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SUPREME COURT NO. 101609-3
NO. 38176-5-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DARRYL POND,

Petitioner.

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

The Honorable Charnelle Bjelkengren, Timothy Fennessy & Annette Plese, Judges

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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Darryl Pond asks this Court to review the decision of the Court of Appeals referenced below.

B. COURT OF APPEALS DECISION

Pond seeks review of the Court of Appeals decision in State v. Pond, No. 38176-5-III (Slip Op. filed December 8, 2022). A copy is attached as an appendix.

C. REASON WHY REVIEW SHOULD BE GRANTED

Review is warranted under RAP 13.4(b)(3) because it involves a significant question of law under the State and Federal Constitutions regarding tension between the Rape Shield statute and a criminal defendant's constitutional right to present a defense under the Sixth Amendment and Wash. Const. Art. I, §22.

D. STATEMENT OF THE CASE

The Spokane County Prosecutor charged Pond with first degree child molestation and attempted first degree child molestation. CP 22-23. The prosecutor alleged Pond molested

his step granddaughter, A.B. and, on a separate occasion, S.L., a close friend of A.B. CP 1-4.

A trial was held before the Honorable Judge Annette Plese. 3RP; 4RP.[1] A jury convicted Pond of the charge involving A.B., but not S.L. CP 154-55; 5RP 367-69. Pond was sentenced to an indeterminate sentenced of 40 months to life. CP 201-17. Pond appealed. CP 197-98.

During pretrial proceedings the Honorable Judge Timothy B. Fennessy held a hearing on the parties' motions in limine. 2RP 4-93. At the hearing Pond registered his "general denial" defense. 2RP 43-44.

Defense counsel explained the defense theory was that A.B. made up the claim to avoid punishment for breaking her

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[1] There are five volumes of verbatim report of proceedings referenced as follows: 1RP – July 25, 2019 (defense motion to dismiss before the Honorable Judge Charnelle Bjelkengren); 2RP – January 28, 2021 (pretrial hearing before the Honorable Judge Timothy B. Fennessy); 3RP – April 12, 2021 (first day of trial); 4RP – April 13, 2021 (second day of trial); and 5RP – April 14-15, 19 & 26, 1 2021 (remainder of trial) and May 28, 2021 (sentencing).

parents' rules. 2RP 69-72. Counsel explained that when A.B. was 10 or 11 years old she began dating a 14 year old boy despite her parents' rule she not date at all. 2RP 69-70. A.B. accepted a cell phone from the boy, despite her parents' rule against having a cell phone. 2RP 70. Counsel noted A.B.'s clandestine cell phone contained "over 1,000 text messages," some of which were "explicit" in nature and that when A.B.'s parents found out about the clandestine relationship they angrily confronted the boy at school, which A.B. witnessed. 2RP 70-71. Counsel explained the defense wanted to introduce this evidence as a basis to show why A.B. would make up a claim of attempted molestation by Pond. 2RP 71-72.

Counsel noted the content of the text messages found on A.B.'s secret phone were more explicit than would be expected for middle school-age children. 2RP 72. Counsel noted one of the messages to the boy said, "do to me what you did behind the school." Another, sent on the phone by S.L. to the boy read, "You should fuck [A.B.]." 2RP 75.

After Judge Fennessy expressed reluctance at accepting the defense theory, opining it was not corroborated by some tangible advantage or reward for A.B. by making a false allegation (2RP 73-74, 76), defense counsel noted that after she accused Pond of sexual abuse, she was no longer grounded for disobeying her parents' rules, so there was in fact a benefit to A.B. by falsely accusing Pond. 2RP 78.

Judge Fennessy declined to rule on whether the defense could pursue its theory of the case, noting he had not yet been assigned to try the case. 2RP 81. Nonetheless, Judge Fennessy offered his opinion that he did not think the defense theory made sense. 2RP 79-81

The motions in limine reserved for trial were addressed by Judge Plese at the beginning of trial. Defense counsel reiterated the defense position previously argued. 4RP 209-17.

In response, the prosecutor argued the evidence the defense sought to admit was at most minimally relevant yet more

prejudicial than probative and therefore should be excluded. 4RP 220-23.

