated occurred.

statutes would be unconstitutional if they were mandatory.” *Id.* at 889. The Court stated “the legislature cannot usurp the inherent charging discretion of prosecuting attorneys; as an executive officer, a prosecuting attorney necessarily has discretion to forgo a supplemental charge even if sufficient evidence exists and regardless of whether the charge would interfere with obtaining a conviction.” *Id.* at 890.

In *Agustin*, following the trial court granting a motion to suppress most of the evidence against the defendant, the State filed a motion to dismiss the charges under CrR 8.3(a), based on its belief that there was insufficient evidence to proceed. *Agustin*, 1 Wn. App. 2d at 914, 918. The trial court denied the State’s motion to dismiss, and following a bench trial, the defendant was found guilty of a single charge. *Id.* at 915. On appeal, the defendant argued, in relevant part, “that for the court to refuse the State’s request to dismiss the charges violated constitutional separation of powers.” *Id.*

This Court agreed with the defendant and found that the trial court violated the constitutional separation of powers by denying the State’s motion to dismiss the charges. *Id.* at 916-22. This Court reversed the defendant’s conviction and remanded the case with directions to dismiss the charge. *Id.* at 922.

This Court reasoned that “[o]ur Supreme Court’s decision in *Rice* supports the conclusion that a trial court may not deny a prosecutor’s request to dismiss a

charge the prosecutor believes is unsupported by sufficient evidence.” *Id.* at 919. This Court stated “[i]f the legislative branch cannot mandate that the executive branch prosecute a charge if it is supported by sufficient evidence, then neither can the judicial branch.” *Id.* This Court further stated “[i]t is consistent with *Rice* to limit a court’s discretion to deny a prosecutor’s CrR 8.3(a) motion to situations where the prosecutor’s reasons for wishing to dismiss a charge stray from the legitimate prosecutorial considerations identified in *Rice* and violate either the defendant’s rights or the public interest.” *Id.* at 919-20.

This Court held “that because a trial court’s discretion to deny a prosecuting attorney’s motion to dismiss under CrR 8.3(a) must be exercised with due regard for constitutional separation of powers, a court may deny such a motion only when the prosecuting attorney offers an inappropriate reason.” *Id.* at 921-22. This Court then found “the prosecutor’s belief that the admissible evidence would not support conviction was an appropriate reason for moving to dismiss the charges.” *Id.* at 922.

Here, the trial court’s rejection of the proposed amendment to the information and the corresponding plea agreement violated the constitutional separation of powers. The State acknowledged there was not evidentiary problems on the original charges. (RP (Sept. 18, 2017) 10). Nonetheless, as acknowledged by this Court in *Agustin*, the judicial branch cannot mandate that the executive branch prosecute a charge even if it is supported by sufficient

evidence. *See Agustin*, 1 Wn. App. 2d at 919; *see also Rice*, 174 Wn.2d at 890 (acknowledging that “a prosecuting attorney necessarily has discretion to forgo a supplemental charge even if sufficient evidence exists and regardless of whether the charge would interfere with obtaining a conviction.”).

Under the separation of powers doctrine, no branch of government may usurp the power of another branch, even with that branch’s permission. *Rice*, 174 Wn.2d at 906. The trial court here (judicial branch) usurped the power of the prosecuting attorney (executive branch). It is a prosecuting attorney’s decision whether to pursue charges and seek justice. *Id.* at 901-03. It is also a prosecuting attorney’s decision whether to decline to prosecute. *Id.*

The trial court abused its discretion in rejecting the proposed amendment to the information and the corresponding plea agreement. The trial court’s rejection of the State’s proposed amendment to the information and the corresponding plea agreement violated constitutional separation of powers. Therefore, Mr. Westwood’s convictions should be reversed.

**Issue 2: Whether Mr. Westwood was denied his article I, section 22 and Sixth Amendment right to a fair and impartial jury, where the trial court denied his motion for a mistrial based upon jurors discussing extrinsic DNA evidence.**

Mr. Westwood moved for a mistrial after the jury was exposed to extrinsic evidence directly related to his defense. After conducting a subjective inquiry of the jury, the trial court denied his motion. This denial violated Mr. Westwood’s right to a fair and impartial jury. The trial court abused its discretion by applying

the wrong legal standard, conducting a subjective, rather than an objective inquiry. In addition, the extrinsic information was too powerful for the jury to disregard under either standard, because the evidence was too powerful to disregard and irreparably tainted the jury.

The accused in a criminal trial has a constitutional right to have a fair and impartial jury. U.S. Const. amends. VI, XIV § 1; Wash. Const. art. 1, §§ 3, 22; *State v. Brett*, 126 Wn.2d 136, 157, 892 P.2d 29 (1995). “The right of trial by jury means a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct.” *State v. Tigano*, 63 Wn. App. 336, 341, 818 P.2d 1369, 1372 (1991).

