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NO. 37253-7-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

DALE A. TENINTY,

Appellant.

BRIEF OF APPELLANT,
DALE A. TENINTY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY
THE HONORABLE RAYMOND F. CLARY, JUDGE

STEPHANIE TAPLIN
Attorney for Appellant
Newbry Law Office
623 Dwight St.
Port Orchard, WA 98366
(360) 876-5567

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 1

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

IV. STATEMENT OF THE CASE..... 3

V. ARGUMENT 10

 A. The Trial Court Excluded Juror 34 Based on a Racially
 Disproportionate and Unconstitutional Factor..... 10

 1. Excluding jurors in a racially disproportionate
 manner violates the U.S. and Washington
 Constitutions. 11

 2. The trial court abused its discretion by excluding
 Juror 34 based on his friendship with a man who
 was tried and acquitted..... 14

 3. Excluding Juror 34 based on a racially disparate
 factor was structural error and prejudiced Mr.
 Teninty. 20

 B. A.E.’s Hearsay Statements were Tainted and
 Unreliable, and the Trial Court Should Have Excluded
 Them. 23

 C. Mr. Teninty’s Convictions Encompassed the Same
 Criminal Conduct for Sentencing Purposes..... 30

VI. CONCLUSION..... 33

TABLE OF AUTHORITIES

Cases

<i>Batson v. Kentucky</i> , 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).....	11, 12, 20, 21
<i>Chapman v. California</i> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).....	21
<i>City of Redmond v. Moore</i> , 151 Wn.2d 664, 91 P.3d 875 (2004).....	11
<i>City of Seattle v. Erickson</i> , 188 Wn.2d 721, 398 P.3d 1124 (2017).....	11-12, 21
<i>Commonwealth v. Davis</i> , 939 A.2d 905, 2007 Pa. Super. Ct. 382 (2007).....	26, 27, 29
<i>Commonwealth v. Delbridge</i> , 578 Pa. 641, 855 A.2d 27 (2003).....	25-27, 29, 30
<i>Dutton v. Evans</i> , 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970).....	24
<i>In re Dependency of A.E.P.</i> , 135 Wn.2d 208, 956 P.2d 297 (1998).....	25, 27, 29
<i>Miller v. State</i> , 29 P.3d 1077 (Ok. Crim.App. 2001).....	14
<i>Neder v. United States</i> , 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed. 2d 35 (1999).....	21
<i>People v. Bowers</i> , 87 Cal.App.4th 722 (Cal.App. 2001).....	15
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	24

///

<i>State v. Aldana Graciano,</i> 176 Wn.2d 531, 295 P.3d 219 (2013).....	31
<i>State v. Berhe,</i> 193 Wn.2d 647, 444 P.3d 1172 (2019).....	11
<i>State v. Bernard,</i> 182 Wn. App. 106, 327 P.3d 1290 (2014).....	21
<i>State v. Burns,</i> 114 Wn.2d 314, 788 P.2d 531 (1990).....	32
<i>State v. Carol M.D.,</i> 89 Wn. App. 77, 948 P.2d 837 (1997).....	23, 24
<i>State v. Coristine,</i> 177 Wn.2d 370, 300 P.3d 400 (2013).....	21, 22
<i>State v. Depaz,</i> 165 Wn.2d 842, 204 P.3d 217 (2009).....	14
<i>State v. Irby,</i> 170 Wn.2d 874, 246 P.3d 796 (2011).....	22
<i>State v. Kloeppe,</i> 179 Wn. App. 343, 317 P.3d 1088 (2014).....	16-17
<i>State v. Lanciloti,</i> 165 Wn.2d 661, 201 P.3d 323 (2009).....	11
<i>State v. Levy,</i> 156 Wn.2d 709, 132 P.3d 1076 (2006).....	21
<i>State v. Maxfield,</i> 125 Wn.2d 378, 886 P.2d 123 (1994).....	31
<i>State v. Michaels,</i> 264 N.J.Super. 579, 625 A.2d 489, 517 (1993).....	23
<i>State v. Michaels,</i> 136 N.J. 299, 642 A.2d 1372 (1994).....	29, 30

<i>State v. Noltie</i> , 116 Wn.2d 831, 809 P.2d 190 (1991).....	16, 19, 20
<i>State v. Oppelt</i> , 172 Wn.2d 285, 257 P.3d 653 (2011).....	11
<i>State v. Parris</i> , 98 Wn.2d 140, 654 P.2d 77 (1982).....	24
<i>State v. Paumier</i> , 176 Wn.2d 29, 288 P.3d 1126 (2012).....	21
<i>State v. Pierce</i> , 195 Wn.2d 230, 455 P.3d 647 (2020).....	11-13, 22
<i>State v. Porter</i> , 133 Wn.2d 177, 942 P.2d 974 (1997).....	32
<i>State v. Rohrich</i> , 149 Wn.2d 647, 71 P.3d 638 (2003).....	14
<i>State v. Ryan</i> , 103 Wn.2d 165, 691 P.2d 197 (1984).....	23, 24
<i>State v. Saintcalle</i> , 178 Wn.2d 34, 309 P.3d 326 (2013).....	21, 22
<i>State v. Sassen Van Elsloo</i> , 191 Wn.2d 798, 425 P.3d 807 (2018).....	15
<i>State v. Tili</i> , 148 Wn.2d 350, 60 P.3d 1192 (2003).....	31
<i>State v. Tingdale</i> , 117 Wn.2d 595, 817 P.2d 850 (1991).....	17
<i>State v. Townsend</i> , 142 Wn.2d 838, 15 P.3d 145 (2001).....	12

///

<i>State v. Vike</i> , 125 Wn.2d 407, 885 P.2d 824 (1994).....	31
<i>State v. Walden</i> , 69 Wn. App. 183, 847 P.2d 956 (1993).....	32, 33
<i>State v. Woods</i> , 154 Wn.2d 613, 114 P.3d 1174 (2005).....	24
<i>State v. Young</i> , 97 Wn. App. 235, 984 P.2d 1050 (1999).....	32
<i>Tumey v. Ohio</i> , 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927).....	21
<i>Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	14