Judge Plese expressed doubt about the defense theory of the case and the admissibility of the evidence it sought to introduce in support. Like Judge Fennessy, Judge Plese failed to see a connection between A.B. getting in trouble for possessing a cell phone and having a boyfriend and thereafter lying in a counseling session about being molested by Pond. 4RP 224-25.

The issue was revisited the following day. 5RP 14-35. Defense counsel began by thoroughly fleshing out why evidence A.B. was surreptitiously dating an older boy who gave her a cell phone so they could communicate in secret was relevant to Pond's defense and to the credibility of A.B. and her mother as to the accusation against him 5RP 14-18.

The prosecutor agreed with the timeline and factual scenario set forth by defense counsel. 5RP 20. The prosecutor argued, however, that what the defense sought to introduce at trial was not relevant to the charges and therefore inadmissible.

5RP 22. The prosecutor argued the defense should be precluded from questioning A.B.'s mother about the messages found on the phone and about the fact the phone was in her sock drawer instead of being thrown away as she had initially claimed, arguing these were all collateral matters. 5RP 23-24.

In reply, defense counsel noted the evidence it sought to introduce went not just to credibility, but also to A.B.'s motive to lie. 5RP 25-26.

Judge Plese maintained her conclusion the defense failed to show how evidence of A.B. being caught and sent to counseling for having a boyfriend and a cell phone containing over 1,000 message exchanges was relevant to whether A.B. lied about Pond attempting to molest her. Judge Plese noted there was a 10-day delay between A.B.'s parents' discovery of the cell phone and boyfriend and A.B. disclosure in counseling and opined this was too long a period for A.B. to have waited to accuse Pond of molestation in order to escape punishment. 5RP 29-31.

At the request of defense counsel, the trial court clarified its ruling. 5RP 119-30. The court would allow the defense to elicit from A.B. that she got the cell phone from "a friend at school," but not that the boy was transgendered or that their relationship was physical, concluding the fact of the physical relationship was excluded under the Rape Shield statute.[2] 5RP 119-20. The court also clarified the defense would not be allowed to elicit testimony about the confrontation of the boy at school by A.B.'s parents because it was not relevant. 5RP 120. Nor could it delve into the content of the messages found on the phone. 5RP 127. The court also ruled the defense could elicit that A.B. lived in a strict household, but not that it was a "religious" home. 5RP 130. After the prosecution agreed not to elicit testimony that A.B. first made the accusation against Pond in counseling, the defense conceded not to explore those facts

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[2] RCW 9A.44.020, the so-called "Rape Shield" statute, precludes evidence of a complaining witness's past sexual behavior to prove credibility.

before the jury. 5RP 124-25. The court entered a written ruling memorializing its decisions. CP 122-32. A motion to reconsider was denied. 5RP 175-76.

At trial A.B. testified she was currently 14 years old and in 9th grade. 5RP 184-85. She explained she would often spend the night at her grandmother's house. 5RP 186-87. Pond was usually there. 5RP 187. The home had two bedrooms on the same floor; one for Pond and A.B.'s grandmother and one she and her brother shared when they visited. 5RP 187-88.

According to A.B., Pond tried to molest her the summer before 6th grade. She claimed sometime that summer when she spent the night and her grandmother left early for work, Pond invited her into his room, to which she agreed. 5RP 190. She claims Pond picked her up, carried her into his bedroom, and put her in bed, where she said she turned over to go back to sleep. 5RP 190-91. A.B. claimed Pond attempted to remove her pajama bottoms, but she resisted, and eventually told Pond she was going back to her room and did. 5RP 191-94. A.B. claimed later than

morning Pond told her "not tell anyone and to keep it between us." 5RP 195. A.B. never told anyone immediately after the alleged abuse. 5RP 196. A.B. said she never told S.L. about alleged abuse, but eventually disclosed it to her mother. 5RP 197, 204.

On cross examination, A.B. agreed she and S.L. were like sisters, were very close and spent a lot of time together and would tell each other "[m]ostly everything." 5RP 198-99.