It is misconduct for a jury to consider extrinsic evidence. *State v. Pete*, 152 Wn.2d 546, 552, 98 P.3d 803 (2004). A jury’s consideration of novel or extrinsic evidence can be grounds for a mistrial. *State v. Balisok*, 123 Wn.2d 114, 118, 866 P.2d 631 (1994). “[E]xtrinsic evidence is defined as information that is *outside all the evidence* admitted at trial, either orally or by document.” *Pete*, 152 Wn.2d at 552 (internal quotation marks omitted) (citation omitted). “This type of evidence is improper because it is not subject to objection, cross examination, explanation or rebuttal.” *Id.* at 553 (internal quotation marks omitted) (citation omitted).

A trial court’s denial of a motion for a mistrial is reviewed for an abuse of discretion. *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012).

“An abuse of discretion is found if the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law.” *State v. Lord*, 161 Wn. 2d 276, 284, 165 P.3d 1251 (2007). “[A] mistrial should be granted ‘only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.’” *State v. Greiff*, 141 Wn.2d 910, 920–21, 10 P.3d 390 (2000) (quoting *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994)).

In *State v. Jefferson*, the defendant argued he was denied his right to an impartial jury, when the trial court denied his motion for a mistrial after jurors were exposed to extrinsic evidence during his jury trial. *State v. Jefferson*, 199 Wn. App. 772, 792-97, 401 P.3d 805 (2017), *review granted*, 189 Wn.2d 1038, 409 P.2d 1052 (2018). Prior to denying the motion, the trial court questioned each juror individually, and each juror stated the extrinsic evidence did not affect his or her ability to be fair and impartial. *Id.* at 793.

Division 1 of this Court held that the trial court did not abuse its discretion in denying the defendant’s motion for a mistrial. *Id.* at 795-97. Division 1 reasoned “[a] trial court can inquire into the jurors’ ‘subjective ability to disregard extrinsic information before there is a verdict to potentially impeach.’” *Id.* at 795 (quoting *State v. Gaines*, 194 Wn. App. 892, 898, 380 P.3d 540 (2016)). Division 1 further reasoned that “[b]ecause the misconduct came to light before the verdict

was rendered, the court and parties had the opportunity to inquire into the jurors' 'subjective ability to disregard extrinsic information.'" *Id.* at 796 (quoting *Gaines*, 194 Wn. App. at 898). And, after the trial court conducted a hearing into the matter, it confirmed that each juror could remain impartial. *Id.*

As noted above, *Jefferson* relied on *Gaines*. *Id.* at 795-97. In *Gaines*, the defendant argued the trial court erred by denying his motion for a mistrial after jurors heard extrinsic evidence during his jury trial. *Gaines*, 194 Wn. App. at 897, *review denied*, 186 Wn.2d 1028, 385 P.3d 125 (2016). Prior to denying the motion, the trial court questioned each juror individually, and determined they would be impartial. *Id.* at 895-96.

The defendant argued "the trial court abused its discretion by applying the wrong legal standard: it subjectively investigated the jurors' ability to be fair, rather than objectively inquiring into whether any prejudice could result." *Id.* at 897.

Division 2 held the trial court did not abuse its discretion in denying the defendant's motion for a mistrial. *Id.* at 897-99. Division 2 reasoned "[w]hen a jury hears extrinsic information and where that extrinsic information *inheres in the verdict*, the trial court must make an objective inquiry, asking whether the evidence could have affected the jury's verdict." *Id.* at 898. Division 2 further reasoned "[t]his objective standard applies only after a verdict has been rendered." *Id.* Division 2 found "[t]he logic underlying the objective test does not apply

before the jury reaches a verdict, such as here, because there is no verdict to impeach.” *Id.*

Here, Mr. Westwood was denied his right to a fair and impartial jury, where the trial court denied his motion for a mistrial based upon jurors discussing extrinsic DNA evidence. Mr. Westwood requests this Court decline to follow *Jefferson* and *Gaines*, as these cases are not binding on this Court. *See Jefferson*, 199 Wn. App. at 792-97; *Gaines*, 194 Wn. App. at 897-99; *see also In re Pers. Restraint of Arnold*, 190 Wn.2d 136, 154, 410 P.3d 1133 (2018) (rejecting “horizontal stare decisis” between the divisions of the Court of Appeals). Furthermore, our Supreme Court granted review of *Jefferson* and heard oral argument in that case on May 8, 2018. *See Jefferson*, 199 Wn. App. at 772, *review granted*, 189 Wn.2d 1038, 409 P.2d 1052 (2018).

The focus on a subjective analysis in *Jefferson* and *Gaines* is contrary to United States Supreme Court precedent. The United States Supreme Court does not distinguish between pre-verdict and post-verdict challenges to extrinsic evidence introduced to a jury, because the underlying power of human nature is not altered by the timing of lawyers’ challenges. *Turner v. Louisiana*, 379 U.S. 466, 471, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965); *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961); *Marshall v. United States*, 360 U.S. 310, 312-13, 79 S. Ct. 1171, 3 L. Ed. 2d 1250 (1959). Jurors’ promises to remain impartial after exposure to extrinsic evidence does not mean that the defendant

will receive a fair and impartial trial because the psychological impact on the juror is often impossible to disregard. *Marshall*, 360 U.S. at 312-13; *Irvin*, 366 U.S. at 722.