Statutes and Court Rules

RCW 4.44.170	15, 16, 20
RCW 4.44.180	15
RCW 4.44.190	16
RCW 9.94A.589.....	31
RCW 9.94A.525.....	31
RCW 9A.44.120.....	23, 30

Constitutions

U.S. Const. amend VI	11
U.S. Const. amend XIV	11
Wash. Const. art. I, section 22	11

Other Authority

Research Working Group, Task Force on Race and the Criminal
Justice System, *Preliminary Report on Race and Washington's
Criminal Justice System*, 87 Wash. L. Rev. 1, 18 (2012) 13

I. INTRODUCTION

All criminal defendants have the right to a jury selected without race discrimination. Jury selection practices that disproportionately exclude people of color are per se unconstitutional. Here, Dale Teninty was accused of child molestation. At his trial, the court excluded a juror based on a racially disparate factor—because the juror was friends with a person acquitted of a crime. People of color in Washington are disproportionately policed, arrested, and charged with crimes. Excluding jurors because members of their communities have been charged with, or acquitted of, crimes disproportionately excludes people of color from juries and is thus unconstitutional.

This Court should reverse in order to guarantee that jurors are selected in a fair and unbiased manner. In addition, the trial court erred in two other ways, requiring reversal. The court abused its discretion by admitting unreliable child hearsay statements and by concluding that Mr. Teninty's convictions were not the same criminal conduct for sentencing.

II. ASSIGNMENTS OF ERROR

Assignment of Error 1: The trial court abused its discretion by excluding Juror 34 based on his friendship with a person acquitted of a crime, a racially disparate factor.

Assignment of Error 2: The trial court abused its discretion by excluding Juror 34 for no legitimate reason.

Assignment of Error 3: The trial court abused its discretion by admitting unreliable child hearsay.

Assignment of Error 4: The trial court abused its discretion by finding that Mr. Teninty's convictions were not the same criminal conduct for sentencing purposes.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Issue 1: Did the trial court violate Mr. Teninty's constitutional rights by removing a juror based on a factor that disproportionately excludes people of color from juries?

Issue 2: Did the trial court err by excluding Juror 34 for actual bias when Juror 34 repeatedly stated that he could be impartial and unbiased?

Issue 3: Were A.E.'s hearsay statements reliable and admissible when she was repeatedly questioned by untrained relatives and used nearly identical language to describe her alleged abuse as these relatives?

Issue 4: Did Mr. Teninty's convictions encompass the same criminal conduct when they involved the same victim, occurred at the same location, furthered the same intent, and were part of the same scheme or plan?

IV. STATEMENT OF THE CASE

From about November 2014 to October 2016, Dale Teninty resided with the Best family. RP 483, 487, 663. In the home were Tonya Best (née Hammer) and her now-husband, Robert Best, as well as their young children from prior relationships. RP 463-64. A.E. was Ms. Best's daughter and Mr. Best's stepdaughter. *Id.* In October 2016, when A.E. was seven, she disclosed that she had been sexually abused by "Uncle Dale." RP 435, 483. A.E. was ten when the case against Mr. Teninty proceeded to trial. RP 434.

Mr. Teninty met the Best family when he was dating Ms. Best's sister, Jennifer. RP 466. He and Jennifer resided with the Best family briefly and then broke up. RP 467. Mr. Teninty became friends with Robert Best and moved back into the home. *Id.* He primarily slept in the living room or on the front porch, in a green chair. RP 479. In addition to the Bests and their children, Ms. Best's parents also resided in the home. RP 464. Tonya Best's father, Jack, had mobility issues and used a lift chair, called "papa's chair" by the family. RP 438, 474, 674.

Mr. Teninty got along well with the children in the home. RP 663. He would fix their electronics, watch videos with them, and let them play games on his phone. RP 663-64. Sometimes he would sit with the children on the couch or chair inside, or on the green chair on the porch. RP 675. If it was cold, the children would sometimes be covered by a blanket. *Id.* Mr.

and Ms. Best often worked the night shift and slept during the day. RP 483, 597. Mr. Teninty occasionally babysat the children or watched them when the Bests were sleeping. RP 480-81, 596. The Bests had no concerns about Mr. Teninty interacting with their children. RP 499-500. They reported that the children referred to him as “Uncle Dale.” RP 595.

In early October 2016, Ms. Best witnessed an incident that concerned her. RP 483. She had been sleeping during the day and woke up in the evening. *Id.* Ms. Best’s bedroom is across the hall from the children’s bedroom at the time. RP 483-84. Ms. Best opened the door to her bedroom, stood in the doorframe, and saw Mr. Teninty sitting on a bed in the children’s room with A.E. RP 483. She said that both Mr. Teninty and A.E. were covered with a blanket, and Mr. Teninty had his hand in A.E.’s lap. *Id.* When they saw her, Ms. Best said that both A.E. and Mr. Teninty jumped and brought their hands out from under the blanket. RP 484-85.

According to Mr. Teninty, the incident went very differently. He said that he was upstairs helping the children with a television in their room. RP 664. He was sitting on the bed, trying to get the television to work, when Ms. Best opened the door to her room. RP 665-66. A.E. was also on the bed, but Mr. Teninty denied being close to A.E. and denied touching her lap. *Id.*

After peering into the children's room, Ms. Best turned around, went back into her room, and closed the door. RP 487. She then called Mr. Best at his work to tell him about the incident. *Id.* This allegation came as a shock to Mr. Best. RP 601. The next morning, when Mr. Best returned home, he talked with Mr. Teninty and told him to leave the house. RP 597. Mr. Teninty insisted that he did not touch A.E. RP 598. Later, Ms. Best talked with A.E. about this incident. RP 504. According to Ms. Best, A.E. said that nothing happened. *Id.* Ms. Best told police that she believed A.E. was lying and something did happen that day. *Id.*