A.B. admitted she had a cell phone in 6th grade she was not allowed to have that she got from "[t]his kid from my school." 5RP 199. She kept the phone secret from her parents, but S.L. knew about it. 5RP 199-200. A.B.'s parents eventually found out about the phone. 5RP 200.

Pond was the last witness. 5RP 259-92. He denied ever carrying A.B. into his bedroom, denied ever inviting S.L. to sit with him at his computer and denied ever sexually touching either girl. 5RP 260, 271, 276-77, 284. With regard to whether he could carry a 12 year old girl from one bed to another, Pond

replied: "I could have tried, but I don't think I could have did it. . . [b]ecause I have a very bad low back, and you know, I just can't carry things." 5RP 276-77.

In closing argument, defense counsel noted A.B. and S.L. colluded to keep A.B.'s cell phone a secret from her parents and maintained a connection after A.B. disclosure in counseling until S.L. claimed similar abuse of her by Pond. Despite contrary argument by the prosecutor, defense counsel argued the similarity of S.L.'s claim to A.B. suggested it was made up. 5RP 342.

In rebuttal closing argument, the prosecutor turned to the defense claim A.B. and S.L. made up the accusations. The prosecutor characterized the defense claim as based on a "vague argument" that because A.B. and S.L. were close they conspired to fabricate allegations against Pond and argued it did not make sense. 5RP 353-54.

On appeal, Pond argued he was denied his right to present a defense guaranteed by the Sixth Amendment and Wash. Const.

Art. I, §22 by the trial court's exclusion of defense evidence regarding A.B.'s strict upbringing and the consequences she faced when her parents discovered the cell phone, the boyfriend, and the sexually explicit messages between them. He argued this evidence would have provided a reasonable basis for jurors to conclude A.B. made up her accusation against him.

The court of appeals rejected Pond's claims. Appendix. First the court concluded the trial court did not error in finding the proffered defense evidence was bar under RCW 9A.44.020. Appendix at 6-9.

Regarding Pond's right to present a defense, the court of appeals concluded that because Pond was allowed to introduce some of the defense evidence offered in a 'sanitized' form intended to avoid the Rape Shield statute, his right to present a defense was not denied and affirmed his judgment and sentence. Appendix at 9-11.

E. ARGUMENT

REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS DECISION PRESENTS A SIGNIFICANT QUESTION OF LAW UNDER THE SIXTH AMENDMENT AND WASH. CONST. ART. I, §22.

Pond denied the accusations against him and sought to admit evidence to show why they were made up. The trial court, however, refused to admit this evidence because it did not see how it was relevant to whether Pond molested A.B. and concluded the evidence A.B. was dating an 8th grader was inadmissible under the Rape Shield statute. The court of appeals agreed. Appendix. This Court should grant review in order to determine whether the Rape Shield statute was properly and constitutionally applied to bar Pond from presenting his actual defense instead of the diluted version arising from the trial court decision to preclude most of the relevant evidence.

a. Purpose of the rape shield statute and the scope of its limitations.

RCW 9A.44.020(2) provides:

> Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section, but when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.

The phrase "past sexual behavior" is not defined by statute and no Washington case has offered a definition. State v. Jones, 168 Wn.2d 713, 722, 230 P.3d 576 (2010). RCW 9A.44.020(3) reiterates that for certain offenses, including rape, "evidence of the victim's past sexual behavior . . . is not admissible if offered to attack the credibility of the victim" and "is admissible on the issue of consent" provided a certain procedure is followed. Read

in isolation, subsections (2) and (3) appears to erect an absolute, categorical bar on using evidence of past sexual behavior on the issue of credibility. But that is not how the statute has been interpreted.

First, the statute permits the defense "to cross-examine and impeach the alleged victim's testimony on her past sexual behavior if the prosecution raises the issue of her past sexual behavior in its case in chief." State v. Hudlow, 99 Wn.2d 1, 9, 659 P.2d 514 (1983); see RCW 9A.44.020(4) ("Nothing in this section shall be construed to prohibit cross-examination of the victim on the issue of past sexual behavior when the prosecution presents evidence in its case in chief tending to prove the nature of the victim's past sexual behavior.").