The trial court abused its discretion by denying Mr. Westwood's motion for a mistrial where the jurors were exposed to prejudicial extrinsic evidence directly related to his defense. Mr. Westwood's defense was that it was not him in A.B.'s house, but rather, his DNA was transferred to gloves or clothing used in the crime. (RP 560-562, 629-632, 641). The extrinsic evidence concerned DNA, including an allegation "that [transfer DNA] was impossible." (CP 378-379; RP 288, 294-295, 297-300, 307-308, 415-440).

The trial court abused its discretion by applying the wrong legal standard, conducting a subjective, rather than an objective inquiry. *See Turner*, 379 U.S. at 471; *Irvin*, 366 U.S. at 722; *see also Flyte v. Summit View Clinic*, No. 48278-9-II, 2017 WL 3034638, at \*3-4 (Wash. Ct. App. July 18, 2017) (stating "[t]he trial court must make an objective inquiry into whether the extrinsic evidence *could have* affected the jury's determination and not a subjective inquiry into the *actual affect* of the evidence on the jury.").<sup>9</sup>

In addition, the extrinsic information was too powerful for the jury to disregard under either standard, because the evidence was too powerful to

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<sup>9</sup> This case is cited as persuasive authority only. *See* GR 14.1(a) (authorizes citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

disregard and irreparably tainted the jury. *See Marshall*, 360 U.S. at 312-13; *Irvin*, 366 U.S. at 722. The extrinsic evidence addressed Mr. Westwood's defense in this case, including an allegation "that [transfer DNA] was impossible." (CP 378-379; RP 288, 294-295, 297-300, 307-308, 415-440). According to Juror Number 5, all of the jurors were present during this conversation. (RP 297-299). Given that the extrinsic information went directly to his defense, and a contested issue for the jury's determination, the introduction of this extrinsic information to the jury prejudiced Mr. Westwood, and only a new trial can insure he will be tried fairly. *Greiff*, 141 Wn.2d at 920-21 (quoting *Johnson*, 124 Wash.2d at 76).

Mr. Westwood was denied his right to a fair and impartial jury, where the trial court denied his motion for a mistrial based upon jurors discussing extrinsic DNA evidence. His convictions should be reversed and remanded for a new trial.

**Issue 3: Whether the trial erred by convicting Mr. Westwood of both attempted first degree rape and first degree assault, where the assault conviction merged with the attempted rape conviction, and entry of both convictions violated Mr. Westwood's double jeopardy rights.**

Mr. Westwood's convictions for attempted first degree rape and first degree assault should have merged. The first degree assault was incidental to the attempted first degree rape; the assault had no independent purpose or effect. Therefore, Mr. Westwood's conviction for first degree assault should be vacated.

The Fifth Amendment to the United States Constitution provides that no "person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Article I, section 9 of the Washington Constitution

provides, “[n]o person shall ... be twice put in jeopardy for the same offense.” Wash. Const. art. I, § 9. “A defendant may face multiple charges arising from the same conduct, but double jeopardy forbids entering multiple convictions for the same offense.” *State v. Hall*, 168 Wn.2d 726, 729–30, 230 P.3d 1048 (2010).

Although Mr. Westwood did not raise this argument in the trial court, a double jeopardy argument may be considered for the first time on appeal, “because it implicates a manifest error affecting a constitutional right.” *State v. Allen*, 150 Wn. App. 300, 312, 207 P.3d 483 (2009) (citing *State v. Turner*, 102 Wn. App. 202, 206, 6 P.3d 1226 (2000)). An alleged double jeopardy violation is reviewed de novo. *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008).

A three-part test applies to double jeopardy claims. *State v. Freeman*, 153 Wn.2d 765, 771-773, 108 P.3d 753 (2005). First, the court considers express or implicit legislative intent based on the criminal statutes at issue. *Id.* at 771-72.

Second, if legislative intent is unclear, the court considers the *Blockburger* “same evidence” test. *Id.* at 772; *see also Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Under this test, “[i]f each crime contains an element that the other does not, we presume that the crimes are not the same offense for double jeopardy purposes.” *Id.* (citing *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995)). “Washington courts, however, have occasionally found a violation of double jeopardy *despite* a determination that the offenses involved clearly contained different legal elements.” *State v. Womac*, 160 Wn.2d

643, 652, 160 P.3d 40 (2007); *see, e.g., State v. Johnson*, 92 Wn.2d 671, 679-80, 600 P.2d 1249 (1979).

Furthermore, “where one crime is an anticipatory offense and another crime is both charged separately and used as the basis for the attempt charge, an abstract comparison of elements is not enough.” *State v. Martin*, 149 Wn. App. 689, 699, 205 P.3d 931 (2009).

Third, the court uses the merger doctrine if applicable. *Freeman*, 153 Wn.2d at 772. “Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime.” *Id.* at 772-73.

