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NO. 37159-0-III

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

T.P.,

Appellant.

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

The Honorable Brian Huber, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The juvenile court exceeded its statutory authority by sentencing appellant T.P. to 24 months of community supervision.

2. The juvenile court erred in admitting testimony from the complaining witness's parents as to her reputation for truthfulness in the "community."

3. T.P. was denied his constitutional right to effective assistance of counsel where his trial attorney pursued an unreasonable defense theory.

4. A clerical error in disposition order should be corrected.

Issues Pertaining to Assignments of Error

1. Did the juvenile court exceed its statutory authority by sentencing T.P. to 24 months of community supervision where the plain language of the applicable statutes allows for only 12 months? Alternatively, are the applicable statutes ambiguous and therefore cannot be construed to lengthen T.P.'s sentence under the rule of lenity, necessitating resentencing either way?

2. Must T.P.'s conviction be reversed, where the juvenile court erroneously admitted and then relied on testimony that the complaining witness had a reputation for truthfulness with her parents, who are not a neutral or generalized community under well-established case law?

3. Was T.P. denied his constitutional right to effective assistance of counsel, where his trial attorney pursued an unreasonable defense theory, contrary to T.P.'s own statement to police as well as longstanding law on consent, which effectively amounted to a concession of T.P.'s guilt, necessitating reversal of T.P.'s conviction?

4. Is remand appropriate for the juvenile court to correct a clerical error in the disposition order?

**B. STATEMENT OF THE CASE**

The prosecution charged T.P. with third degree rape, alleging he had sexual intercourse with A.S. without her consent. CP 1. Both T.P. and A.S. were 14 years old at the time of the alleged incident. CP 1.

T.P. and A.S. attended high school together but had not interacted there. RP 66. They connected when T.P. posted on

Snapchat, asking if anyone wanted to “kick it,” and A.S. responded that she did. RP 62-64. They met at the park, talked, and got to know each other. RP 66.

Over the next couple weeks, T.P. and A.S. continued to hang out at the park and eventually A.S.’s home. RP 67. They would also talk on Snapchat, where T.P. told A.S. he wanted to “finger,” or digitally penetrate, her. RP 69-74. A.S. testified she declined each time T.P. brought it up. RP 71-74. A.S. said T.P. eventually told her that he would not hang out with her anymore if she did not let him finger her. RP 74. A.S. again declined, responding, “your loss.” RP 74.

Sometime in March of 2018, A.S. offered to buy T.P. coffee if he came over to her house to hang out (in her room, but with her parents home and the door open). RP 52, 68, 75. T.P. elected not to testify at trial, but explained to police that he and A.S. spent time in her room, playing video games and listening to music. RP 29-31, 89. He recalled they kissed, but nothing else. RP 30-34. T.P. acknowledged he wanted to “finger” A.S. at the time, but did not because her parents were home. RP 32-34. T.P. then walked home without incident. RP 35.

A.S., on the other hand, testified she and T.P. were playing video games, when she got up to do her makeup in the bathroom. RP 75-76. A.S. claimed T.P. followed her into the bathroom, where he tried to put his hand down her pants twice, but she moved his hand away. RP 76-77.

When A.S. returned to her bedroom, T.P. kissed her and they started “making out.” RP 77. A.S. testified T.P. “like pushed [her] on the bed,” and “kept trying” to put his hand in her pants. RP 77-79. A.S. said she repeatedly told T.P. to stop and tried to move his hand away. RP 79. Eventually, A.S. testified, T.P. held her hand down and put his fingers inside her vagina. RP 79-80. When T.P. was finished, A.S. claimed, he showed her his penis and twice asked her to give him a blow job. RP 81. A.S. declined. RP 81. Sometime soon after, A.S.’s parents called them down to go get coffee, so they left. RP 81.