Second, "the prohibition of sexual conduct evidence is directed at the use of such evidence for impeaching the victim's *general credibility* for truth and veracity." Hudlow, 99 Wn.2d at 8. "The purpose of the rape shield statute is to prevent prejudice arising from promiscuity and by suggesting a 'logical nexus

between chastity and veracity.'" State v. Sheets, 128 Wn. App. 149, 155, 115 P.3d 1004 (2005) (quoting State v. Peterson, 35 Wn. App. 481, 485, 667 P.2d 645 (1983)). The statute was intended to protect against the evil of the old common law rule that "apparently recognized a woman's promiscuity somehow had an effect on her character and ability to relate the truth, whereas no such effect existed as to men." Hudlow, 99 Wn.2d at 8. The prohibition on using sexual behavior evidence to disprove the alleged victim's credibility is "directed at the misuse of prior sexual conduct evidence based on this antiquated and obviously illogical premise." Id. at 9.

b. The evidence was admissible because it was relevant to Pond's defense and no compelling interest outweighed Pond's need for this evidence.

The Sixth Amendment and due process require an accused be given a meaningful opportunity to present a complete defense. State v. Cayetano-Jaimes, 190 Wn. App. 286, 297, 359 P.3d 919 (2015); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. VI, XIV; Wash.

Const. art. 1, § 3, 22. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Defendants have the right to present evidence that might influence the determination of guilt before a jury. Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

In conjunction with the right to present a defense, defendants have the constitutional right to confront the witnesses against them. Hudlow, 99 Wn.2d at 14-15; U.S. Const. amend. VI; Wash. Const. Art. 1, § 22. Defense counsel exercises the right to confrontation through cross-examination of the State's witnesses, "the principle means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

Trial court limitations on the scope of cross-examination are reviewed for abuse of discretion. State v. Lee, 188 Wn.2d 473, 486, 396 P.3d 316 (2017). A claimed violation of the right to present a defense is reviewed de novo. Jones, 168 Wn.2d at 19.

Here, the trial court ruled evidence of A.B.'s secret affair with a boy and the trouble it got her into was inadmissible because it was not relevant to whether Pond tried to molest her. The court of appeals agreed. Appendix at 10. This Court should grant review and conclude both were in error.

Analysis begins with the observation the accused has the constitutional right to present relevant evidence in support of a defense. Id. "All facts tending to establish a theory of a party, or to qualify or disprove the testimony of his adversary, are relevant." State v. Perez-Valdez, 172 Wn.2d 808, 824-25, 265 P.3d 853 (2011) (quoting Fenimore v. Donald M. Drake Constr. Co., 87 Wn.2d 85, 89, 549 P.2d 483 (1976)). The State must demonstrate a compelling interest in keeping relevant evidence

out. Jones, 168 Wn.2d at 723 (citing Hudlow, 99 Wn.2d at 16). "[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Id. at 720 (quoting State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)).

"The State's interest in excluding prejudicial evidence must also 'be balanced against the defendant's need for the information sought,' and relevant information can be withheld only 'if the State's interest outweighs the defendant's need.'" Jones, 168 Wn.2d at 720 (quoting Darden, 145 Wn.2d at 622). "'[T]he integrity of the truthfinding process and [a] defendant's right to a fair trial' are important considerations." Jones, 168 Wn.2d at 720 (quoting *Hudlow,* 99 Wn.2d at 14). "[E]vidence relevant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest." State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000).

Here, the trial court ruled the evidence the defense sought to introduce about A.B.'s misbehavior leading up to her

allegation against Pond was simply not relevant. The court could find no "nexus" between that behavior and the subsequent allegation against Pond, noting there was a 10-day gap between discovery if A.B.'s secret phone and her claim of sexual abuse to a counselor. CP 122-32; 4RP 224-25; 5RP 29-31. As such, the court did not require the State to show the evidence was so prejudicial it would disrupt the fairness of the fact-finding process. Jones, 168 Wn.2d at 720. Nor did the court balance the State's interest in excluding prejudicial evidence with Pond's need for it, and it did not determine the State's interest in exclusion outweighed Pond's interest in admission. Jones, 168 Wn.2d at 720.

A trial court abuses its discretion when applies the wrong legal standard. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). The trial court here abused its discretion in failing to apply the test set forth in Jones in determining admissibility of the evidence. It did so because it erroneously found the evidence irrelevant.

