No. 92775-8

NO. 46162-5-II

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

STATE OF WASHINGTON, Respondent

v.

MIGUEL ANGEL ALBARRAN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-01301-1

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

I. THE TRIAL COURT DID NOT ERR IN LIMITING THE SCOPE OF CROSS EXAMINATION.

II. THE TRIAL COURT DID NOT ERR IN EXCLUDING PREJUDICIAL AND INADMISSIBLE HEARSAY.

III. ALBARRAN'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY WAS NOT VIOLATED, AND RAPE IN THE SECOND DEGREE AND RAPE OF A CHILD IN THE SECOND DEGREE ARE NOT CONCURRENT STATUTES.

B. STATEMENT OF THE CASE

a. FACTUAL SUMMARY

Miguel Albarran and Denise Domke were in a dating relationship and living together. RP 243. They began dating approximately two years before this incident, which occurred in April of 2013. RP 243. Albarran began living with Ms. Domke and her daughter, T.P., in July of 2012. RP 243-44. T.P. was thirteen years-old at the time of this incident. RP 248. Although the relationship had, at times, been rocky due to Albarran's repeated infidelity, Ms. Domke wanted the relationship to work and would take Albarran back. RP 244. In the eight months preceding this incident, the relationship was going well. RP 244. Albarran and T.P. would do things together like go to a movie or the mall. RP 245.

On March 31, 2013, which was Easter Sunday, Albarran joined Ms. Domke and T.P. at Domke's parents' home for Easter dinner. RP 245-46. That evening T.P. was permitted to stay up later than usual because she was on Spring Break from school. RP 248. The next morning, Ms. Domke awoke for work at 7:15 a.m. and made a pot of coffee, which was her normal routine. RP 249. Her normal custom was to get up, make a pot of coffee, occasionally have a cigarette, select her work clothes, then take her things into her bathroom and get ready in there. RP 247. She would brush her teeth and get dressed in the bathroom. RP 247. On a normal day, she would then check on T.P. and make sure she was getting ready for school. RP 247. Albarran normally went to work at nine or ten in the morning. RP 247. Ms. Domke always showered before anyone else because it took her longer to get ready for her day. RP 248. On this particular morning, Ms. Domke had brought her clothes into the bathroom to get dressed, as was her custom, but after her shower she realized that she'd forgotten her tights in the dryer so she left her room to retrieve her tights. RP 249-50.

As she walked by T.P.'s room, which was adjacent to her own, she looked inside T.P.'s open door and saw Albarran in T.P.'s room. RP 249-50. T.P. sleeps "like a rock," and was asleep on her bed when Ms. Domke looked in. RP 250-51. Albarran, however, was partially on T.P.'s bed.

RP 251. He had his left leg down on the floor and his right leg up on the bed. RP 250. His left hand was down by his side. RP 251. Albarran's face was in T.P.'s vaginal area. RP 251. Upon seeing this, Ms. Domke began yelling, "What the f*ck are you doing?" RP 251. Albarran sat up quickly and fled the room. RP 251. Ms. Domke shut the door and continued to yell "What the hell are you doing?" RP 251. Albarran replied "I'm covering her up. I'm just covering her up." RP 251. Ms. Domke got dressed and retrieved her phone, all the while saying, "What did you do? Why would you hurt my baby?" RP 251-52. Albarran continued to claim he was just covering her up and was "just looking." RP 252. He also pleaded with Ms. Domke not to call the police, saying he wouldn't be able to see his kids anymore. RP 252. Ms. Domke disregarded his pleas and took her phone into T.P.'s room, where she called 911. RP 252.

There, T.P. was crying. RP 252. Ms. Domke asked her what happened, but T.P. didn't know. RP 252. She was merely aware of Albarran and Ms. Domke fighting. RP 252. Ms. Domke asked T.P. if her underwear were wet, based on where she had seen Albarran's face. RP 252. T.P. replied that they were, but that she didn't know what happened because she was sleeping. RP 253.

T.P. recalled that she fell asleep the night before while watching a movie. RP 57. It wasn't a school night, so she got to stay up late. RP 57.

She woke up to her mom yelling, "What's happening?" RP 57. Albarran was also there, saying, "I'm just covering her." RP 58. Albarran asked Ms. Domke not to call the police, fearing his kids would be taken away. RP 63. Ms. Domke told Albarran to get out of T.P.'s room. RP 58. T.P.'s underwear was wet in the crotch area. RP 59. That was unusual for her. RP 59. The area also felt "tickly." RP 59. When the police came to her house she went into her room and changed her underwear, giving the pair she had been wearing to the police. RP 60.

Officer Rey Reynolds of the Vancouver Police Department responded to the 911 call. RP 120. When he arrived, he observed Ms. Domke holding a young teenage girl, and they were both crying. RP 121. Ms. Domke told Reynolds that she was walking by T.P.'s room and saw her boyfriend with his head between T.P.'s legs. RP 125. She said that T.P. was asleep. RP 126. T.P. was extremely upset during the discussion with Reynolds. RP 126.