When she observed the bedroom incident, Ms. Best did not attempt to intervene or remove A.E. from the children's room. RP 501-02. Ms. Best said that before this incident, she spoke with A.E. about inappropriate touches. RP 488. During this conversation, Ms. Best disclosed that she was abused as a child. RP 489. Ms. Best said that she did not go into details with A.E. *Id.*

A few days after Mr. Teninty left the home, Makayla Mason, A.E.'s cousin, came over to visit. RP 490. Ms. Mason was 15 at the time. RP 577. Ms. Best said that she discussed the bedroom incident and what she witnessed with Ms. Mason. RP 504, 508. Sometime after this discussion, Ms. Mason helped A.E. take a bath. RP 491. She observed A.E.'s behavior, including crossing her legs, and believed that A.E. was uncomfortable. RP

573. According to Ms. Mason, she asked A.E. what was wrong and A.E. said, “Uncle Dale touched my no-no parts.” RP 573-74. Ms. Mason said that A.E. uses “no-no parts” to refer to her vagina. RP 573. At trial, A.E. said that she disclosed to Ms. Mason because she knew that Ms. Mason was also sexually abused as a child. RP 450.

Ms. Mason left the bathroom and told Ms. Best what happened. RP 574. Ms. Best went into the bathroom, shut the door, and spoke with A.E. RP 575. According to Ms. Best, she did not ask A.E. for any details about what happened. RP 492. The next day, Ms. Best called the police. *Id.*

Law enforcement interviewed Ms. Best, but did not interview A.E., leaving that to a trained expert. RP 606. A few months later, Ms. Best brought A.E. to be interviewed by Tatiana Williams, a forensic child interviewer. RP 494. Ms. Williams interviewed A.E. twice, on December 8, 2016, and on January 24, 2017. RP 531. Parents are not allowed to be present during these interviews due to the risk of influencing a child’s statements. RP 532, 552.

Ms. Best said that she did not talk to A.E. about why she was going to be interviewed. RP 506. Despite this, early in the first interview, A.E. says that she was here to talk about Uncle Dale. RP 553. A.E. was reluctant to talk in the first interview, which is not uncommon. RP 538. Children sometimes need time to build rapport with an interviewer. *Id.* Additionally,

during the first interview the investigating officer, Det. Christopher Bode, was called away from observing due to an emergency. *Id.* For these reasons, Ms. Williams scheduled a second interview a month and a half later. *Id.*

During the second interview, A.E. disclosed that Mr. Teninty touched her on her vagina with his hands. RP 443-45. She said that he touched her on the green chair on the porch, inside the house on the couch, and on papa's chair. Ex. 32 at 27-28. A.E. also drew pictures to help explain what happened. Ex.s 15-27. She corrected Ms. Williams and clarified points that she believed Ms. Williams got wrong. RP 543. A.E. described the touching as "inappropriate." RP 542.

In June 2018, Mr. Teninty was charged with four counts of child molestation in the first degree. CP 1-2. The case proceeded to trial in October 2019. CP 154-161. During pretrial hearings, the trial court heard evidence about A.E.'s hearsay statements to her mother, Ms. Best; her cousin, Ms. Mason; and the forensic interviewer, Ms. Williams. CP 223-27. The court concluded that A.E. was competent to testify and that her statements had "sufficient indicia of reliability" to justify admission at trial pursuant to the child hearsay statute, RCW 9A.44.12. *Id.*

Jury selection for this case occurred on October 15 and 16, 2019. CP 154. During jury selection, the parties and the court questioned Juror

34 individually. RP 256. Juror 34 had a friend who was charged and acquitted for sexual assault of a minor. RP 256-58, 260. About 10 years prior, his friend was in his 30s and was accused of assaulting a teenage girl, the daughter of his girlfriend at the time. RP 257-58. Juror 34 testified on behalf of his friend. RP 257. Juror 34 believed that his friend was unfairly treated by the alleged victim in this case, but not by law enforcement or the courts. RP 259-60. He said that the trial process had “panned out, in my opinion, correctly.” RP 260. He said that it was “possible” this experience could impact him. RP 262. However, Juror 34 was adamant that he could be unbiased and impartial and could follow the court’s instructions. RP 262-63. He said that he would convict if there was “proof” or acquit if there was not. RP 258.

The state moved to exclude Juror 34 for cause because “he believed his friend was wrongfully charged.” RP 263. Mr. Teninty objected, arguing that Juror 34 stated his ability to be impartial. RP 264. The trial court agreed with the state. RP 265. The court found it “significant” that Juror 34 was a witness for his friend and “thought his friend was wrongfully charged.” *Id.* The court found that Juror 34 was “predisposed” and thus excluded him for cause. *Id.*

At trial, the jury heard testimony from A.E.; her mother, Ms. Best; her stepfather, Mr. Best; and her cousin, Ms. Mason. RP 434, 462, 568,

581. The state also presented testimony from professionals involved with the case, including two police officers and the forensic interviewer, Ms. Williams. RP 510, 604, 610. The jury also viewed recordings of the child forensic interviews and of a conversation between Mr. Teninty and Det. Bode. Ex.s 13-14; RP 534, 539-40. Finally, Mr. Teninty testified at trial. RP 661. He denied ever touching A.E. in a sexual manner. RP 666.

A.E. testified that a man named Dale sexually abused her. RP 441, 446-47. She could not identify Mr. Teninty in the courtroom. RP 438. She also stated that she had a neighbor named Dale. RP 439. However, Mr. Teninty was the only person named Dale who had lived in the Best home, and A.E. was clear that the Dale who lived with them was the one who abused her. *Id.* Both A.E. and her mother testified using similar language. RP 441, 489. They both discussed their childhood sexual abuse, describing it as inappropriate touching. *Id.*

At the conclusion of evidence, the jury convicted Mr. Teninty of two counts of child molestation in the first degree. RP 773-74. During trial, the state amended the first count to attempted child molestation. CP 97-98. The jury acquitted Mr. Teninty of the attempt count and of the last child molestation count. RP 773-74.