Using the correct framework for determining admissibility, the evidence was relevant to the defense theory A.B. had a motive to make up the allegation against Pond; to minimize punishment for having had a secret cell phone and boyfriend in violation of her strict home rules. Unfortunately, Judge Plese, likely influenced by Judge Fennessy's previously skepticism about the admissibility of the evidence, failed to recognize its relevance to Pond's defense. Judge Plese explained the problem was the timing; a 10-day delay in the discovery of the secret phone and making the accusation against Pond was too long a period in her opinion to qualify as relevant. 5RP 29-31. Judge Plese, like Judge Fennessy, reached this erroneous conclusion based on an overly myopic perspective of the evidence, likely influence by her personal experience with texting and children.[3] According to Judge Plese, A.B.'s credibility was at issue at trial,

[3] In her oral ruling excluding the evidence Judge Please stated, "I don't find 1500 texts between children unusual. So I text that

> but the timeline of even the ten days, if she was going to use it to get out of trouble, she should have told her mom right then and there. So then we wouldn't be here because there would be a nexus.

5RP 31. This constitutes an improper factual finding that A.B. would have made the accusation against Pond sooner if it had been a lie to get out of trouble. Judge Plese should have left such factual findings to Pond's jury.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." ER 401. All facts tending to establish a party's theory are relevant. State v. Harris, 97 Wn. App. 865, 872, 989 P.2d 553 (1999), review denied, 140 Wn.2d 1017 (2000) (citing Lamborn v. Phillips Pac. Chem. Co., 89 Wn.2d 701, 706, 575 P.2d 215 (1978)). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of

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much myself, so I can't imagine and having a kid who texts ten time more, I don't find that unusual." 5RP 29-30.

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." ER 403.

It is important to consider how this evidence would be used. The defense did not want to use the evidence of A.B.'s affair with an older boy to attack on her "general credibility," which is forbidden by the rape shield statute. Hudlow, 99 Wn.2d at 8. That is, the defense argument was not that A.B. should be disbelieved because promiscuity means a lack of veracity, which would draw a false connection between chastity and veracity. Id. at 8-9; Sheets, 128 Wn. App. at 155. Rather, the defense wanted to provide a reasonable explanation for why in this specific instance A.B. made a false allegation against Pond, which was to minimize the punishment for her violation of her strict home rules. This would have given jurors a basis to doubt her claim. The rape shield statute allows for this kind of use of prior sexual behavior evidence.

In State v. Horton, 116 Wn. App. 909, 920, 68 P.3d 1145 (2003), evidence the victim had engaged in previous sexual behavior with someone other than the defendant was not barred by the rape shield statute. The defense offered the victim's prior statements not to show she had engaged in sexual conduct at some earlier time, "but to show that she was testifying inaccurately at the time of trial; he wanted the jury to compare her prior statements to her trial testimony, find a significant inconsistency, and thus doubt her credibility." Id. (citing State v. Carver, 37 Wn. App. 122, 125, 678 P.2d 842 (1984) (evidence of a witness' prior statement to investigating authorities that she had not engaged in past sexual behavior was admissible not to show that she had engaged in sexual conduct at some earlier time, but to show that she was testifying inaccurately at the time of trial)). Similarly, the defense here wanted to use evidence of A.B.'s affair with the boy and the resulting consequences when discovered not as evidence she had engaged in prior sexual

behavior, but instead to show she had a reason to make up the claim against Pond.

Neither the State nor the trial court identified a compelling interest in keeping the jury from hearing about this evidence. The fact of the relationship is not inflammatory. It does not show A.B. engaged in sexual intercourse with the boy or anyone else. It does not reveal A.B. as someone with perverse sexual urges. And the defense did not intend to use the evidence to argue A.B.'s credibility should be doubted because she was promiscuous.