A.S. eventually disclosed the alleged incident to her parents in January of 2019, who reported it to the police. RP 18, 44. Over defense objection to improper character evidence, the court allowed both A.S.’s mother and father to testify A.S. had a reputation for truthfulness in the “community.” RP 44-46, 48-

50, 55-57. Neither testified as to who belonged to this “community,” and A.S.’s mother admitted on cross-examination that she had never talked to anyone about A.S.’s reputation. RP 44-46, 55-57.

In closing, defense counsel advanced a theory, contrary to T.P.’s statement to police, that intercourse occurred but A.S. consented to it. RP 95-98. Counsel claimed, when A.S. invited T.P. to hang out after he expressed his desire to finger her, she consented to the subsequent sexual activity. RP 96, 98.

The juvenile court found T.P. guilty of third degree rape, accepting defense counsel’s concession that intercourse occurred, but finding A.S. clearly expressed her lack of consent. RP 101-03 (oral ruling); CP 41-43 (written findings). The court entered written findings based “the testimony of the witnesses” and “the exhibits admitted into evidence.” CP 41.

The prosecution asked for a standard range sentence of 30 days in confinement and 24 months of community supervision, as well as sex offender treatment. RP 115-16. Defense counsel requested 15 days in confinement and no supervision or treatment, because T.P. and his mother could not afford it. RP

118-20. There was some dispute as to whether 12 or 24 months of community supervision was allowed. RP 121.

The court imposed a “standard range” disposition of 30 days in confinement and 24 months of community supervision. CP 13-14; RP 123-24. The court further ordered T.P. to complete a sex offender evaluation and any recommended treatment. CP 16; RP 123-24. T.P. timely appealed. CP 23.

C. ARGUMENT

1. The juvenile court exceeded its statutory authority in sentencing T.P. to 24 months of community supervision, where the plain language of the statute allows for only 12 months.

The juvenile court erroneously sentenced T.P. to 24 months of community supervision, where the standard range sentence is clearly limited to 12 months of community supervision. At worst, the applicable statutes are ambiguous as to the allowable term of supervision for sex offenses subject to local sanctions, as in T.P.’s case. Ambiguous statutes may not be construed against a defendant to increase a penalty. T.P.’s sentence must be reversed.

“Sentencing is a legislative power, not a judicial power.”  
State v. Soto, 177 Wn. App. 706, 713, 309 P.3d 596 (2013). A trial

court's discretion to impose a sentence is therefore limited to that granted by the legislature. Id. “If the trial court exceeds its sentencing authority, its actions are void.” Id. Statutory construction is a question of law reviewed de novo. Id.

When interpreting a statute, this Court's fundamental objective is to ascertain and carry out the legislature's intent. State v. Gray, 174 Wn.2d 920, 926, 280 P.3d 1110 (2012). Statutory interpretation begins with the statute's plain meaning, which is discerned from the ordinary meaning of the language used in the context of the entire statute, related provisions, and the statutory scheme as a whole. Id. at 926-27. If the statute is unambiguous, the court's inquiry ends. Id. at 927. But, if the statute remains susceptible to more than one reasonable interpretation, it is ambiguous. Id.

T.P. was convicted of third degree rape. CP 11. Under the Juvenile Justice Act (JJA) of 1977, chapter 13.40 RCW, third degree rape is classified as a C+ offense. RCW 13.40.0357. The sentencing schedule contained in RCW 13.40.0357 specifies it “must be used for juvenile offenders.” See also State v. Bacon, 190 Wn.2d 458, 465, 415 P.3d 207 (2018) (recognizing the “JJA

contains very specific sentencing standards” and the sentencing schedule *must* be used).

In sentencing a juvenile offender, the court “may select sentencing option A, B, C, or D.” RCW 13.40.0357. Option A is a standard range sentence. Id. Option B is a suspended disposition alternative. Id. Option C is a chemical dependency or mental health disposition alternative. Id. Option D is a manifest injustice, which allows a sentence outside the standard range if the court determines options A, B, or C “would effectuate a manifest injustice.” Id. A “manifest injustice” is “a disposition that would either impose an excessive penalty on the juvenile or would impose a serious, and clear danger to society in light of the purposes of this chapter.” RCW 13.40.020(19).