Dr. Staci Kristin examined T.P. in the emergency room of Legacy Salmon Creek hospital. RP 156-58. Dr. Kristin took swabs of T.P.'s external vaginal area, her right inner thigh, and her left inner thigh. RP 173-75. Teresa Shank of the Washington State Patrol Crime Lab examined the evidence from T.P.'s sexual assault kit, as well as T.P.'s underwear. RP 192, 197. She also received reference DNA samples from

Albarran and T.P. RP 197. This is a summary of her findings: She did not find semen in any of the swabs that were taken from T.P.'s external vaginal areas or inner thighs. RP 198. The swabs from the external vaginal area and inner left thigh were positive for saliva, but the swab from the right inner thigh was negative for saliva. RP 199. The external vaginal swab had male DNA but there was not a large enough sample to obtain a DNA profile. RP 199-200. There was enough from the swab from the inner left thigh to get a profile. RP 200. In that sample was a mixture of DNA, which is to be expected because the person whose skin was swabbed would be expected to contribute DNA. RP 201-02. In this sample, it was 6.6 million times more likely that the DNA was a mixture of Albarran and T.P., as opposed to T.P. and someone else. RP 202. T.P.'s underwear was positive for saliva in the crotch area. RP 204. Ms. Shank took three cutouts from the crotch area of the underwear for testing. RP 204. Semen was found in all three cutouts. RP 204-05, 209. Saliva was also found in all three cutouts. RP 205-09. The cutout labeled sample A had a mixture of DNA of T.P. and Albarran. RP 211. It was 211 trillion times more likely that the DNA from that mixture came from Albarran and T.P. than T.P. and someone else. RP 211. Sample C of the cutouts had a sperm fraction and a non-sperm fraction. RP 212. The sperm fraction

matched Albarran to a degree of one in 780 quadrillion. RP 212. The non-sperm fraction matched T.P. Id.

Albarran was interviewed by Detective Hafer. Hafer asked Albarran what happened on the morning of April 1st and Albarran said that he followed his normal routine, but went into T.P.'s room to cover her with a blanket. RP 305. Albarran said at that point, Ms. Domke walked in and accused him of touching T.P. Id. Hafer asked what could have happened to make Ms. Domke think he had his face between T.P.'s legs and he replied, "I'm not no ugly fuck that couldn't get anyone off the street." RP 306. When pressed again with this question by Hafer, Albarran began telling Hafer about his history of cheating on Ms. Domke. RP 306. However, Albarran confirmed that he and Ms. Domke had gotten back together eight months prior to this incident and said things had been going well. RP 306. When pressed again about why Ms. Domke would think he had his head between T.P.'s legs, he said that an ex-girlfriend of his made Ms. Domke jealous, but then said "[b]ut that has nothing to do with that." RP 306. Albarran denied begging Ms. Domke not to call the police, claiming that he simply told her, "there's no need to call the cops, because nothing happened." RP 307-08. Albarran said Ms. Domke was a nice girl and he'd always known her to be honest. RP 308. Albarran said he had no idea why T.P.'s underwear was wet that morning. RP 310. Albarran also

claimed that Ms. Domke punched him in the eye that morning and gave him a black eye. RP 311. Albarran again reiterated that his cheating past had "nothing to do with" Ms. Domke's accusation against him. RP 312.

b. MOTIONS ON EVIDENCE

Prior to trial, defense counsel indicated he wanted to introduce evidence that the mother of the victim, Ms. Domke, Albarran's girlfriend at the time of the rape, was a jealous woman who put a GPS tracking device on Albarran's telephone and tracked him to a woman's house, where she assaulted him. RP 30-32. The court noted that because the mother would be testifying later in the case, it would defer ruling on the proffered evidence until that time. Id. Later, when it came time for Ms. Domke to testify, the court revisited Albarran's motions. RP 233. In addition to his request to cross-examine Ms. Domke about allegedly tracking his phone and assaulting him, Albarran also sought permission to cross examine Ms. Domke about an alleged Facebook post wherein Ms. Domke supposedly told another of Albarran's girlfriends that she (Ms. Domke) would help the girlfriend "go after" Albarran in court. RP 237-38. The alleged Facebook exchange took place after the rape. RP 238. Albarran, despite a request from the court to produce the alleged Facebook post, did not produce the exchange for the court's review.