The court erred in excluding probative defense evidence without a compelling interest. When evidence tends to prove a defense to a criminal charge, "the probative value of such evidence is of such significance that its admission is required, regardless of the prejudice that might otherwise result from its admission." State v. Bedada, 13 Wn. App. 2d 185, 198 463 P.3d 125 (2020). This has never meant an unfair trial must result because "courts have long recognized that limiting instructions

are a readily available means by which to mitigate whatever prejudice might otherwise result from the introduction of evidence that is admissible for one purpose but not for others." Id. "Thus, the calculation is clear: some evidence is so important that it must be admitted and limiting instructions are the mechanism by which unfair trials are avoided and prejudice minimized." Id. at 198-99.

Bedada applied the principle to admission of immigration status evidence under ER 413, which is inspired by and comparable to the rape shield statute. See 5A Wash. Prac., Evidence Law and Practice § 413.1, Purpose and History of Rule (6th ed.). The efficacy of a limiting instruction has been recognized in the rape shield context. See Sheets, 128 Wn. App. at 158 (any problem associated with evidence showing complaining witness was uncharacteristically flirtatious earlier in the night "should have been corrected by instructing the jury about the limited purpose of the testimony."). In finding prejudice outweighed probative value, the trial court gave no

consideration to how a limiting instruction could ensure the jury did not consider the evidence for an improper purpose. Under Bedada, this was error.

The evidence was relevant to Pond's defense and was probative of the credibility of A.B.'s claim against him. Cross-examination is designed to expose a witness's motivation in testifying and thereby "expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." Olden v. Kentucky, 488 U.S. 227, 231, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988) (quoting Davis, 415 U.S. at 316-17). Confrontation helps assure the accuracy of the fact-finding process; thus, whenever the right to confront is denied, the integrity of the fact-finding process is called into question. Darden, 145 Wn.2d at 620.

As sole judges of witness credibility, jurors are entitled to the benefit of all relevant defense evidence so they can make an informed judgment regarding the veracity of the complaining witness. The more essential the witness is to the prosecution's

case, the more latitude the defense should be given to explore the witness's credibility. Darden, 145 Wn.2d at 619. "This is especially so in the prosecutions of sex crimes where, owing to natural instincts and laudable sentiments on the part of the jury, the usual circumstances of isolation of the parties involved at the commission of the offense and the understandable lack of objective corroborative evidence, the defendant is often disproportionately at the mercy of the complaining witness' testimony." State v. Roberts, 25 Wn. App. 830, 835, 611 P.2d 1297 (1980) (quoting State v. Peterson, 2 Wn. App. 464, 466-67, 469 P.2d 980 (1970)).

A.B. was an essential witness for the prosecution. This was a sex case where the only witnesses to the alleged event were Pond and A.B. In this circumstance, the latitude given to defendants to cross-examine and impeach complaining witnesses is at its zenith. The evidence was admissible to support Pond's defense by showing A.B. had a reason to make up a false accusation against him.

Assuming the full realization of the damaging potential of cross-examination A.B. about her affair with the boy, its discovery and fallout, A.B.'s credibility as to the accusation against Pond would have been undermined because it would have showed she had a motive to fabricate the claim to avoid punishment from her strict parents. A.B.'s credibility was critical to the State's case because she and Pond were the only two people who know whether Pond actually carried her to his bed and tried to molest her.

In a case that rose and fell on which witness the jury believed, the exclusion of evidence that could have provided jurors with a basis to find reasonable doubt as to A.B. claims against Pond cannot be deemed harmless beyond a reasonable doubt because the defense theory would have been far less "vague" as the prosecution claimed in rebuttal closing argument. 5RP 353-54.

The trial court's strict adherence to the antiquated notion that a woman's chastity has a bearing on her credibility codified by the Rape Shield statute led to its failure to afford Pond the ability to fully exercise his rights under the Sixth Amendment and Wash. Const. Art. I, §22 to present a defense and confront his accusers. The court of appeals decision perpetuates this error.

This Court should grant review in order to determine whether the Rape Shield statute must give way a defendant's right to preset a defense under circumstances like those faced by Pond. This is a significant question of law under the State and Federal Constitutions that warrants review under RAP 13.4(b)(3).

D. CONCLUSION

For the reason stated, this Court should grant review.

I certify that this document was prepared using word processing software and contains 4,931 words excluding those portions exempt under RAP 18.17.

DATED this 6th day of January, 2023.