Here, the juvenile court selected Option A, a disposition within the standard range. CP 13. No one requested and the court did not impose a manifest injustice or any disposition alternative. RP 115 (prosecution requesting “standard range disposition in this case”), 119 (defense requesting “mid-range sentence”); CP 13 (disposition order specifying, “[X] Count 1: Disposition shall be within the standard range”). Yet the court

imposed 30 days in confinement and *24 months of community supervision*.<sup>1</sup> CP 14; RP 123-24.

For a juvenile offender with no felony criminal history, like T.P.,<sup>2</sup> who commits a C+ offense, the standard range sentence is “local sanctions,” as defined in RCW 13.40.020. RCW 13.40.0357 (Option A). “Local sanctions’ means one or more of the following: (a) 0-30 days of confinement; (b) 0-12 months of community supervision; (c) 0-150 hours of community restitution; or (d) \$0-\$500 fine.” RCW 13.40.020(18) (emphasis added). “It is an axiom of statutory interpretation that where a term is defined [courts] will use that definition.” United States v. Hoffman, 154 Wn.2d 730, 741, 116 P.3d 999 (2005).

These statutes, read together, clearly limit a local sanctions sentence like T.P.’s to 12 months of community supervision. The

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<sup>1</sup> With regard to the length of community supervision, the prosecution noted, “I believe it’s two years.” RP 121. Defense counsel responded, “Standard range, I think, is a year.” RP 121. The prosecution insisted, “it’s zero to 24 months,” to which defense counsel responded, “I stand corrected on that, Your Honor.” RP 121. Regardless, “established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.” State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

<sup>2</sup> T.P. has one prior conviction for fourth degree assault, a gross misdemeanor, so scored as only 1/4 point, which is rounded down to zero. CP 51-52; RCW 13.40.0357.

juvenile court exceeded its statutory authority in sentencing T.P. to 24 months of community supervision. This Court's inquiry should end there, with the plain language of RCW 13.40.020(18) (defining local sanctions) and .0357 (limiting standard range sentence for C+ offenses to local sanctions).

The State may argue RCW 13.40.020(5) authorized the juvenile court to impose 24 months of community supervision because T.P. committed a sex offense. That provision states:

“Community supervision” means an order of disposition by the court of an adjudicated youth not committed to the department or an order granting a deferred disposition. A community supervision order for a single offense may be for a period of up to two years for a sex offense as defined by RCW 9.94A.030 and up to one year for other offenses.

RCW 13.40.020(5) (emphasis added). Third degree rape is a sex offense as defined by RCW 9.94A.030(48)(a)(i).

This Court should reject any such argument from the State. The plain language of RCW 13.40.020(18) clearly limits community supervision to 12 months when local sanctions are imposed, as in T.P.'s case. The definition of community supervision does not specify it is an exception to the standard range local sanctions sentence of 0-12 months. Nor does the local

sanctions definition include any language like, “except as provided in RCW 13.40.020(5)” or “except for sex offenses.” RCW 13.40.020(18). Courts must not “read into the statute words that are not there.” In re Pers. Restraint of Bovan, 157 Wn. App. 588, 599, 238 P.3d 528 (2010).

Other provisions of the JJA indicate the legislature did not intend the 24-month community supervision period to apply to sex offenses subject to local sanctions. Local sanctions as a standard range sentence was added to the JJA in 1997, including the 0-12 months of allowable supervision. Laws of 1997, ch. 338, §§ 10, 12, 25. The community supervision definition, as it reads today, was already present in the statute. Former RCW 13.40.020(3) (1995). Thus, 0-12 months is a more recent enactment than 24 months previously allowed for less serious sex offenses. “[A] change in legislative intent is presumed when a material change is made in a statute.” Davis v. Dep’t of Licensing, 137 Wn.2d 957, 967, 977 P.2d 554 (1999) (quoting Rhoad v. McLean Trucking Co., 102 Wn.2d 422, 427, 686 P.2d 483 (1984)).