RP 240-41. Absent an ability to even review the contents of the alleged Facebook post, the court said, "[s]o at this point, I'd exclude any question about some Facebook posting." RP 241. Contrary to Albarran's assertion in his appeal that the court was primarily concerned with Albarran's willful discovery violation in not producing the post for the State, the court was concerned with being asked to make a ruling on the admissibility of evidence it had not seen. Id. With respect to the other two proposed areas for cross-examination, the court ruled:

> Well, I'll allow questions about whether she was, prior to this incident, angry with the defendant over affairs. Again, we would have to be specific as to the time frame; because no doubt, she became angry; there's evidence of that on the day in question. So the focus would be on -- on setting him up, something prior to this being angry.
>
> As far as specific incidents, this gets into more of the domestic affairs of people that can be outside the scope of what we're concerned with here. So a specific incident as to GPS, a tracking and so on, I would exclude. The Facebook -- first of all, it hasn't been disclosed, contrary to the Court's direction that that be disclosed; and also happened after the incident, so would not be relevant here. It's also difficult for the Court to evaluate, since we haven't actually had something specific to look at. So at this point, I'd exclude any question about some Facebook posting.
>
> So I think what it comes down to is whether, at the time, her state of mind was one that indicated bias towards the defendant as to having numerous affairs; that would be something that you would be allowed to ask her about.

RP 240-41.

Albarran also sought to testify that he and Ms. Domke used sex toys each time they had sex, which were kept in a drawer on the left side of the bed where he slept. RP 352. He sought to testify that Ms. Domke called him one day and told him that one of her sex toys and some lubricant were missing. RP 352. Albarran wanted to testify that the implication of what Ms. Domke told him was that T.P. stole the sex toy because she was the only other person in the house. RP 352. He never saw T.P. take a sex toy. RP 353. He also wanted to testify that Ms. Domke told him that she (Ms. Domke) had allowed T.P. to use one of Ms. Domke's sex toys. Albarran wanted to use this hearsay to opine for the jury that the presence of his DNA on T.P.'s body and underwear was from this shared sex toy. RP 353. The Court ruled that people are not allowed to testify about statements made by someone else, which are offered for the truth of the matter asserted, because such testimony is unreliable. RP 355. The court disallowed the proposed testimony. RP 355.

c. VERDICT AND JUDGMENT

Albarran was convicted of rape in the second degree, rape of a child in the second degree, attempted rape of a child in the second degree, and child molestation in the second degree. CP 31-34. He was also found to have committed the rape in the second degree against a person under the age of 15. CP 37. The court entered judgment only on the rape in the

second degree conviction. CP 48-61. The other convictions were vacated and dismissed. This timely appeal followed.

C. ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN LIMITING THE SCOPE OF CROSS EXAMINATION.

The trial court did not err in disallowing Albarran from offering testimony about Ms. Domke allegedly having put a GPS tracker on his phone and then using it to track him to a woman's house, where Domke allegedly assaulted Albarran. The proposed testimony related to a collateral matter and did not show bias. Albarran was adequately permitted to explore any possible bias on the part of Ms. Domke by eliciting evidence that she was aware of numerous instances of his infidelity.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). "Abuse exists when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons." *Id.* (quotation and citation omitted). Likewise, "a court's limitation of the scope of cross-examination will not be disturbed unless it is the result of [a] manifest abuse of discretion." *Id.* (citing *State v. Campbell*, 103 Wn.2d 1, 20, 691 P.2d 929 (1984)). In addition, a reviewing court "can affirm on

any grounds supported by the record." *State v. Huynh*, 107 Wn.App. 68, 74, 26 P.3d 290 (2001) (citing *State v. Bryant*, 97 Wn.App. 479, 490-91, 983 P.2d 1181 (1999)).

A defendant's right to confront and meaningfully cross-examine "adverse witnesses is guaranteed by both the federal and state constitutions." *Darden*, 145 Wn.2d at 620 (citations omitted). Confrontation in the form of cross-examination assures "the accuracy of the fact-finding process" by testing the "perception, memory, [] credibility," and bias of witnesses. *Id.* (citations omitted). Thus, "the right to confront must be zealously guarded." *Id.* Indeed, "latitude must be allowed in cross-examining an essential prosecution witness to show motive for his testimony." *State v. Knapp*, 14 Wn.App 101, 107, 540 P.2d 898 (1975). Moreover, a defendant may establish bias through impeachment by introducing extrinsic evidence, including third party testimony. *United States v. Abel*, 469 U.S. 45, 49, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984); *Huynh*, 107 Wn.App. at 74 (holding that "extrinsic evidence of acts or conduct may be introduced to prove a witness's bias.").

The right to cross-examine adverse witnesses, however, is not absolute as the scope of the examination can be limited by the trial court. *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038 (1973); *State v. Robbins*, 35 Wn.2d 389, 396, 213 P.2d 310 (1950) ("Where the right [to

cross-examination] is not altogether denied, the scope or extent of cross-examination for the purpose of showing bias rests in the sound discretion of the trial court."). Further, the trial court may limit "the extent to which defense counsel may delve into the witness' alleged bias 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or *interrogation that is repetitive or only marginally relevant*.'" *State v. Fisher*, 165 Wn.2d 727, 752, 202 P.3d 937 (2009) (emphasis added) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)). The Supreme Court has stated:

> Although the law allows cross-examination into matters which will affect the credibility of a witness by showing bias, ill will, interest or corruption . . . the evidence sought to be elicited must be material and relevant to the matters sought to be proved and specific enough to be free from vagueness; otherwise, all manner of argumentative and speculative evidence will be adduced.