Conduct involved in the perpetration of a rape merges with that crime, unless the conduct has an independent purpose or effect. *Johnson*, 92 Wn.2d at 674-82. An assault that is “merely incidental” to rape merges with a charge of first degree rape. *State v. Hudlow*, 36 Wn. App. 630, 632, 676 P.2d 553 (1984).

In *Johnson*, our Supreme Court found that the defendant’s convictions for first degree assault and first degree kidnapping merged into his conviction for first degree rape. *Johnson*, 92 Wn.2d at 674-82. The Court stated “[a]s we read the statutes, the legislature intended that conduct involved in the perpetration of a rape, and not having an independent purpose or effect, should be punished as an incident of the crime of rape and not additionally as a separate crime. *Id.* at 676.

The Court held “as to any such offense which is proven, an additional conviction cannot be allowed to stand unless it involves some injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element.” *Id.* at 680. In applying the merger doctrine, the Court found “[t]he sole purpose of the kidnapping and assault was to compel the victims’ submission to acts of sexual intercourse.” *Id.* at 681.

Here, A.B. testified Mr. Westwood was going for her throat with the knife at the same time he pushed her on her bed, told her to take her clothes off, and attempted to take her clothes off by force. (RP 200-204). Under the merger doctrine, Mr. Westwood’s convictions for both attempted first degree rape and first degree assault based on this conduct violated double jeopardy. This conduct was all incidental to the attempted rape; it had no independent purpose or effect. The first degree assault had no purpose other than furthering the attempted first degree rape. The sole purpose of the assault was to attempt to compel A.B. to submit to sexual intercourse. *See Johnson*, 92 Wn.2d at 681.

Under the facts of this case, the trial court should not have entered convictions for both attempted first degree rape and first degree assault. Mr. Westwood’s conviction for first degree assault should be vacated.

**Issue 4: Whether the trial court erred by finding Mr. Westwood’s three convictions were not same criminal conduct and in sentencing Mr. Westwood to consecutive sentences for attempted first degree rape and first degree assault.**

The trial court erred in finding Mr. Westwood’s convictions for first degree burglary, first degree assault, and attempted first degree rape were not the same criminal conduct. The trial court misapplied the law, using the wrong legal test for determining whether the crimes had the same criminal intent. Under the correct legal test, the crimes were same criminal conduct. The case should be reversed and remand for resentencing, to sentence the attempted first degree rape and the first degree assault concurrent, and to count the first degree burglary, first degree assault, and attempted first degree rape counted as one crime.

RCW 9.94A.589(1)(a) sets forth when two or more current offenses should be counted as one crime for sentencing purposes:

...whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime . . . “Same criminal conduct,” as used in this subsection, means two or more crimes that require the [1] same criminal intent, [2] are committed at the same time and place, and [3] involve the same victim . . .

RCW 9.94A.589(1)(a).

In order for the trial court to find same criminal conduct, all three requirements set forth in RCW 9.94A.589(1)(a) must be met. *State v. Porter*, 133

Wn.2d 177, 181, 942 P.2d 974 (1997) (citing *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994)).

In addition, Mr. Westwood’s convictions for attempted first degree rape and first degree assault are serious violent offenses. *See* RCW 9.94A.030(45) (2012). Under RCW 9.94A.589(1)(b), serious violent offenses are sentenced consecutively to each other if they arise from “separate and distinct criminal conduct.” RCW 9.94.589(1)(b). “That standard is defined to be the same as the ‘same criminal conduct’ standard of RCW 9.94A.589(1)(a).” *State v. Kloepper*, 179 Wn. App. 343, 356, 317 P.3d 1088 (2014). “Crimes that do not constitute the same criminal conduct are necessarily separate and distinct offenses.” *Id.*

Appellate courts review determinations of same criminal conduct for abuse of discretion or misapplication of the law. *State v. Graciano*, 176 Wn.2d 531, 535-36, 295 P.3d 219 (2013). “Under this standard, when the record supports only one conclusion on whether crimes constitute the ‘same criminal conduct,’ a sentencing court abuses its discretion in arriving at a contrary result.” *Id.* at 537-38. The defendant bears the burden of proving the crimes constitute the same criminal conduct. *Id.* at 539.

Here, Mr. Westwood’s three convictions, for first degree burglary, first degree assault, and attempted first degree rape, were “same criminal conduct.” *See* RCW 9.94A.589(1)(a) (defining same criminal conduct). First, these three crimes were committed at the same time and place, A.B.’s home during the early

morning hours of December 6, 2012. (RP 196-204). The crimes took place in a matter of minutes, with the longest possible time estimate given by A.B. being 25 minutes. (RP 247-248). The three crimes occurred in a continuous, uninterrupted sequence of events from the time Mr. Westwood entered A.B.'s home until he left. (RP 196-204); *see Porter*, 133 Wn.2d at 183 (“same time” element of “same criminal conduct” statute was proven where sequential drug sales occurred as closely in time as they could without being simultaneous because the sales were part of a continuous, uninterrupted sequence of conduct over a short period of time). The attempted first degree rape and the first degree assault occurred simultaneously, when Mr. Westwood used a knife as he attempted to remove A.B.'s clothes or force A.B. to remove her clothing. (RP 200, 203-204, 206).