RCW 13.40.160(1)(a), which governs disposition orders, likewise specifies:

When the court sentences an offender to a local sanction as provided in RCW 13.40.0357 option A, the court shall impose a determinate disposition within the standard ranges, except as provided in subsection (2), (3), (4), (5), or (6) of this section. The disposition may be comprised of one or more local sanctions.

(Emphasis added.) The provision says nothing of community supervision, referring only to local sanctions within the standard range (with its corresponding 0-12 months of supervision). And, none of the exceptions apply here, because the court imposed a standard range disposition. CP 13.

By contrast, subsection (2), which addresses manifest injustice dispositions, discusses community supervision: “A disposition outside the standard range shall be determinate and shall be comprised of confinement or community supervision, or a combination thereof.” RCW 13.40.160(2). Community supervision can therefore extend up to two years for a sex offense when the court imposes a manifest injustice. Subsection (3) similarly deals with the special sex offender disposition alternative (SSODA), which allows the court to “suspend the execution of the disposition and place the offender on community supervision for at least two years.” RCW 13.40.160(3), .162(3).

Thus, the two definitions can be harmonized by reading the 24-month community supervision provision to apply only to more serious sex offenses (inapplicable option A under RCW 13.40.0357), alternative dispositions like a SSODA (Option B), or manifest injustice dispositions (Option D). More serious sex offenses, like first and second degree rape, are not subject to local sanctions, and so 24 months of community supervision would be permitted. RCW 13.40.0357. But the 24-month community supervision period does not apply to less serious sex offenses subject to local sanctions, as in T.P.'s case. This interpretation not only complies with the language of the statute, but makes logical sense.

At worst, the definition of "community supervision" (RCW 13.40.020(5)) and the definition of "local sanctions" (RCW 13.40.020(18)) are in conflict. The first allows for 24 months of community supervision, while the second allows for only 12 months of community supervision. This conflict creates ambiguity as to the appropriate term of community supervision for a sex offense subject to local sanctions. Under the rule of lenity, courts must interpret an ambiguous statute in the defendant's favor.

City of Seattle v. Winebrenner, 167 Wn.2d 451, 462, 219 P.3d 686 (2009). The rule requires “that an ambiguous criminal statute cannot be interpreted to increase the penalty imposed.” Id.

Interpreting the statutory ambiguity in T.P.’s favor, as this Court must, the juvenile court erred by imposing 24 rather than 12 months of community supervision. The ambiguity cannot be construed to increase T.P.’s punishment. This Court should accordingly reverse T.P.’s sentence and remand for appropriate reduction in his community supervision term.

2. The juvenile court erred in admitting evidence of A.S.’s reputation for truthfulness with her parents, who are not a neutral, generalized community.

The juvenile court erred in admitting testimony from A.S.’s parents that she had a reputation for truthfulness in the “community.” The prosecution failed to establish the relevant community and, regardless, A.S.’s parents are not a neutral or generalized community under well-established case law. Where the court then relied on the reputation testimony to find T.P. guilty, T.P.’s conviction must be reversed.

A trial court’s decision to admit evidence is typically reviewed for abuse of discretion. State v. Gunderson, 181 Wn.2d

916, 922, 337 P.3d 1090 (2014). “[T]here is an abuse of discretion when the trial court’s decision is manifestly unreasonable or based upon untenable grounds or reasons,’ such as the misconstruction of a rule.” Id. (quoting State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997)).

There is also a constitutional element to reputation evidence. Our state and federal constitutions enshrine the right to have factual questions decided by the trier of fact. State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008) (citing U.S. CONST. amend. VI; CONST. art. I, §§ 21, 22). “Testimony regarding the credibility of a key witness” is improper “[b]ecause issues of credibility are reserved strictly for the trier of fact.” City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993). Accordingly, “no witness may give an opinion on another witness’ credibility.” State v. Carlson, 80 Wn. App. 116, 123, 906 P.2d 999 (1995).