State v. Jones, 67 Wn.2d 506, 512, 408 P.2d 247 (1965). Consequently, where a defendant's "offer of proof refer[s] to no specific acts, conduct or statements on the part of the witness, but vaguely tending to show bias in the most indefinite and speculative way," it would be "too remote to meet the purpose for which it was offered, and [a] trial court [could] properly h[o]ld it to be immaterial and irrelevant." *Id.* Simply put, "[t]here is no

right, constitutional or otherwise, to have irrelevant evidence admitted." *Darden*, 145 Wn.2d at 624.

Here, the proffered evidence was vague and collateral. In his offer of proof, the defendant's assertion that Ms. Domke placed a tracker on his phone was based on his vague claim that when he tried to call his other girlfriends, he was unable to do so and he took his phone to the Verizon store to find out why. RP 235. There, he was told that he couldn't make his calls because "somebody[] put a GPS thing on here and it won't let you make calls from this." RP 235. On that anemic offer of proof, Albarran sought to cross examine Ms. Domke on this alleged misconduct and introduce this spurious allegation to the jury. But the offer of proof was insufficient to allow cross examination on this allegation. Moreover, the allegation, even if true, did not establish bias of the witness. "Bias" is defined as "Inclination; prejudice; predilection." BLACK'S LAW DICTIONARY, 171 (8th ed. 2004). While all parties agreed that Albarran's infidelity was a proper area of cross examination because it might reveal ongoing anger or hurt on Ms. Domke's part, which could tend to show bias, the specific alleged act of placing a tracking application on Albarran's phone did not show bias. The act was collateral, and would have misled the jury and unduly prejudiced the State. It was also cumulative of the evidence tending to show that Ms. Domke was angry at

Albarran over his infidelity. Likewise, the allegation that Ms. Domke had assaulted Albarran on this occasion did not tend to show bias. It would have cast Ms. Domke in a poor light with respect to her general character and been very prejudicial to the State's ability to receive a fair trial.

When a defendant offers extrinsic evidence that only has an indirect bearing on the bias or prejudice of a witness the trial court can exclude that evidence under the rule that extrinsic evidence cannot be used to impeach a witness on collateral issues. *State v. Carlson*, 61 Wn.App. 865, 876, 812 P.2d 536 (1991). "A trial court may, in its discretion, reject cross-examination where the circumstances only remotely tend to show bias or prejudice of the witness, where the evidence is vague, or where the evidence is merely argumentative and speculative." *State v. Classen*, 143 Wn.App. 45, 59, 176 P.3d 582 (2008); *Knapp*, supra, at 107-08. It is worth noting that Albarran overstates the importance of Ms. Domke's testimony. Although T.P. was asleep during the rape, she woke up to her mother screaming at what she witnessed. T.P. testified about the very authentic response of a mother witnessing the sexual assault of her child. Further, the defendant nullified his tardy claims of having been the victim of the jealous Ms. Domke when he told the police that everything had been fine between him and Ms. Domke in the preceding eight months (corroborating what Ms. Domke said), and when he told the police that his prior

infidelities had nothing to do with Ms. Domke's accusation against him. Finally, the DNA found on T.P.'s inner thigh and underwear, which included not just Albarran's semen but his saliva, established his guilt beyond a reasonable doubt. The trial court did not err in limiting the scope of cross examination to those matters germane to the case.

As to the alleged Facebook entry, the court was never provided with this evidence to review in an offer of proof. It did not exist. The court advised defense counsel that it couldn't evaluate his request without seeing the actual Facebook entry and counsel failed to produce it (in spite of the court's order that he do so). RP 240-41. The court correctly precluded cross examination on an alleged Facebook post, the existence of which Albarran could not prove. Additionally, the court correctly held that the non-existent Facebook post was irrelevant because it occurred after the rape. It would not, as Albarran claimed, show that Ms. Domke planned to frame Albarran for rape in advance of the incident. Even if the Facebook post, assuming it truly existed[1], could be arguably deemed relevant, Albarran's wholesale failure to produce it precludes a finding, at this stage, that the trial court abused its discretion in precluding cross

[1] The State is not referring to the Facebook exchange that was tardily produced and referenced at pages 356-57 of the verbatim report of proceedings. That exchange, which was evidently heavily edited, did not purport to show what Albarran claimed it would show. Defense counsel apparently agreed with the prosecutor's representation of what the exchange said.

examination about it. *State v. Knapp*, supra, is instructive here as well. In *Knapp*, supra, the defendant sought to cross examine his brother about his brother having encouraged him on two prior occasions to commit crimes with him (the brother). Knapp argued that this testimony would bolster his theory of the case that his brother wanted to put him in jail. *Knapp* at 108. The Court of Appeals affirmed the exclusion of this evidence:

> The trial court ruled that the attempts to persuade Kenneth to commit these crimes were too remote to show bias because it was not shown that Clarence was going to lay a trap for Kenneth, such as contacting law enforcement officers once Kenneth agreed to commit the crimes. We believe that it was well within the discretion of the trial court to reject this cross-examination because, as the court stated, the evidence was too remote, and was also too vague, argumentative and speculative.