Second, the offenses involved the same victim, A.B. (RP 196-204).

Third, the crimes involved the same criminal intent. In making its contrary ruling, the trial court relied upon *State v. Chenoweth*. (RP (Jan. 8, 2018) 47); *see also State v. Chenoweth*, 185 Wn.2d 218, 370 P.3d 6 (2016).

In *Chenoweth*, the defendant was convicted of six counts of third degree child rape and six counts of incest, based on six incidents, each involving a single act. *Chenoweth*, 185 Wn.2d at 219. On appeal to our Supreme Court, the defendant “argue[d] that child rape and incest, based on a single act, as a matter of law constitute the same criminal conduct for purposes of calculating his offender

score.” *Id.* at 221. The only element of the same criminal conduct analysis at issue was whether the two offenses shared the same criminal intent. *Id.*

The Court held “the same act constituting rape of a child and incest is not the same criminal conduct for purposes of sentencing.” *Id.* at 224. In reaching this holding, the Court looked to the statutory criminal intents for third degree child rape and incest, stating that “[t]he intent to have sex with someone related to you differs from the intent to have sex with a child.” *Id.* at 223. The Court reasoned that the defendant’s “single act is compromised of separate and distinct statutory criminal intents and therefore under RCW 9.94A.589(1)(a) do not meet the definition of ‘same criminal conduct.’” *Id.* In reaching its holding, the Court relied upon two other cases involving rape of a child and incest. *Id.* at 221-24 (citing *State v. Bobenhouse*, 166 Wn.2d 881, 896, 214 P.3d 907 (2009); *Calle*, 125 Wn.2d at 780)).

Prior to *Chenoweth*, the test applied to determine whether crimes had the same criminal intent for purposes of the same criminal conduct analysis was whether, when viewed objectively, the criminal intent did not change from one offense to the next. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). “Intent, in this context, is not the particular *mens rea* element of the particular crime, but rather is the offender’s objective criminal purpose in committing the crime.” *State v. Phuong*, 174 Wn. App. 494, 546, 299 P.3d 37 (2013) (citing *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990)). “In

determining whether multiple crimes constitute the same criminal conduct, courts consider ‘how intimately related the crimes are,’ ‘whether, between the crimes charged, there was any substantial change in the nature of the criminal objective,’ and ‘whether one crime furthered the other.’” *Id.* at 546–47 (quoting *State v. Burns*, 114 Wn.2d 314, 318, 788 P.2d 531 (1990)). The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next. *Vike*, 125 Wn.2d at 411 (citing *Dunaway*, 109 Wn.2d at 215). When one crime furthers another, same criminal conduct applies. *State v. Garza-Villarreal*, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993); *see also Dunaway*, 109 Wn.2d at 217. And, “if one crime furthered another, and if the time and place of the crimes remained the same, then the defendant’s criminal purpose or intent did not change and the offenses encompass the same criminal conduct.” *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

Here, the trial court misapplied the law in its same criminal conduct analysis. (RP (Jan. 8, 2018) 47). The standard set forth in *Chenoweth*, looking to the statutory criminal intents for determining whether the two offenses shared the same criminal intent, does not apply in this case. *See Chenoweth*, 185 Wn.2d at 220-25. The same criminal intent test set forth in *Dunaway* has not been expressly overruled by our Supreme Court, and *Chenoweth* applies only to cases involving rape of a child and incest offenses. *See State v. Santos*, No. 75614-1-I, 2018 WL 1110496, at \*3 n.1 (Wash. Ct. App. Feb. 26, 2018); *State v.*

*McDonough*, No. 75337-1-I, 2018 WL 1611616, at \*3-4 n.1 (Wash. Ct. App. Apr. 2, 2018); *but see State v. Yusuf*, No. 75571-4-I, 2018 WL 1168724, at \*6-7 (Wash. Ct. App. Mar. 5, 2018) (applying *Chenoweth* to convictions for assault and harassment); *State v. Baza*, No. 48541-9-II, 2017 WL 589189, at \*3-4 (Wash. Ct. App. Feb. 14, 2017) (applying *Chenoweth* to convictions for assault, felony harassment, and felony violation of a no-contact order).<sup>10</sup>

The proper standard for determining whether Mr. Westwood’s crimes had the same criminal intent is that set forth in *Dunaway* and subsequent cases, the extent to which the criminal intent, objectively viewed, changed from one crime to the next. *Vike*, 125 Wn.2d at 411, 885 P.2d 824 (1994) (citing *Dunaway*, 109 Wn.2d at 215). The trial court erred in applying *Chenoweth* and looking to the particular statutory mens rea of the crimes. (RP (Jan. 8, 2018) 47).