The court sentenced Mr. Teninty on December 4, 2019. RP 786. At the sentencing hearing, Mr. Teninty argued that his two convictions were

the same criminal conduct. RP 798. The trial court disagreed and counted each conviction against the other for sentencing purposes. RP 803-04. The court sentenced Mr. Teninty to an indeterminate sentence, 82 months to life, as well as lifetime community custody. RP 808; CP 189-205. Mr. Teninty appeals. CP 218-19.

V. ARGUMENT

The trial court in this case excluded a potential juror on a racially disparate basis—because the juror was friends with a person acquitted of a crime. This factor is unconstitutional because it disproportionately excludes people of color from Washington juries. No legitimate basis justified removing this juror, who repeatedly stated he could be fair and unbiased. The trial court also erred in this case by admitting unreliable child hearsay statements and by concluding that Mr. Teninty’s convictions were not the same criminal conduct for sentencing. This Court should reverse and remand for a new trial.

A. **The Trial Court Excluded Juror 34 Based on a Racially Disproportionate and Unconstitutional Factor.**

The trial court in this case abused its discretion by excluding a juror based on a racially disproportionate factor: the juror’s association with a person acquitted of a crime. As an individual, Juror 34’s race is irrelevant. In Washington, and across the country, people of color are disproportionately policed, arrested, and charged with crimes. Excluding

jurors because members of their communities have been charged with, or acquitted of, crimes disproportionately excludes people of color from juries. Additionally, no legitimate basis justified excluding Juror 34 in this case. This Court must reverse in order to guarantee that jurors are selected in a fair and constitutional manner.

1. Excluding jurors in a racially disproportionate manner violates the U.S. and Washington Constitutions.

Every defendant has the constitutional right to a fair trial by an impartial jury. *Batson v. Kentucky*, 476 U.S. 79, 85, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *State v. Berhe*, 193 Wn.2d 647, 657, 444 P.3d 1172 (2019); U.S. Const. amends. VI, XIV; Wash. Const. art. I, section 22. Ultimately, courts must ensure that defendants receive due process of law. *See, e.g., State v. Oppelt*, 172 Wn.2d 285, 288, 257 P.3d 653 (2011); *City of Redmond v. Moore*, 151 Wn.2d 664, 677, 91 P.3d 875 (2004). Within our criminal justice system, juries serve as a “vital a check on government power.” *State v. Pierce*, 195 Wn.2d 230, 231, 455 P.3d 647 (2020).

“To perform their vital function, juries must be fairly selected.” *Id.* (citing *State v. Lanciloti*, 165 Wn.2d 661, 667-68, 201 P.3d 323 (2009)). Jury selection must be done in a “fair way that does not exclude qualified jurors on inappropriate grounds, including race.” *Id.* at 231-32 (citing *City*

of Seattle v. Erickson, 188 Wn.2d 721, 723, 398 P.3d 1124 (2017); *Batson*, 476 U.S. 79; GR 37).

In *Pierce*, the Washington Supreme Court addressed racially disparate practices in jury selection. 195 Wn.2d at 242-43. In that case, the Court abrogated its decision in *State v. Townsend*, 142 Wn.2d 838, 846, 15 P.3d 145 (2001). *Id.* at 244. *Townsend* prohibited informing potential jurors about sentencing consequences in voir dire, specifically whether the state sought the death penalty. 142 Wn.2d at 846-47. However, this rule had unintended consequences—it disproportionately excluded people of color from juries. *Pierce*, 195 Wn.2d at 242. The *Pierce* Court reversed, concluding that “[h]ewing to a rule that has a disproportional effect of eliminating people of color undermines our commitment to fostering juries that reflect our society.” *Id.* at 243.

In other words, removing jurors in ways that “disproportionally exclude people of color” violates due process. *Pierce*, 195 Wn.2d at 242-43. Here, the state moved to exclude Juror 34 because someone close to him was charged with a similar crime and acquitted. As explained below, this was not a legitimate reason for removal because Juror 34 stated he could be fair and impartial, could follow the court’s instructions, and could base a decision on the evidence. Additionally, this was an improper basis for

removing a juror because it has a racially disparate impact. *See Pierce*, 195 Wn.2d at 242-43.

People of color in Washington are overrepresented at every stage of the criminal justice system. Research Working Group, Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System*, 87 Wash. L. Rev. 1, 18 (2012). Data about “arrests, charges, convictions, and imprisonment” show “racial and ethnic disproportionalities” in Washington’s criminal justice system. *Id.* Notably, this disparate treatment extends to charging: “prosecutors are significantly less likely to file charges against white defendants than they are against defendants of color,” even after accounting for after legally relevant factors such as the seriousness of the offense. *Id.* at 25.

In short, people of color in Washington are charged with crimes at a disparate rate. *Id.* at 18, 25. Excluding a juror because a member of their community was charged with a crime is not race neutral, regardless of whether that person was convicted or acquitted. This basis disproportionately removes people of color from Washington juries and is thus unconstitutional. *See Pierce*, 195 Wn.2d at 242-43.

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2. The trial court abused its discretion by excluding Juror 34 based on his friendship with a man who was tried and acquitted.

The trial court in this case also lacked a legitimate basis for removal because Juror 34 did not display bias or an inability to serve as a juror. The only reasonable explanation is that Juror 34 was excluded because his friend was charged with a crime and acquitted—an unconstitutional and racially disparate basis.

Appellate courts review a trial court’s decision to discharge a juror for abuse of discretion. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). A trial court abuses its discretion if its decision is “manifestly unreasonable or based on untenable grounds.” *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). “A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (internal quotations omitted).

The trial court in this case abused its discretion by removing Juror 34 on a racially disparate basis, despite no legitimate reason justifying his removal. A court does not have unlimited discretion to remove a potential juror. *See, e.g., Miller v. State*, 29 P.3d 1077, 1083-84 (Ok. Crim.App. 2001) (court’s discretion to dismiss selected juror for good cause “ought to

be used with great caution”); *People v. Bowers*, 87 Cal.App.4th 722, 729 (Cal.App. 2001) (court’s discretion to dismiss juror is “bridled to the extent” that juror’s inability to perform his or her functions must appear in the record as a “demonstrable reality, and court[s] must not presume the worst of a juror.”).