Knapp at 108-09.

Similarly here, the post-rape Facebook post, even assuming it existed and said what Albarran claimed it said, did not reveal a plot on Ms. Domke's part to frame Albarran for this crime in advance. The trial court did not abuse its considerable discretion in limiting the scope of cross examination on this subject.

Even if the court erred, the error was harmless. Assuming, without necessarily agreeing, that this Court should review this claim under the constitutional harmless error test, the error was harmless beyond a

reasonable doubt.[2] "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The State bears the burden of proving that the error was harmless. *Id.* The State will meet this burden by showing that the overwhelming untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *Id.* at 426. Reiterating the argument from above, Ms. Domke's testimony about what she saw that morning, combined with her authentically horrified response as related by T.P., as well as the defendant's own inculpatory statements and the DNA evidence, constituted overwhelming untainted evidence of Albarran's guilt. The court's decision, if error, was harmless.

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[2] In *State v. Turnipseed*, 162 Wn.App. 60, 69, 255 P.3d 843 (2011), the Court of Appeals said:

> It is well established that a trial court that limits cross-examination through evidentiary rulings as the examination unfolds does not violate a defendant's Sixth Amendment rights unless its restrictions on examination "effectively ... emasculate the right of cross-examination itself." Generally speaking, the confrontation clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.

State v. Turnipseed, 162 Wn.App. 60, 69, 255 P.3d 843, 848 (2011), as amended (June 9, 2011) (Internal citations omitted).

Thus, it is not clear that the constitutional harmless error standard is the correct standard. Nevertheless, the State submits that the error was harmless under either the constitutional error or non-constitutional error harmlessness test.

II. THE TRIAL COURT DID NOT ERR IN EXCLUDING PREJUDICIAL AND INADMISSIBLE HEARSAY.

Here, the trial court correctly ruled that Albarran should not be allowed to testify about a hearsay statement in which Ms. Domke supposedly told him that a sex toy that she jointly used with Albarran was missing from her drawer, and a separate hearsay statement in which Ms. Domke supposedly told him that she allowed T.P. to use the sex toy. Albarran argues that the admission of this statement would have necessarily led to the conclusion that it was T.P. who took the sex toy. That, he argues, would have then necessarily led to the conclusion that T.P. used the sex toy. That, he argues, would have then necessarily led to the conclusion that the sex toy was the source of Albarran's semen on T.P.'s underwear. It is worth noting at the outset that Albarran wanted to admit this evidence through his own testimony rather than by cross examining Ms. Domke. The inference to be drawn from that is that Ms. Domke would have denied making such a statement.

The court correctly disallowed the admission of this hearsay statement for which no exception existed to justify its admission. "A defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible." *State v. Rehak*, 67 Wn.App. 157, 162, 834 P.2d 651 (1992); *State v. Austin,* 59

Wn.App. 186, 194, 796 P.2d 746 (1990); citing *Taylor v. Illinois*, 484 U.S. 400, 404-10, 108 S.Ct. 646 (1988). The constitutional right to present a defense is not unfettered. *State v. Strizheus*, 163 Wn.App. 820, 830, 262 P.3d 100 (2011). A defendant has no right to present irrelevant or inadmissible evidence. *Strizheus* at 830, *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Here, the proffered evidence was both inadmissible and irrelevant. The evidence was inadmissible because it was an out of court statement offered for the truth of the matter asserted, and no recognized exception would have allowed its admission.

The evidence was irrelevant because it was inflammatory, it served to besmirch the victim without a proper factual basis, and because it would have confused the jury. Albarran does not tell us how this evidence would have helped him where, even if his ridiculous story about the thirteen year-old victim using her mother's sex toy were true, it would not explain why T.P.'s underwear was wet that morning, would not explain how Albarran's saliva got on T.P.'s inner left thigh, and would not explain how Albarran's saliva got on T.P.'s underwear. The sex toy would presumably have semen on it, not saliva. Albarran also does not explain why Ms. Domke's DNA was wholly absent from any of the samples collected from T.P.'s body. Again, Albarran's theory was that T.P. stole a sex toy that was *jointly used* by him and Ms. Domke. How is it, then, that only