Here, Mr. Westwood’s criminal purpose or intent did not change from one crime to the next. *See Vike*, 125 Wn.2d at 411, 885 P.2d 824 (1994) (citing *Dunaway*, 109 Wn.2d at 215); *see also State v. Tili*, 139 Wn.2d 107, 119, 123, 985 P.2d 365 (1999). Mr. Westwood’s criminal purpose was to force A.B. to have sexual intercourse with him. He had this criminal purpose when he committed the burglary: immediately upon entering A.B.’s home, Mr. Westwood told her to get in her room, and pushed her toward her bedroom. (RP 198-200,

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<sup>10</sup> These cases are cited as persuasive authority only. *See* GR 14.1(a) (authorizes citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

246-247, 276). He maintained this criminal purpose when he committed the assault: Mr. Westwood used the knife as he attempted to remove A.B.'s clothes or force A.B. to remove her clothing. (RP 200, 203-204, 206, 276). The first degree burglary and the first degree assault furthered the attempted first degree rape. *See Garza-Villarreal*, 123 Wn.2d at 47.

In sum, the crimes of first degree burglary, first degree assault, and attempted first degree rape constituted the same criminal conduct in this case. The three crimes involved the same time and place, the same victim, and the same intent. *See* RCW 9.94A.589(1)(a) (defining same criminal conduct); *see also Dunaway*, 109 Wn.2d at 215. The trial court misapplied the law and abused its discretion in failing to find first degree burglary, first degree assault, and attempted first degree rape were the same criminal conduct. *See Graciano*, 176 Wn.2d at 535-36.

The case should be reversed and remand for resentencing, to sentence the attempted first degree rape and the first degree assault concurrent, as opposed to consecutive, because the two crimes did not arise from "separate and distinct criminal conduct." *See Kloeppe*r, 179 Wn. App. at 356.

The case should also be reversed and remanded for resentencing, with the first degree burglary, first degree assault, and attempted first degree rape counted as one crime.<sup>11</sup> *See* RCW 9.94A.589(1)(a).

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<sup>11</sup> Mr. Westwood acknowledges that the burglary anti-merger statute gives a sentencing court discretion to punish a burglary and a crime committed during a burglary separately, even if

**Issue 5: Whether the trial court abused its discretion in sentencing Mr. Westwood without considering mitigating circumstances related to his age at the time of the crimes.**

The trial court violated Mr. Westwood’s rights under the Eighth Amendment by imposing a standard range sentence without conducting an individualized evaluation of his age and circumstances surrounding his youth at the time of the crimes. The case should be reversed and remanded for resentencing, during which the trial court must consider the whether youth diminished Mr. Westwood’s culpability and exercise its discretion to consider a sentence below the standard adult range.

“When a juvenile offender is sentenced in adult court, youth matters on a constitutional level.” *State v. Ramos*, 187 Wn.2d 420, 428, 387 P.3d 650 (2017). In *Miller v. Alabama*, the United States Supreme Court held “the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.” *Miller v. Alabama*, 567 U.S. 460, 479, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). While the *Miller* decision does not categorically bar a penalty of life without parole for a juvenile defendant, it does mandate that the sentencing court conduct an individualized hearing and “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Id.* at 480; *see also*

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the two crimes are same criminal conduct. *See State v. Lessley*, 118 Wn.2d 773, 781, 827 P.2d 996 (1992). However, the trial court did not address the anti-merger statute here. (RP (Jan. 8, 2018) 47). Therefore, application of the burglary anti-merger statute needs to be determined by the trial court in the first instance, at resentencing on remand.

*Ramos*, 187 Wn.2d at 428. This *Miller* hearing “gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.” *Montgomery v. Louisiana*, 136 S. Ct. 718, 735, 193 L. Ed. 2d 599 (2016); *see also Ramos*, 187 Wn.2d at 428-29.

In *Ramos*, our Supreme Court held “while not every juvenile homicide offender is automatically entitled to an exceptional sentence below the standard range, every juvenile offender facing a literal or *de facto* life-without-parole sentence is automatically entitled to a *Miller* hearing. *Ramos*, 187 Wn.2d at 434, 436 (emphasis added). The Court further held:

At the *Miller* hearing, the court must meaningfully consider how juveniles are different from adults, how those differences apply to the facts of the case, and whether those facts present the uncommon situation where a life-without-parole sentence for a juvenile homicide offender is constitutionally permissible. If the juvenile proves by a preponderance of the evidence that his or her crimes reflect transient immaturity, substantial and compelling reasons would necessarily justify an exceptional sentence below the standard range because a standard range sentence would be unconstitutional.

*Id.* at 434-35.

The Court “reject[ed] the notion that *Miller* applies only to literal, not *de facto*, life-without-parole sentences.” *Id.* at 438. The Court stated “[t]he juvenile cannot forfeit his or her right to a *Miller* hearing merely by failing to affirmatively request it, and all doubts should always be resolved in favor of holding a *Miller* hearing.” *Id.* at 443.

In *State v. Houston-Sconiers*, our Supreme Court held “[t]rial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA [Sentencing Reform Act] range and/or sentence enhancements.” *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 34, 391 P.3d 409 (2017).