On direct-examination of A.S.’s mother, the prosecution asked, “Does A.S. have a reputation in the community as being someone who makes things up?” RP 45. Defense counsel objected, asserting, “first you have to define the community.” RP 45. The

court overruled and A.S.'s mother responded, "No, she's not the kind of person that would make something up, no." RP 45.

The prosecution continued, "Does she have a reputation in the community as being somebody who would do things purely for attention?" RP 45. Defense counsel again objected, reiterating, "he's asking for character evidence once again." RP 45. The court again overruled and A.S.'s mother answered, "No, she does not." RP 46.

On cross-examination of A.S.'s mother, defense counsel began, "Have you ever talked to anybody about her rep -- about her making things up? Anybody?" RP 46. A.S.'s mother responded, "No." RP 46. As the end of her testimony, defense counsel moved to strike all the reputation evidence, pointing out, "it became clear that [A.S.'s mother] doesn't know anything about her reputation because she's never talked to anybody about that particular reputation." RP 48. The court refused to strike the testimony, reasoning, "if the testimony is there is no such reputation for making things up or things of that nature, then if there is no such reputation, then no one would have mentioned it to the Witness." RP 50.

Then, on direct-examination of A.S.'s father, the prosecution pursued the same questioning, "as A.S. grew up from childhood into the person she is today, was she the type of person who you would have to discipline for lying or being untruthful?" RP 55. Defense counsel objected to the character evidence and the court initially sustained under ER 405. RP 55.

But the prosecution persisted, "to your understanding, does A.S. in the community have a reputation for truthfulness?" RP 56. Defense counsel again objected, arguing, "He's not laid any foundation for why this particular witness would have any indication as to why that's true." RP 56-57. This time the court overruled and A.S.'s father answered, "Yes." RP 57. The prosecutor ended his direct-examination there. RP 57.

No conceivable construction of any evidence rule allowed the prosecution to introduce testimony by A.S.'s parents that she had a reputation for truthfulness. The juvenile court's admission of and reliance on the improper reputation evidence was manifestly unreasonable and based on misconstruction of several rules of evidence.

ER 404 and 405 govern admissibility of character evidence. State v. O'Neill, 58 Wn. App. 367, 793 P.2d 977 (1990). ER 404(a) specifies “[e]vidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion,” with three enumerated exceptions. Relevant here is the second exception, character of the alleged victim, ER 404(a)(2).

ER 404(a)(2) provides evidence of the victim’s character is admissible only when “offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.” (Emphasis added.) Tegland recognizes, “Evidence of the victim’s character is generally admissible only in cases in which the defense is self-defense or suicide. In most other situations, the victim’s character is irrelevant and thus inadmissible.”<sup>3</sup> 5 KARL B. TEGLAND, WASH. PRACTICE: EVIDENCE LAW AND PRACTICE § 404.6 (6th ed. 2019).

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<sup>3</sup> See also State v. Bell, 60 Wn. App. 561, 564, 805 P.2d 815 (1991) (“Evidence of a person’s reputation may, however, be admitted in certain circumstances to show that a victim acted in conformity with his or her character where the defendant claims that he acted in self-defense.”).

Tegland's interpretation makes sense, given the plain language of the rule. It clearly contemplates the *defense* introducing relevant evidence of the victim's character. ER 404(a)(2). The prosecution may introduce such evidence only "to rebut the same." Id. The prosecution here was not rebutting any evidence of A.S.'s character offered by the defense. Rather, the prosecution was bolstering A.S.'s credibility with reputation evidence in its case-in-chief. The prosecution "may not introduce evidence of the victim's character until the defendant has attacked the victim's character." TEGLAND, supra, § 404.6. T.P. had not attacked A.S.'s character and, indeed, did not even cross-examine A.S., or otherwise introduce any evidence. RP 88-89.