Albarran's and T.P.'s DNA was present on these samples? The mixture samples were a mixture of the victim and a person who is 6.6 million times more likely to be Albarran than anyone else on the inner left thigh sample, and 210 trillion times more likely to be Albarran than anyone else on Sample A of the underwear samples. Where was the unknown third party in this mixture who was presumably Ms. Domke? The evidence was not relevant under ER 402 because Albarran's sex toy theory was incredible.[3] And even if some measure of relevance could be shown, the proffered evidence was inadmissible under ER 403 because the minimal probative value of this evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading of the jury.[4]

Nevertheless, Albarran claims not only that the trial court erred, but that the error resulted in the denial of his constitutional right to present a defense. In general, decision to exclude evidence or testimony is within

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[3] ER 402 provides:

> All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provide by statute, by these rules, of by other rules and regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

[4] ER 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

the sound discretion of the trial court and will not be grounds for reversal absent a showing that discretion was abused. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002); *State v. Strizheus*, 163 Wn.App. 820, 829, 262 P.3d 100 (2011). In *State v. Rehak*, 67 Wn.App. 157, 163, 834 P.2d 651 (1992), Division II of the Court of Appeals considered a claim that the defendant had been denied his constitutional right to present a defense when the trial court disallowed the defendant from introducing evidence that her son may have committed the murder. The Court reviewed the claim for abuse of discretion. *Rehak* at 163. However, Division I of the Court of Appeals, relying on *State v. Iniguez*, 167 Wn.2d 273, 217 P.3d 768 (2009), instead recently held that whether a defendant has been denied his constitutional right to present a defense by way of exclusion of evidence is reviewed de novo. *State v. Strizheus*, supra, at 829. In *Iniguez*, the Supreme Court said that even where the underlying decision is one that lies within the discretion of the trial court (such as whether to grant a continuance or admit evidence), if the decision results in the denial of a constitutional right of the defendant, the claim of denial is reviewed de novo. *Iniguez* at 280. It would seem, then, that the manner in which the defendant elects to frame the issue, even if clearly erroneous, controls the standard of review he enjoys.

In this case, Albarran has not shown that he was denied his constitutional right to present a defense. Not only was the evidence inadmissible and irrelevant, but it did not prevent Albarran from presenting his theory of the case, which was that Ms. Domke did not witness what she claimed to have witnessed and lied about the incident out of spite. Albarran's theory that Ms. Domke fabricated this story conflicted with his proposed theory that his DNA was transferred to T.P.'s underwear innocently as a result of T.P.'s actions. In setting out to get Albarran in trouble with this concocted story, did Ms. Domke know that T.P. inadvertently transferred Albarran's DNA to her underwear by her alleged use of the sex toy—a necessary component of the frame-up? Is Ms. Domke just that lucky? Because Albarran has not shown that his constitutional right to present a defense was abridged, this Court should review the trial court's decision not to allow this testimony under the abuse of discretion standard and, if error is found, apply the non-constitutional harmless error test. See *State v. Anderson,* 112 Wn.App. 828, 837, 51 P.3d 179 (2002) (Where defendant did not meet his burden of showing the denial of his right to present a defense, Court applied non-constitutional harmless error test). Under the non-constitutional harmless error test, an error is "not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected

had the error not occurred." *Anderson* at 837, quoting *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Here, it is difficult to imagine how precluding Albarran from claiming that Ms. Domke said that her sex toy was missing from her bedside drawer would, within reasonable probabilities, have materially affected the outcome of the trial. Albarran would not have been permitted to testify that Ms. Domke believed that T.P. took the sex toy, because Albarran cannot testify about another person's unexpressed thought or belief. Additionally, precluding Albarran from claiming that T.P. used the sex toy with her mother's permission also would not, within reasonable probabilities, have materially affected the outcome of the case. The absence of Ms. Domke's DNA, or the DNA of a third unidentified contributor, in the DNA samples taken from T.P.'s body renders this story irretrievably non-credible, notwithstanding the general unbelievability of a mother allowing her thirteen year-old daughter to use the mother's sex toy. The trial court did not err in prohibiting the introduction of hearsay statements allegedly made by Ms. Domke.

III. ALBARRAN'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY WAS NOT VIOLATED, AND RAPE IN THE SECOND DEGREE AND RAPE OF A CHILD IN THE SECOND DEGREE ARE NOT CONCURRENT STATUTES.

Albarran contends that his right to double jeopardy was violated when the trial court entered judgment on his conviction of rape in the second degree and dismissed all other counts with prejudice. Albarran's claim is frivolous.

The double jeopardy clauses of the Washington State Constitution and United States Constitution provide identical protection against multiple punishments for the same offense. *State v. Graham*, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005). Unlike the classic type of double jeopardy, which bars the State from retrying a defendant for a crime on which he has been acquitted—which is explicitly barred by the Fifth Amendment to the United States Constitution, the double jeopardy proscription on multiple punishments for the same offense requires us to look at whether the legislature has authorized separate punishments for a single act. That is, it is a question of statutory construction and legislative intent.