Respectfully submitted,

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APPENDIX

FILED
DECEMBER 8, 2022
In the Office of the Clerk of Court
WA State Court of Appeals Division III

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

STATE OF WASHINGTON,	)	
	)	No. 38176-5-III
Respondent,	)	
	)	
v.	)	
	)	UNPUBLISHED OPINION
DARRYL WARREN POND,	)	
	)	
Appellant.	)	

FEARING, J. — Darryl Pond appeals his conviction for attempted child molestation in the first degree. He contends the trial court committed evidentiary and constitutional error when denying him an opportunity to submit evidence that attributed an ulterior motive behind one of his victim's accusations against him. Some of this proffered evidence violated the rape shield statute. Regardless, the trial court did not breach its discretion when excluding the evidence. We affirm the conviction.

FACTS

This prosecution arose from separate accusations asserted by A.B. (formerly known as A.P.) and S.L. against Darryl Pond. Both children reported being touched in a sexual manner by Pond. The accusation made by A.B. led to Pond's conviction for

attempted child molestation, and the accusation forwarded by S.L. resulted in Pond's child molestation charge, a charge on which the jury acquitted.

A.B. and S.L. are not biological sisters. Nevertheless, the two girls view themselves as sisters because they share a biological half-brother. Darryl Pond was previously married to A.B.'s and S.L.'s grandmother, Faye Pond. Thus, Pond was the two girls' step-grandfather until his divorce from their grandmother.

When A.B. attended sixth grade, she began a clandestine relationship with S.M., an eighth-grade boy at her middle school. S.M. gifted A.B. a cell phone to communicate with him. She engaged in a relationship with a boy and maintained a cell phone in violation of her parents' rules. A.B.'s parents prohibited her from maintaining a boyfriend.

A.B. and S.M. exchanged approximately 1,500 text messages during the time in which A.B. possessed the cell phone. Three messages between the friends, which messages Darryl Pond sought to introduce as evidence read:

> "I love you."
>
> "Tell your parents that you're going to a track meet so we can meet up instead."
>
> "I like what you did to me behind the school[. . .]last week."

Report of Proceedings (RP) (Apr. 13, 2021) at 212. A fourth message from sister S.L. to A.B. that Pond sought to introduce read:

> [T]his is [S.L.] You should fuck [A.B.].

RP (Jan. 28, 2021) at 75.

When A.B.'s parents learned of her relationship with S.M., the parents journeyed to her school and confronted S.M. They also ordered A.B. to see a counselor.

On June 13, 2018, during her first counseling session, A.B. reported to her counselor that Darryl Pond inappropriately touched her during the previous summer. A.B. had not earlier reported to anyone any abuse. A.B. disclosed to her counselor details of the molestation. She and Pond were alone at the Pond residence while her grandmother worked outside the house. Pond left his bedroom, entered A.B.'s bedroom, and asked her if she wanted to come to his room. Once A.B. agreed, Pond carried her to his bedroom, where he laid her on the bed. According to A.B., when she turned on her side to sleep, Pond reached to pull her pajama shorts down. Pond's hands shook as he placed one hand on her upper thigh. A.B. rose from the bed and left Pond's bedroom. Later that morning, Pond directed A.B. to keep the occurrence a secret.

On January 14, 2019, S.L. revealed her accusation against Darryl Pond. During a conversation with her grandmother, Pamela LaFontaine, the grandmother discussed A.B.'s allegations. S.L. then described a night in 2017 when she and A.B. both slept at the Pond residence. S.L. was nine-years-old at the time of this sleepover.

According to S.L., Darryl Pond entered the bedroom she shared with A.B. while A.B. slept. Pond asked S.L. if she wanted to go downstairs to play computer games. In

the basement, Pond requested that S.L. sit on his lap on a chair in front of the computer. While S.L. sat on Pond's lap, he inserted his hands under her shorts and touched her vagina. He also slid his hands under her shirt and placed them on her bare breasts. S.L. stood at Pond's direction, after which her step-grandfather attempted to pull down her pants. S.L. exclaimed "no" and fled the basement. As S.L. left the basement, Pond called to her: "'This is our secret.'" RP (Apr. 15, 2021) at 235.