Thus, the prosecution's reputation evidence failed to pass ER 404(a)(2)'s gatekeeping. Without meeting the test for admission under ER 404, it was not allowable under ER 405. ER 405 governs the methods by which admissible ER 404 evidence may be introduced, "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation." Regardless, however, the reputation evidence also failed ER 405's standards.

A note first. There appears to be confusion in the case law over the applicability of ER 404 and 405 versus ER 608. ER 608(a) provides:

The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.

Tegland notes ER 608 is “narrower than it may first appear to be,” typically applying only to impeachment (or rehabilitation). 5A KARL B. TEGLAND, WASH. PRACTICE: EVIDENCE LAW AND PRACTICE § 608.2 (6th ed. 2019). Tegland emphasizes ER 608 is “clearly inapplicable when character evidence is offered to prove that a person was apt to have acted in conformity with that character on a particular occasion.” TEGLAND, supra, § 608.2. This is precisely what the prosecution attempted to do here—prove A.S. acted in conformity with her reputation (among her parents) for truthfulness. Tegland makes clear ER 404 and 405 govern this situation instead. Id.

However, the same standards for “reputation” apply under both ER 405 and ER 608, and so this brief treats them as interchangeable.<sup>4</sup> Under either rule, the reputation evidence here failed to meet those standards.

The party seeking to admit evidence—here, the prosecution—bears the burden of establishing foundation for that evidence. State v. Land, 121 Wn.2d 494, 500, 851 P.2d 678 (1993). “To establish a valid community, the party seeking to admit the reputation evidence must show that the community is both neutral and general.” Id. “A witness’s personal opinion is not sufficient to lay a foundation.” State v. Thach, 126 Wn. App. 297, 315, 106 P.3d 782 (2005).

Washington courts have long held an individual’s family is not neutral or generalized enough to be classified as a community. Id. at 315. In Thach, for instance, the trial court properly excluded testimony from Thach’s sister that he was peaceful and nonviolent. Id.

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<sup>4</sup> See TEGLAND, *supra*, § 405.2 & n.8 (discussing State v. Callahan, 87 Wn. App. 925, 943 P.2d 676 (1997), where “the court stated that Rule 608 was the controlling rule. Since Callahan involved substantive evidence rather than impeachment, presumably the court meant to say that the controlling rule was Rule 405.”)

Same, too, in State v. Gregory, 158 Wn.2d 759, 805, 147 P.3d 1201 (2006), overruled on other grounds by State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014), where the victim’s family “was neither neutral nor sufficiently generalized to constitute a community.” The Gregory court explained “the inherent nature of familial relationships often precludes family members from providing an unbiased and reliable evaluation of one another.” Id. Furthermore, “[a]ny community comprised of two individuals is too small to constitute a community.” Id.

The prosecution’s reputation evidence failed to meet these standards for multiple reasons. First, the prosecution did not lay any foundation for the pertinent community. Defense counsel was correct when he objected, “first you have to define the community.” RP 45. At most, the pertinent “community” consisted solely of A.S.’s mother and father. A.S.’s family is not a neutral or generalized community. Furthermore, A.S.’s mother admitted on cross that she had not spoken to anyone about A.S.’s reputation. RP 46. Her testimony was therefore based exclusively on her opinion of A.S.’s truthfulness, which is likewise insufficient foundation.

Under no circumstance was the prosecution entitled to introduce evidence of A.S.'s reputation for truthfulness with her parents. The juvenile court's admission of the reputation evidence was clear error, contrary to the rules of evidence, and therefore an abuse of discretion.

Evidentiary error requires reversal where, within reasonable probabilities, the error materially affected the trial's outcome. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). This analysis "does not turn on whether there is sufficient evidence to convict without the inadmissible evidence." State v. Grower, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014).

The case against T.P. boiled down to A.S.'s credibility. There were no eyewitnesses and no physical evidence of the alleged rape. The prosecution improperly bolstered A.S.'s credibility by eliciting her parents' testimony that A.S. had a reputation for truthfulness in the "community." This went to the ultimate question: whether A.S. was telling the truth.