In *State v. O’Dell*, the defendant was convicted of second degree rape of a child and given a standard range sentence of 95 months confinement.<sup>12</sup> *State v. O’Dell*, 183 Wn.2d 680, 683, 358 P.3d 359 (2015). The defendant had requested the trial court impose an exceptional sentence below the standard range based on his youth. *Id.* at 685. The trial court ruled it could not consider age as a mitigating circumstance. *Id.*

On appeal, the defendant argued “the trial court abused its discretion when it refused to consider [the defendant’s] own relative youth as a basis to depart from the standard sentence range.” *Id.* at 683. Our Supreme Court agreed, “remand[ing] for a new sentencing hearing at which the trial court can consider whether youth diminished [the defendant’s] culpability for his offense.” *Id.* The Court held “a defendant’s youthfulness can support an exceptional sentence below the standard range applicable to an adult felony defendant, and that the sentencing court must exercise discretion to decide when that is.” *Id.* at 699. The Court

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<sup>12</sup> Although not stated in the *O’Dell* opinion, it appears the defendant there was sentenced to an indeterminate sentence under RCW 9.94A.507, as Mr. Westwood was in the present case. *See* RCW 9.94A.507(1)(a)(i) (statute applies to offender convicted of rape of a child in the second degree).

found that “the trial court did not meaningfully consider youth as a possible mitigating circumstance.” *Id.* at 696. The Court found “[t]his failure to exercise discretion is itself an abuse of discretion subject to reversal.” *Id.* at 697.

Here, Mr. Westwood was sentenced to a standard range sentence, including an indeterminate sentence of life with a minimum term of 105 months on the attempted first degree rape count, pursuant to RCW 9.94A.507. (CP 595, 599-600; RP (Jan. 8, 2018) 48, 104-105; RP (Jan. 30, 2018) 118-120). Although Mr. Westwood requested the trial court impose a mitigated sentence below the standard range, the trial court ruled there is no basis in the law for imposing an exceptional sentence on this basis. (CP 445, 460-461; RP (Jan. 8, 2018) 48, 71-83, 84-86, 93-99, 101).

The trial court’s failure to its exercise discretion to meaningfully consider youth as a possible mitigating circumstance was an abuse of discretion. *See O’Dell*, 183 Wn.2d at 696-97. Mr. Westwood is entitled to be re-sentenced, with consideration given to the mitigating factor of youth at the time of his crimes. *See Miller*, 567 U.S. at 479-80; *Ramos*, 187 Wn.2d at 434, 436; *Houston-Sconiers*, 188 Wn.2d at 21, 34; *O’Dell*, 183 Wn.2d at 697, 699; *see also, e.g., State v. Figueroa*, No. 34708-7-III, 2018 WL 2753656, at \*9-11 (Wash. Ct. App. June 7, 2018) (where this Court reversed the defendant’s sentence for crimes committed when the defendant was 15 years old, and remanded for resentencing for the trial

court to consider the mitigating factor of youth).<sup>13</sup> A *Miller* hearing is required, with the trial court giving full consideration to the *Miller* factors, focusing on Mr. Westwood’s culpability at the time of the offense, not at the time of trial. *See Miller*, 567 U.S. at 479-80; *Ramos*, 187 Wn.2d at 434, 436; *Houston-Sconiers*, 188 Wn.2d at 21, 34; *O’Dell*, 183 Wn.2d at 697, 699.

This is a direct appeal where the sentence imposed was unlawful, and therefore, Mr. Westwood is entitled to resentencing where the trial court considers the mitigating qualities of youth and exercises its discretion to consider a sentence below the standard adult range. The case should be reversed and remanded for resentencing.

**Issue 6: Whether this Court should deny costs against Mr. Westwood on appeal in the event the State is the substantially prevailing party.**

Mr. Westwood preemptively objects to any appellate costs being imposed against him, should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612 (2016), this Court’s General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).

Prior to trial, the trial court determined Mr. Westwood was “[e]ligible for a public defender at no expense.” (CP 27-28). At sentencing, the trial court made

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<sup>13</sup> This case is cited as persuasive authority only. *See* GR 14.1(a) (authorizes citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

no inquiry into Mr. Westwood's ability to pay legal financial obligations, but imposed only mandatory legal financial obligations. (CP 602-603; RP (Jan. 8, 2018) 107; RP (Jan. 30, 2018) 118-120). The trial court also entered an Order of Indigency for purposes of appeal. (CP 587-592). There has been no known improvement to this indigent status. To the contrary, Mr. Westwood's report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Westwood remains indigent. His report as to continued indigency shows that he has no real property, no personal property other than his personal effects, no income from any source, and no employment history.