In Washington, RCW 4.44.170 limits the trial court’s discretion to dismiss a potential juror. *See State v. Sassen Van Elsloo*, 191 Wn.2d 798, 808, 425 P.3d 807 (2018) (RCW 4.44.170 outlines “three reasons” for removing jurors for cause). The court can dismiss a juror based on “implied bias, actual bias, [or] physical inability.” RCW 4.44.170. Here, the record does not reflect that Juror 34 had a physical inability to serve as a juror or any implied bias, such as consanguinity or a financial interest in the action. *See* RCW 4.44.180 (defining implied bias).

Instead, the state challenged Juror 34 based on his alleged preconceived notions and inability to be impartial. This is a challenge based on actual bias, which is defined as:

[T]he existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging . . .

RCW 4.44.170(2). A showing of actual bias requires more than a juror expressing an opinion:

A challenge for actual bias may be taken for the cause mentioned in RCW 4.44.170(2). But on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon what he or she may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but ***the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.***

RCW 4.44.190 (emphasis added). In other words, actual bias must “be established by proof.” *State v. Noltie*, 116 Wn.2d 831, 838, 809 P.2d 190 (1991).

Equivocal answers, without more, cannot establish “actual bias warranting dismissal of a potential juror.” *Id.* at 839. Instead, “the question is whether a juror with preconceived ideas can set them aside.” *Id.* The trial court must be satisfied that a potential juror is unable to “try the issue impartially and without prejudice to the substantial rights of the party challenging” before dismissing the juror for actual bias. RCW 4.44.170(2). Additionally, a mere possibility of bias is not sufficient to prove actual bias; the record must demonstrate “that there was a ***probability*** of actual bias.” *Noltie*, 116 Wn.2d at 838-39 (emphasis added).

In this case, Juror 34 disclosed that his friend was charged with a tangentially similar crime, that Juror 34 testified in this trial, and that his friend was acquitted. RP 257-58, 260. Mere connection to a case does not establish actual bias and does not warrant removal. *See State v. Kloepper*,

179 Wn. App. 343, 353, 317 P.3d 1088 (2014) (acquaintance with complaining witness did not reveal bias warranting removal where juror indicated it would not affect his ability to serve); *State v. Tingdale*, 117 Wn.2d 595, 601, 817 P.2d 850 (1991) (social relationship between prosecutor and juror not grounds for disqualification).

Here, Juror 34 was not even connected to the case at bar; he was merely involved with a somewhat similar case tried a decade ago. His friend's case was different from the present case in several critical ways. First, the alleged victim in the friend's case was a teenager, 14 or 15, while A.E. was between 5 and 7 during the critical points of this case. RP 257. Second, the friend's case was remote in time: Juror 34 estimated that the trial occurred about 10 years ago. RP 260

Most importantly, Juror 34 repeatedly assured that he could be unbiased and impartial. RP 257-58, 262-63. He repeatedly said that he could be fair to both parties, that he did not resent law enforcement or the justice system, and that he would carefully consider the evidence presented before reaching a decision. RP 258-60, 262-63. Juror 34 said that he would follow the court's instructions, consider the evidence, and convict if the evidence supported the charged crimes. RP 258, 262-63.

Juror 34 believed his friend was treated "unfairly," but by his accuser, not "law enforcement or the courts." RP 259-60. He did not hold

“negative” views “towards how law enforcement handled their investigation.” RP 260. When asked about “the actual trial process,” Juror 34 acknowledged that it was a “hardship” for his friend to be incarcerated pending trial, but stated that, “It all panned out in the end, in my opinion, correctly.” RP 260. He also did not feel anything “negative” regarding testifying at his friend’s trial. RP 260-61.

The state specifically asked Juror 34 whether “anything from [his] experience” could “impact [his] view in our case here in court.” RP 261. Juror 34 was equivocal and said that it depended on the evidence presented:

You know, I guess I can’t really say because I don’t know the circumstances. But I guess if I feel it’s along the same lines, I could be persuaded by the situation. . . . I mean, like it was the same circumstances and somebody was saying this and this and I knew that it wasn’t true . . . I could be persuaded [to acquit].

RP 261-62. Answering leading questions from the state, Juror 34 stated that it was “possible” he could be “impacted” by his experiences, which “could affect [his] ability to be fair” in the present case. RP 262. However, when questioned by defense counsel, Juror 34 stated that he could set aside his experiences, follow the court’s instructions, remain unbiased towards either party, and “look at the evidence as presented.” RP 262-63.

The state challenged Juror 34 for cause. RP 263. The state argued that Juror 34 “believed his friend was wrongfully charged,” “testified in the

case as a character witness,” and “indicated that [his experiences] could affect his ability to be fair and impartial.” RP 263-64. The trial court agreed and granted the state’s request. RP 265. The court acknowledged that this situation was “difficult,” but found it “significant” that Juror 34 “was a character witness” and “thought [that] his friend was wrongfully charged.” *Id.* The court pointed out that Juror 34 acknowledged that his experience “could affect his thinking in this case.” *Id.* On balance, the court found that Juror 34 was “predisposed” and removed him for cause. *Id.*

The trial court erred and abused his discretion. All persons carry their experiences with them onto juries. That is the point of a jury—to gather a fair cross-section of the community with a breadth of experiences. We do not expect jurors to be blank slates with no life experiences or preconceived ideas. Instead, the relevant inquiry is whether “a juror with preconceived ideas can set them aside.” *Noltie*, 116 Wn.2d at 839. Here, Juror 34 was equivocal about whether his experiences could impact his ability to be fair. RP 261. Equivocal answers, without more, cannot establish actual bias. *Id.* at 839. By contrast, Juror 34 was unequivocal when asked whether he could be impartial. RP 257-58, 262-63. He repeatedly assured the parties and the court that he could set aside his experiences and remain unbiased. *Id.* This evidence barely establishes the

possibility of bias, let alone the “*probability* of actual bias” required to remove a juror for cause. *Id.* at 838-39 (emphasis added).