The juvenile court then based its finding of guilt on the "testimony of witnesses," along with the exhibits. CP 41. While the court did not expressly call out the testimony of A.S.'s parents,

they made up *half* the witnesses presented by the prosecution (two of four total witnesses). RP 17 (detective), 42 (A.S.'s mother), 51 (A.S.'s father), 60 (A.S.).

The presumption that judges in bench trials do not consider inadmissible evidence is inapplicable “when the judge actually ‘consider[ed] matters which are inadmissible when making his [or her] findings.’” State v. Gower, 179 Wn.2d 851, 856, 321 P.3d 1178 (2014) (alteration in original) (quoting State v. Miles, 77 Wn.2d 593, 601, 464 P.2d 723 (1970)). Moreover, the court in T.P.’s case clearly considered the reputation evidence to be admissible, overruling defense counsel’s objections and refusing to strike the testimony. This indicates, in addition to the written bench findings, that the court relied on the impermissible reputation evidence to find T.P. guilty.

Where improper testimony regarding A.S.’s supposed reputation for truthfulness contributed to the juvenile court’s finding of guilt, this Court should reverse T.P.’s conviction and remand for a new trial.

3. Defense counsel was ineffective for advancing a theory that was irreconcilable with T.P.'s statement to police and contrary to well-established law on consent.

Defense counsel made an unreasonable choice by arguing a theory of consent that was inconsistent with T.P.'s own statement to police, was based on a patently incorrect view of the law, and, ultimately, was tantamount to a concession of T.P.'s guilt. Where this choice denied T.P. his right to effective representation, T.P.'s conviction must be reversed.

Every accused person enjoys the constitutional right to effective assistance of counsel. U.S. CONST. amend. VI; CONST. art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the accused. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Counsel's performance is deficient when it falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable

performance. Strickland, 466 U.S. at 689; State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009). Thus, trial strategy or tactics are not immune from attack—“The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.” Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

Prejudice occurs when there is a reasonable probability that but for counsel’s deficiency, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome. Id.

“A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude.” State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Appellate courts review ineffective assistance claims de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

In closing argument, defense counsel conceded sexual intercourse occurred, instead arguing the issue was whether A.S. consented to it. RP 94 (“It’s not about whether or not sexual activity occurred because it did. Whether or not it consensually occurred because it did.”). Specifically, counsel claimed A.S.

consented to intercourse because she offered to buy T.P. coffee if he came over to hang out with her, after he said he wanted to finger her:

She tells him after he says well I'm not going to hang out with you if you don't let me do that and then she contacts him. And she not only contacts him, but she puts a carrot in front of him that says look, I'll take you out for coffee; I'm attracting you to me. That is her intention. And her intention knows what his intention is. At that moment in time, even if we believe everything that A.S. says, it's her intention at that moment in time to do that and she's told him that by her actions.

RP 96. "So," defense counsel asserted, "there's not a lack of consent here." RP 96. Counsel concluded his argument by reiterating, "And then she asks [T.P.] to hang out. I don't know what -- what more of a yes you can say there." RP 98.

Defense counsel's chosen theory of the case, though perhaps a strategic choice, was unreasonable for two reasons. First, it was inconsistent with T.P.'s statement to the police. T.P. stipulated his statement to police was admissible—defense counsel knew it would be admitted. CP 8-9; RP 6-7. It was then played during testimony of the prosecution's first witness, Detective Ramon Bravo, who interviewed T.P. RP 17, 23-25. T.P. denied A.S.'s

allegations. RP 30-35. He told Detective Bravo that he and A.S. kissed, but he never fingered her, explaining he would not have done so because her parents were home. RP 30-34.