The imposition of costs under the circumstances of this case would be inconsistent with those principles enumerated in *Blazina*. See *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). In *Blazina*, our Supreme Court recognized the "problematic consequences" LFOs inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 835-37. To confront these serious problems, the Court emphasized the importance of judicial discretion: "The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case." *Blazina*, 182 Wn.2d at 834. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." *Id.*

The *Blazina* Court addressed LFOs imposed by trial courts, but the “problematic consequences” are every bit as serious with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then “become[s] part of the trial court judgment and sentence.” RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants’ ability to successfully rehabilitate in precisely the same ways the *Blazina* court identified for trial costs.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene our High Court’s reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion *Blazina* held was essential before imposing monetary obligations. This is particularly true where, as here, the trial court imposed only mandatory costs and entered an Order of Indigency, and Mr. Westwood’s Report as to Continued Indigency demonstrates a continued inability to pay costs. (CP 587-592).

Furthermore, the *Blazina* court instructed *all* courts to “look to the comment in GR 34 for guidance.” *Blazina*, 182 Wn.2d at 838. That comment provides, “[t]he adoption of this rule is rooted in the constitutional premise that

*every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis.” GR 34 cmt. (emphasis added). The *Blazina* court said, “if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person’s ability to pay LFOs.” *Blazina*, 182 Wn.2d at 839. Mr. Westwood met this standard for indigency. (CP 587-592).

This Court receives orders of indigency “as a part of the record on review.” RAP 15.2(e); CP 587-592. “The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party’s financial condition has improved to the extent that the party is no longer indigent.” RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) indigency standard, requires this Court to “seriously question” this indigent appellant’s ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

It does not appear to be the burden of Mr. Westwood to demonstrate his continued indigency given the newly amended RAP 15.2, since his indigency is presumed to continue during this appeal. Nonetheless, Mr. Westwood’s report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Westwood remains indigent.

This Court is asked to deny appellate costs at this time. Pursuant to RAP 14.2, effective January 31, 2017, this Court, a commissioner of this court, or the court clerk are now specifically guided to deny appellate costs if it is determined

that the offender does not have the current or likely future ability to pay such costs. RAP 14.2. Importantly, when a trial court has entered an order that the offender is indigent for purposes of the appeal, that finding of indigency remains in effect pursuant to RAP 15.2(f), unless the commissioner or court clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency. *Id.*

There is no evidence Mr. Westwood's current indigency or likely future ability to pay has significantly improved since the trial court entered its order of indigency in this case. And, to the contrary, there is a completed report as to continued indigency showing that Mr. Westwood remains indigent.

Appellate costs should not be imposed in this case.

#### **F. CONCLUSION**

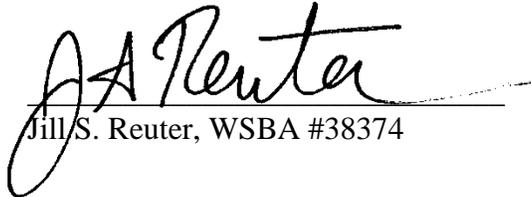
Mr. Westwood's convictions should be reversed, because the trial court abused its discretion and violated the constitutional separation of powers in rejecting the proposed amendment to the information and the corresponding plea agreement.

Mr. Westwood's convictions should be reversed and remanded for a new trial, because he was denied his right to a fair and impartial jury, where the trial court denied his motion for a mistrial based upon jurors discussing extrinsic DNA evidence.

At a minimum, the case should be reversed and remanded for resentencing to: (1) vacate Mr. Westwood's conviction for first degree assault, because his convictions for both attempted first degree rape and first degree assault violate double jeopardy; or (2) sentence the attempted first degree rape and the first degree assault concurrent, as opposed to consecutive; and/or (3) count first degree burglary, first degree assault, and attempted first degree rape as one crime; and (3) for the trial court to exercise its discretion to consider a sentence below the standard adult range based upon Mr. Westwood's age at the time of the crimes.

Mr. Westwood also asks this Court to deny the imposition of any costs against him on appeal.

Respectfully submitted this 2nd day of August, 2018.

  
Jill S. Reuter, WSBA #38374

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

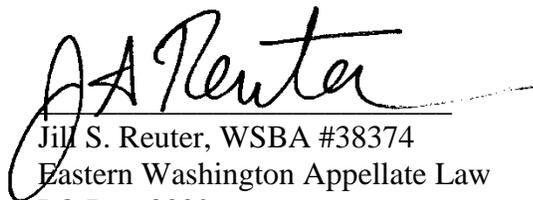
STATE OF WASHINGTON	)	
Plaintiff/Respondent	)	COA No. 35792-9-III
vs.	)	Grant Co. No. 16-1-00352-7
	)	
DAHNDRE KAVAUGN WESTWOOD	)	PROOF OF SERVICE
Defendant/Appellant	)	
_____		)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on August 2, 2018, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Dahndre K. Westwood DOC #403168  
Washington State Penitentiary  
1313 North 13th Avenue  
Walla Walla, WA 99362

Having obtained prior permission, I also served a copy on the Respondent at [kburns@co.grant.wa.us](mailto:kburns@co.grant.wa.us) using the Washington State Appellate Courts' Portal.

Dated this 2nd day of August, 2018.

  
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**Appellate Court Case Number:** 35792-9  
**Appellate Court Case Title:** State of Washington v. Dahndre K. Westwood  
**Superior Court Case Number:** 16-1-00352-7

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