The trial court also abused its discretion by basing its decision on the fact that Juror 34 “thought his friend was wrongfully charged.” RP 265. The limited information we have about his friend’s case establishes that his friend *was* wrongfully charged—he was jailed for a considerable amount of time and then acquitted of wrongdoing. RP 260. Persons accused of a crime are innocent until proven guilty. The fact that Juror 34’s friend was acquitted carries the presumption that he was innocent of the alleged conduct. It violates public policy to hold an acquittal against Juror 34, particularly given the racially disparate impact of the criminal justice system discussed above. This Court must reverse because no legitimate basis justified removing Juror 34. *See* RCW 4.44.170.

3. Excluding Juror 34 based on a racially disparate factor was structural error and prejudiced Mr. Teninty.

The only appropriate remedy in this case is to reverse and remand for a new trial. The trial court committed structural error. Even if prejudice is required, the court’s decision also prejudiced Mr. Teninty.

The right to a fair trial guarantees that jurors “are selected pursuant to non-discriminatory criteria.” *Batson*, 476 U.S. at 85-86. Denial of the right fair trial “is a classic structural error, requiring reversal without a

showing of prejudice.” *State v. Berniard*, 182 Wn. App. 106, 123-24, 327 P.3d 1290 (2014) (citing *Chapman v. California*, 386 U.S. 18, 24 n.8, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Tumey v. Ohio*, 273 U.S. 510, 535, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (reversing the defendant’s conviction despite clear evidence of guilt because “[n]o matter what the evidence was against him, he had the right to have an impartial judge”). An error is “structural” when “it taints the entire proceeding.” *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). Structural errors are not subject to harmless error analysis and require “automatic reversal.” *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013) (quoting *Neder v. United States*, 527 U.S. 1, 7, 119 S.Ct. 1827, 144 L.Ed. 2d 35 (1999)).

Structural error specifically includes “racial discrimination in the selection of a grand jury.” *State v. Paumier*, 176 Wn.2d 29, 46, 288 P.3d 1126 (2012). “Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try”; it also “shamefully belittles minority jurors who report to serve their civic duty only to be turned away on account of their race.” *State v. Saintcalle*, 178 Wn.2d 34, 46, 309 P.3d 326 (2013) (plurality opinion), *abrogated on other grounds by Erickson*, 188 Wn.2d 721 (quoting *Batson*, 476 U.S. at 87). Racial discrimination in jury selection also “undermine[s] public

confidence in the fairness of our system of justice” and “offends the dignity of persons and the integrity of the courts.” *Id.* (internal quotations omitted).

These detrimental effects extend to racially disparate criteria for selecting jurors. Every criminal defendant has the right to a jury selected fairly, without using racially disproportionate bases for removing jurors. *See Pierce*, 195 Wn.2d at 242-43. The denial of this basic right results in a jury unfairly selected pursuant to discriminatory criteria. *Id.* The race of the individual juror removed is irrelevant—the harm is using discriminatory criteria to decide upon a jury. This structural error requires reversal regardless of prejudice. *See Coristine*, 177 Wn.2d at 380.

Even if this Court requires a showing of prejudice, Mr. Teninty was prejudiced in this case. He was entitled to a fairly selected jury and was denied that right. Additionally, jurors are not interchangeable:

It is no answer to say that the 12 jurors who ultimately comprised Irby’s jury were unobjectionable. Reasonable and dispassionate minds may look at the same evidence and reach a different result. Therefore, the State cannot show beyond a reasonable doubt that the removal of several potential jurors in Irby’s absence had no effect on the verdict.

State v. Irby, 170 Wn.2d 874, 886-87, 246 P.3d 796 (2011) (discussing the accused’s right to be present during jury selection). The same is true here. The state cannot show that Juror 34’s dismissal had no effect on the verdict. This Court should therefore reverse and remand for a new trial.

B. A.E.’s Hearsay Statements were Tainted and Unreliable, and the Trial Court Should Have Excluded Them.

This Court should also reverse because the trial court improperly admitted child hearsay. A.E.’s statements were tainted by exposure to information about her mother’s and her cousin’s child sexual abuse histories, and by their questioning of A.E. Her forensic interview was properly conducted, but by that point it was too late. A.E.’s memory was already tainted, and her statements should have been excluded.

In Washington, hearsay statements by children are admissible under certain circumstances. Statements about sexual abuse are admissible if (1) the child is competent and testifies, and (2) the trial court finds “that the time, content, and circumstances of the statement provide sufficient indicia of reliability.” RCW 9A.44.120(1). Trial courts must closely analyze these statements because children can “use their imagination and stray from reality.” *State v. Carol M.D.*, 89 Wn. App. 77, 92, 948 P.2d 837 (1997) (quoting *State v. Michaels*, 264 N.J.Super. 579, 511, 625 A.2d 489, 517 (1993)).

The state has the “statutory and constitutional burdens” of proving that child hearsay is reliable before it is admissible at trial. *State v. Ryan*, 103 Wn.2d 165, 179-80, 691 P.2d 197 (1984). Appellate courts review the trial court’s decision to admit child hearsay statements for abuse of

discretion. *State v. Woods*, 154 Wn.2d 613, 623, 114 P.3d 1174 (2005). A trial court abuses its discretion when its evidentiary ruling is manifestly unreasonable or is based on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Trial courts consider a set of factors when determining if hearsay statements are reliable:

(1) [W]hether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; and (5) the timing of the declaration and the relationship between the declarant and the witness.

Ryan, 103 Wn.2d at 175-76 (quoting *State v. Parris*, 98 Wn.2d 140, 146, 654 P.2d 77 (1982)). These factors are not exclusive. *Id.* In addition to the *Parris* factors, courts also consider the factors set forth by the U.S. Supreme Court in *Dutton v. Evans*:

(1) [T]he statement contains no express assertion about past fact, (2) cross-examination could not show the declarant's lack of knowledge, (3) the possibility of the declarant's faulty recollection is remote, and (4) the circumstances surrounding the statement . . . are such that there is no reason to suppose the declarant misrepresented [the] defendant's involvement.