But before we look at whether multiple punishments violate double jeopardy, there must be, in fact, multiple punishments. Albarran's assignment of error is baffling. Albarran did not receive multiple

punishments for the same offense. He received one punishment for the one offense he stands convicted of--rape in the second degree. CP 48-61. Thus, he did not receive multiple punishments for the same offense. While it is true that Albarran would rather be convicted of rape of a child in the second degree, than rape in the second degree, that argument is not a double jeopardy argument. When a trial court is forced to vacate one or more convictions in order to avoid imposing multiple punishments for the same offense, the trial court is required to enter judgment on the more serious offense--as determined by the length of sentence that would be imposed for each offense. The offense with the longest sentence is the offense that stands. *State v. Weber*, 159 Wn.2d 252, 266, 149 P.3d 646 (2006). Here, rape in the second degree carried the longer sentence. Albarran's sentence for rape in the second degree was a mandatory sentence of 300 months, due to the jury's answer on the special allegation. CP 48-61.[5] Thus, the trial court was required to enter judgment on the conviction for rape in the second degree. The trial court followed the law, and there was no double jeopardy violation.

Albarran also contends that rape in the second degree and rape of a child in the second degree are concurrent statutes--that rape of a child in

[5] Under RCW 9.94A.507(3)(c)(ii), when the jury returns a special verdict under RCW 9.94A.837, the trial court must impose a sentence of twenty-five years of the top of the standard range, whichever is greater.

the second degree is the specific statute and that rape in the second degree is always committed when rape of child in the second degree is committed. Albarran's argument is meritless.

"When a specific statute and a general statute punish the same conduct, the statutes are concurrent and the State can only charge a defendant under the specific statute." *State v. Wilson*, 158 Wn.App. 305, 313-14, 242 P.3d 19 (2010). Whether two statutes are concurrent is a legal question reviewed de novo. *Id.* at 314. Statutes are concurrent only when every violation of the specific statute will violate the general statute—i.e., when all the elements of the general statute are also elements of the specific statute. *State v. Ou*, 156 Wn.App. 899, 902, 234 P.3d 1186 (2010). This inquiry turns on the elements of the statutes, not of the facts of the particular case. *Id.*; *State v. Chase*, 134 Wn.App. 792, 800, 142 P.3d 630 (2006).

The concurrent statute rule is a rule of statutory construction, not a constitutional principle. *See State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d 237 (1984), citing *State v. Cann*, 92 Wn.2d 193, 197, 595 P.2d 912 (1979) ("It is a well-established rule of statutory construction that "where a special statute punishes the same conduct which is punished under a general statute, the special statute applies and the accused can be charged only under that statute.") Limiting prosecutors to the specific statute

ensures that charging decisions comport with legislative intent in a given area. *Wilson* at 314. In some instances, defendants have argued that the election of one statute over another in the prosecutor's charging decision may result in an equal protection violation. Statutes that have identical elements but proscribe different penalties may violate equal protection by giving prosecutors unfettered discretion to determine criminal penalties. *See generally City of Kennewick v. Fountain,* 116 Wn.2d 189, 802 P.2d 1371 (1991); *accord State v. Presba*, 131 Wn.App. 47, 54-55, 126 P.3d 1280 (2005). Here, Albarran does not make an equal protection claim. He confines his claim to statutory construction and legislative intent.

The statutes proscribing rape in the second degree and rape of a child in the second degree are not concurrent. RCW 9A.44.050 provides:

> (1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:
>
> > (a) By forcible compulsion;
> >
> > (b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated;
> >
> > (c) When the victim is a person with a developmental disability and the perpetrator is a person who is not married to the victim and who:
> >
> > > (i) Has supervisory authority over the victim; or

(ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense;

(d) When the perpetrator is a health care provider, the victim is a client or patient, and the sexual intercourse occurs during a treatment session, consultation, interview, or examination. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that the client or patient consented to the sexual intercourse with the knowledge that the sexual intercourse was not for the purpose of treatment;

(e) When the victim is a resident of a facility for persons with a mental disorder or chemical dependency and the perpetrator is a person who is not married to the victim and has supervisory authority over the victim; or

(f) When the victim is a frail elder or vulnerable adult and the perpetrator is a person who is not married to the victim and who:

(i) Has a significant relationship with the victim; or

(ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense.

(2) Rape in the second degree is a class A felony.

RCW 9A.44.076 provides:

(1) A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years

> old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.
>
> (2) Rape of a child in the second degree is a class A felony.