Defense counsel's theory of consent was irreconcilable with his client's express denial that intercourse occurred. See McCoy v. Louisiana, \_\_U.S.\_\_, 138 S. Ct. 1500, 1505, 200 L. Ed. 2d 821 (2018) ("When a client expressly asserts that the objective of "his defence" is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." (alteration in original) (quoting U.S. CONST. amend. VI)). Counsel's closing argument made it seem like he did not believe his own client and, therefore, neither should the court. It was an unreasonable strategy for defense counsel to so undermine his client's credibility and argue a theory of the case inconsistent with his client's own statement.

Second, defense counsel's theory was based on an incorrect and—frankly—outmoded, sexist view of the law on consent. Counsel argued A.S. consented by inviting T.P. to hang out after T.P. expressed the desire to finger her. "Consent" means that at the time of the act of sexual intercourse or sexual contact there

are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.” RCW 9A.44.010(7) (emphasis added). This precise definition of consent has been codified since at least 1975. Laws of 1975, ch. 14, § 1. It plainly requires that consent be contemporaneously given.

Counsel’s theory was contrary to this longstanding definition of consent. “Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.” State v. Killo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). A.S. testified T.P. “kept trying to put his hands in my pants and I would push his hand away and tell him no or stop or I kept saying T.P. It was like over and over and over again. And I would keep moving his hand.” RP 79. If A.S. was to be believed (the ultimate question), her lack of consent was clearly expressed “at the time of the act of sexual intercourse.” RCW 9A.44.010(7). Defense counsel all but conceded his client’s guilt by pursuing an unreasonable strategy of arguing A.S. consented.

Counsel’s unreasonable choice of theory undermines confidence in the outcome of T.P.’s trial. The juvenile court accepted counsel’s concession that intercourse occurred, “I would

note that, as [defense counsel] stated, there really isn't an issue about the act. The issue is whether consent was given." RP 101. Because A.S. clearly did not consent "at the time of the act" (again, if A.S. was to be believed that the act occurred), that was the end of the case for T.P. Indeed, the court correctly noted, "Even if she had given such consent, that consent would not be irrevocable. And the case law books are filled with cases where victims or alleged victims maybe even at some earlier point in time gave consent, but they withdrew consent." RP 102. Counsel's theory of consent effectively sealed T.P.'s fate.

Defense counsel's undermining of T.P.'s credibility was also particularly significant in a case like this one, where everything boiled down to credibility. T.P. denied the incident occurred; A.S. said it did. There were no eyewitnesses and no physical evidence of sexual assault. T.P.'s credibility was the linchpin of his defense. Counsel devastated that defense when he conceded, contrary to T.P.'s own statement, "sexual activity occurred." RP 95.

T.P.'s trial counsel performed deficiently in pursuing an unreasonable theory of consent, irreconcilable with T.P.'s own statement, as well as well-established law on consent. That

performance, in turn, prejudiced the outcome of T.P.'s trial. This Court should reverse T.P.'s conviction, where he was denied his constitutional right to effective assistance of counsel.

4. A clerical error in the disposition order should be corrected.

At sentencing, the juvenile court ordered T.P. to complete a sex offender evaluation and treatment. RP 123. The court did not impose any other evaluations or treatment. RP 122-24 (e.g., expressly declining to impose any conditions related to drugs or alcohol). Yet the disposition order broadly states: “[X] Respondent shall participate in counseling, outpatient substance abuse treatment programs, outpatient mental health programs, sex offender, and/or anger management classes, as probation officer directs.” CP 16 (Condition H). This is a clerical error. The proper remedy is to remand for the juvenile court to specify in the disposition order that only sex offender treatment was ordered. In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2005).

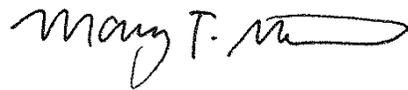
D. CONCLUSION

For the reasons discussed above, this Court should reverse T.P.'s conviction and remand for a new trial. Alternatively, this Court should reverse T.P.'s sentence and remand for reduction of his community supervision term.

DATED this 5th day of February, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC

A handwritten signature in black ink, appearing to read "Mary T. Swift", with a horizontal line extending to the right from the end of the signature.

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