Id. at 176 (citing *Dutton v. Evans*, 400 U.S. 74, 88-89, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970)).

Courts must be especially cautious with children, whose memories are easily tainted by outside influences. *See Carol M.D.*, 89 Wn. App. at

92. The Washington Supreme Court addressed false memories in *In re Dependency of A.E.P.*, 135 Wn.2d 208, 956 P.2d 297 (1998). In that case, the father appealed a dependency finding that he sexually abused his daughter, A.E.P., the child witness at issue. *A.E.P.*, 135 Wn.2d at 211. Significantly, A.E.P. was exposed to outside influences, including an interview by a babysitter: that potentially “planted false ideas in [her] memory”:

Another possible explanation for A.E.P.’s minor sexual knowledge with regard to the touching is Deanne’s [the babysitter’s] repeatedly questioning A.E.P. over a period of time whether anyone, including her father, had touched her. Deanne’s obvious obsession with abuse, culminating in the 45 to 90 minute-long interrogation of A.E.P., could have planted false ideas in A.E.P.’s memory. The details supplied by A.E.P. regarding the touching incident fail to demonstrate any knowledge that A.E.P. could not have picked up from [another child’s] behavior, or from Deanne’s questioning.

Id. at 232-33. The Court concluded that A.E.P.’s hearsay statements were not reliable and thus were inadmissible at trial. *Id.* at 231.

Cases from other jurisdictions have also examined how outside influences can affect the reliability of children’s statements. In *Commonwealth v. Delbridge*, a father was convicted of sexually abusing his children. 578 Pa. 641, 647, 855 A.2d 27 (2003). The children disclosed this abuse to their mother, during an acrimonious separation between the parents. *Id.* at 648. Under these circumstances, the Pennsylvania Supreme

Court found evidence of taint that undermined the children's statements. *Id.* at 665-66.

The Court in *Delbridge* defined taint as “the implantation of false memories or the distortion of real memories caused by interview techniques” that are “so unduly suggestive and coercive as to infect the memory of the child.” *Id.* at 655. Children in particular are susceptible to taint because they are “subject to repeat ideas placed in their heads by others.” *Id.* at 663. The *Delbridge* Court found evidence of taint in part because the children's mother “was herself the victim of child sexual abuse,” raising “the possibility that her experiences may have influenced the course of the investigation” by impacting “the children's actual memories of the events in question.” *Id.* at 665.

Applying *Delbridge*, another Pennsylvania court held that a child witness's “testimony was tainted to the extent that he lacked the capacity to testify.” *Commonwealth v. Davis*, 939 A.2d 905, 906, 2007 Pa. Super. Ct. 382 (2007). In *Davis*, the defendant was charged with sexually abusing his children. *Id.* One child's initial interview consisted of “a series of leading questions, and questions describing the circumstances, calculated to elicit affirmative or negative answers from the child rather than simply soliciting the child's narrative of the events.” *Id.* At one point, police told the child: “All right. Relax, little guy. I know this is tough. **I know dad has done**

some things that weren't appropriate and that's what we're going to talk to you about. Okay?" *Id.* at 908 (emphasis in original). Under these circumstances, the Court found that the child's "recollections were tainted" and "not of his own memory." *Id.* at 910.

Here, like in *A.E.P., Delbridge*, and *Davis*, A.E. was exposed to outside influences that likely shaped and altered her memory of the relevant events. She was properly interviewed in December 2016 and January 2017 by Ms. Williams. However, by that point it was too late. A.E. was already exposed to information about the childhood sexual abuse of her mother and her cousin, she was already questioned by both family members, and she had already changed her description of the relevant events in this case.

A.E.'s mother, Ms. Best, testified that she discussed unsafe touches with her daughter before the allegations in October 2016. RP 488. She told A.E. about her own sexual abuse as a child but said that she did not go into details. RP 489. A.E. also knew about her cousin, Ms. Mason's, childhood sexual abuse. RP 450. A.E. said that she disclosed to Ms. Mason because she knew that Ms. Mason had a similar experience. *Id.*

A.E. also changed her disclosure after speaking with her mother and her cousin. Initially, A.E. said that nothing happened with Mr. Teninty. RP 487, 504. Her mother asked her repeatedly, but A.E. said nothing happened. RP 453, 504. Then, A.E. was questioned by her cousin, Ms. Mason, while

taking a bath. RP 473. Before this conversation, Ms. Best told Ms. Mason that she suspected that Mr. Teninty sexually abused A.E. RP 504. After speaking with Ms. Mason, A.E.'s story changed, and she said that she was abused by "Uncle Dale." RP 473-74.

Both Ms. Best and Ms. Mason testified that they did not extensively question A.E. and did not share details of their own sexual abuse with her. RP 487, 489, 492, 574, 579-80. However, A.E. said that her mother repeatedly asked her about what happened with Mr. Teninty. RP 453. Additionally, Ms. Best and Ms. Mason are not professionals. They do not have training interviewing victims of sexual abuse. It is entirely possible that they inadvertently influenced A.E., tainting her memory and leading her to change her disclosure. This conclusion is supported by two important pieces of evidence. First, A.E. knew that she was going to the forensic interview with Ms. Williams in order to talk about what happened with "Uncle Dale." RP 553. This suggests that A.E. knew what she was expected to talk about.

Second, the language used by A.E. and her mother to describe their experiences strongly suggests that A.E.'s memory was tainted. When testifying about "Dale," A.E. said, "He touched me inappropriately." RP 441. A.E. also used "inappropriate" to describe the abuse in her interview with Ms. Williams. RP 538. This is nearly identical to the language Ms.

Best used when speaking with A.E. about her own childhood sexual abuse. Ms. Best testified that she told A.E. that she was “inappropriately touched” and she learned to “know what is appropriate and not appropriate.” RP 489.