Albarran contends that the anytime one violates RCW 9A.44.076 he also violates RCW 9A.44.050(1)(b). Albarran is wrong. In order to prove rape in the second degree under RCW 9A.44.050(1)(b), the State must prove that the victim is incapable of consent by reason of being physically helpless or mentally incapacitated. Albarran claims, without citation to apposite authority, that a victim whose age falls within the parameters of RCW 9A.44.076, is "mentally incapacitated." Albarran relies entirely on the inapposite *State v. Hughes,* 166 Wn.2d 675, 212 P.3d 558 (2009), for this proposition. *Hughes* was a double jeopardy case, and it relied heavily on the now disapproved *State v. Birgen*, 33 Wn.App. 1, 651 P.2d 240 (1982) (disapproval recognized in *State v. Smith*, 177 Wn.2d 533, 549, 303 P.3d 1047 (2013)). At issue in *Hughes* was whether the legislature intended separate punishments for both rape in the second degree by mental incapacity and rape of a child in the second degree. *Hughes* at 684. *Hughes* did not address the question of whether the statutes were concurrent, which would prevent the prosecutor from even *charging* the general statute crime. *Hughes* did not hold, as Albarran disingenuously claims, that rape in the second degree is committed every

time rape of a child in the second degree is committed. *Hughes* did not hold that a child falling between the ages of twelve and fourteen years old is "mentally incapacitated" as defined by RCW 9A.44.010(4). Albarran has cited no true authority for his claim.

It is apparent that the intent of the legislature was not to disallow prosecution for rape in the second degree when an adult rapes an unconscious or developmentally disabled child. First, the definition of mental incapacity, which should have been the starting point of Albarran's analysis but which he never mentions, specifically omits age or youth as demonstrative of mental incapacity. The definition states: "Mental incapacity" is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause. RCW 9A.44.010. Importantly, Albarran has cited no authority—statutory or otherwise—which holds that a child falling within a certain age category is deemed, as a matter of law, from understanding the nature or consequences of the act of sexual intercourse. It is obvious that children can understand the nature of sexual intercourse, particularly when they have been subjected to it.

Second, Albarran wholly ignores the fact that it is only unlawful to have intercourse with a child if the perpetrator is a certain number of months older than the victim. For rape of a child in the second degree, the victim must be less than fourteen years old and older than twelve years old (and not married to the perpetrator), while the perpetrator must be at least thirty-six months older than the victim. If the perpetrator is only thirty months older than the victim, then the child is not deemed unable to consent and no crime has occurred. Stated another way, the legislature has not declared all children under the age of fourteen incapable of giving consent. Indeed, the rape of a child statute is not concerned at all with consent (or the lack of ability to give it). Rather, it is a status offense. We have decided, as a society, that we will not tolerate sexual intercourse between children who are under the age of fourteen but older than twelve, and perpetrators who are at least thirty-six months older than they are. We think it bad public policy to allow sex between such parties. We are concerned with the potential imbalance of power and undue influence. But we have not said, categorically, that a child falling between the ages of twelve and fourteen is incapable of consenting to sex. He/she is only incapable, legally, if the other party is a certain number of months older than he/she. Thus, children falling between the ages of twelve and fourteen are not "mentally incapacitated" under RCW 9A.44.010(4).

Additionally, the State cannot show that a victim is "physically helpless" by merely showing that she is less than fourteen years old but over the age of twelve. Notably, "physically helpless" and "mentally incapacitated" are not alternative means of committing rape in the second degree. *State v. Al-Hamdani*, 109 Wn.App. 599, 36 P.3d 1103 (2001).

It is nonsense to suggest that the State could charge and obtain a conviction for rape in the second degree when the State's evidence shows nothing more than a defendant having had intercourse with a thirteen year-old while being at least thirty-six months older than the victim. To prove rape in the second degree, the state must prove physical helplessness or mental incapacity. As this is the entirety of Albarran's argument, it fails.

Finally, we can discern legislative intent by looking elsewhere in the SRA. In RCW 9.94A.537, the legislature has provided for a special allegation where, when a defendant is charged with rape in the second degree, the victim of the crime is less than fifteen years old. Rape of a child in the second degree, for obvious reasons, is not on the list of crimes for which this allegation can be charged. Thus, if Albarran is correct, the portion of RCW 9.94A.537 which allows this aggravator to be applied to rape in the second degree would be rendered meaningless. It is a canon of statutory construction that appellate courts interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous.

State v. Ervin, 169 Wn.2d 815, 823, 239 P.3d 354, 357 (2010). It would be absurd for the legislature to have included rape in the second degree, without qualification, on the list of crimes for which this special allegation may be charged, if it intended for the State to be precluded from charging rape in the second degree when the victim is a child under the age of fourteen. Again, the concurrent statute rule is a rule of statutory construction, which, when found to be applicable, is meant to give effect to the intent of the legislature. Albarran has not shown that rape in the second degree and rape of a child in the second degree are concurrent statutes. This assignment of error is meritless.

D. CONCLUSION

Albarran's conviction and sentence should be affirmed.

DATED this 31st day of March, 2015.

Respectfully submitted:

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