Like in *A.E.P.*, *Delbridge*, and *Davis*, these “unduly suggestive” conversations likely tainted A.E.’s memory of these events. Initially, she did not disclose abuse by Mr. Teninty, then after speaking repeatedly with her mother and cousin, she disclosed abuse using nearly identical language that her mother used.

Despite this, the trial court concluded that A.E.’s hearsay statements were reliable and thus admissible. CP 223-27. The court’s conclusions were based in large part on the interviews by Ms. Williams, which were properly conducted. *Id.* In those interviews, A.E. was able to describe the abuse verbally, in writing, and in drawings. RP 443-45; Ex.s 15-27; Ex. 32 at 27-28. She corrected Ms. Williams and pushed back when she believed Ms. Williams misinterpreted her statements. RP 543.

These proper forensic interviews could not cure A.E.’s tainted memories, for two reasons. First, once a child is improperly questioned, those interviews can “distort the child’s recollection of events, thereby undermining the reliability of the statements and subsequent testimony concerning such events.” *Delbridge*, 578 Pa. at 658 (quoting *State v.*

Michaels, 136 N.J. 299, 642 A.2d 1372, 1379 (1994)). In other words, improper interviews can taint subsequent disclosures.

Second, Ms. Williams was a stranger who built rapport with A.E. during two interviews. RP 539. Ms. Williams had a different relationship with A.E. than her mother or her cousin. As the *Delbridge* Court noted, “the victim’s relationship with the interrogator” is an important factor when assessing the reliability of a child’s statement. 578 Pa. at 658 (quoting *Michaels*, 642 A.2d at 1381). Ms. Williams acknowledged as much by testifying that parents are not permitted to observe forensic interviews because they may influence a child’s disclosures. RP 532, 552. Due to this difference in relationship, the fact that A.E. corrected Ms. Williams is irrelevant to the question of whether her memory was tainted by her mother and her cousin. The trial court erred and abused its discretion by concluding that A.E.’s hearsay statements were admissible. This Court should reverse because her memories were likely tainted and unreliable. *See* RCW 9A.44.120.

C. Mr. Teninty’s Convictions Encompassed the Same Criminal Conduct for Sentencing Purposes.

Finally, the trial court erred at sentencing by concluding that Mr. Teninty’s convictions did not amount to the same criminal conduct. Mr. Teninty’s offender score was erroneously calculated for each offense to

include his other current conviction. Instead, these convictions should have merged for sentencing purposes.

Sentencing courts calculate an offender score by adding current offenses and prior convictions, and by calculating any multipliers. RCW 9.94A.589(1)(a); RCW 9.94A.525(17). The offender score for each current offense includes all other current offenses unless the court finds “that some or all of the current offenses encompass the same criminal conduct.” RCW 9.94A.589(1)(a). Where the court makes such a finding, those current offenses are counted as one crime for sentencing purposes. *Id.* Offenses constitute the same criminal conduct if they are (1) committed with the same criminal intent, (2) committed at the same time and place, and (3) involve the same victim. *Id.*; *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

Courts review de novo the calculation of an offender score. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). However, factual determinations, such as whether offenses count as the same criminal conduct, are reviewed for abuse of discretion. *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994). The defendant bears the burden of proving that offenses encompass the same criminal conduct for sentencing purposes. *State v. Aldana Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013).

When determining whether multiple crimes constitute the same criminal conduct, sentencing courts consider “how intimately related the crimes committed 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.” *State v. Burns*, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). It is not necessary that the crimes be committed simultaneously. *State v. Porter*, 133 Wn.2d 177, 182, 942 P.2d 974 (1997). Separate incidents can satisfy the same time element of the test if “they occur as part of a continuous transaction” or in “a single, uninterrupted criminal episode over a short period of time.” *State v. Young*, 97 Wn. App. 235, 240, 984 P.2d 1050 (1999) (citing *Porter*, 133 Wn.2d at 183).

In *State v. Walden*, Division 1 of the Court of Appeals examined whether sex offenses constituted the same criminal conduct for sentencing. 69 Wn. App. 183, 187-88, 847 P.2d 956 (1993). In that case, the defendant lured a boy off his bicycle and up a hill and then sexually abused him. *Id.* at 184. The defendant was convicted of one count of second degree rape and one count of attempted second degree rape. *Id.* The Court of Appeals held that the trial court abused its discretion by concluding that these offenses did not constitute the same criminal conduct. *Id.* at 188. The offenses met the definition of “same criminal conduct” because “the acts

occurred at the same place and nearly at the same time, the same victim was involved, and each count involved the same criminal objective.” *Id.*

Here, like in *Walden*, Mr. Teninty’s alleged actions amounted to the same criminal conduct for sentencing. They involved the same victim, A.E., and the same location, the Best residence. Although the alleged acts were not “simultaneous,” they were part of the same overall “criminal objective”—abusing A.E. The trial court erred and abused its discretion by counting these convictions separately for sentencing purposes. This Court should reverse and remand for resentencing.

VI. CONCLUSION

For the foregoing reasons, Mr. Teninty respectfully requests that this Court reverse his convictions and remand for a new trial.

RESPECTFULLY SUBMITTED this 8th day of July, 2020.



STEPHANIE TAPLIN

WSBA No. 47850

Attorney for Appellant, Dale A. Teninty

No. 37253-7-III

CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On July 8, 2020, I electronically filed a true and correct copy of the Brief of Appellant, Dale A. Teninty, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division III. I also served said document as indicated below:

Larry D. Steinmetz
Spokane County Prosecuting
Attorney's Office

(X) via email to:
lsteinmetz@spokanecounty.org,
scpaappeals@spokanecounty.org

Dale A. Teninty
DOC # 352334
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

(X) via U.S. mail

SIGNED in Tacoma, Washington, this 8th day of July, 2020.



STEPHANIE TAPLIN
WSBA No. 47850
Attorney for Appellant, Richard A.
Vedder

NEWBRY LAW OFFICE

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