PROCEDURE

Darryl Pond sought to admit evidence he believed would support his defense theory that A.B. lied about him to her counselor in order to deflect from her parent's disapproval and diminish the repercussions from this disapproval of her secret relationship with S.M. and her use of the cell phone. To support this motive theory, Darryl Pond sought to admit the following evidence:

(1) text messages between A.B. and S.M. that illustrate not just the existence of a relationship between them, but the existence, duration, and intimacy of a physical relationship between them;

(2) testimony that A.B.'s parents ordered her to see a counselor after discovery of her relationship with S.M. and her use of a cell phone; and

(3) testimony that A.B.'s mom misled the defense as to the disposition of the phone once it was discovered in her sock drawer.

The superior court declined to admit evidence from all three categories. The trial court reasoned that admitting the text messages exchanged between A.B. and S.M. and the message sent by S.L. would violate the rape shield statute since the messages revealed A.B.'s past sexual behavior. According to the trial court, Pond could argue a motive to deflect from the parents' ire without introducing evidence revealing why the parents ordered A.B. to engage in counseling. The trial court also deemed the text messages with S.M. to be unduly prejudicial. According to the superior court, evidence demonstrating the mother's dishonesty about the location of the phone and its disposition when found was irrelevant to whether A.B. possessed a motive to falsely accuse Pond.

The superior court permitted Darryl Pond to elicit testimony that A.B. used a cell phone to text a friend at school, that she hid the use of the phone from her parents, and that she denied the existence of the phone to her parents. In turn, the superior court allowed Pond to argue that A.B. possessed a motive to falsely accuse Pond because her parents learned she had maintained a cell phone in violation of their rules. Pond, however, withheld this argument during trial since the State presented no testimony as to the reason why A.B.'s parents ordered her to counseling.

The jury found Darryl Pond guilty on the charge of attempted child molestation of A.B. in the first degree and not guilty on the charge of child molestation of S.L. in the first degree.

LAW AND ANALYSIS

On appeal, Darryl Pond argues that the trial court violated his constitutional right, under the Sixth Amendment to the United States Constitution and Wash. Const. art. I, § 22, to present a defense when the court excluded evidence of (1) text messages between A.B. and S.M. that established the existence of their physical relationship, its duration, and the level of intimacy, (2) the reasons behind A.B.'s parents ordering her to counseling, and (3) A.B.'s mother's misleading the defense as to the disposition of A.B.'s cell phone.

When this reviewing court assesses whether the trial court breached a defendant's Sixth Amendment right to present a defense, we begin our analysis by reviewing the trial court's evidentiary rulings under state evidence rules. *State v. Jennings*, 199 Wn.2d 53, 58, 502 P.3d 1255 (2022). If this court finds that the trial court did not abuse its discretion with respect to its evidentiary rulings, the court reviews de novo whether the exclusion of evidence violated a defendant's Sixth Amendment right to present a defense. *State v. Jennings*, 199 Wn.2d 53, 58 (2022).

Rape Shield Statute

We first review whether any of Darryl Pond's proffered evidence violated Washington's rape shield statute. The statute, RCW 9A.44.020 declares, in pertinent part:

> (2) Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section, but when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.
>
> . . . .
>
> (4) Nothing in this section shall be construed to prohibit cross-examination of the victim on the issue of past sexual behavior when the prosecution presents evidence in its case in chief tending to prove the nature of the victim's past sexual behavior, but the court may require a hearing pursuant to subsection (3) of this section concerning such evidence.

Generally, the accused seeks to introduce evidence of the victim's earlier sexual behavior in order to impugn the victim as possessing low morals. Darryl Pond sought to introduce the evidence, not for this typical purpose, but to show A.B. sought to distract from her parents' disappointment in her and to gain sympathy from the parents because of the misbehavior of Pond. Pond argues that the rape shield statute does not preclude evidence of past sexual behavior to show a motive behind asserting false accusations. We disagree.

The rape shield statute precludes evidence of past sexual behavior for the purpose of challenging the credibility of the witness. RCW 9A.44.020(2). Darryl Pond wished to employ text messages to challenge the credibility of A.B. by showing a motivation to lie

because she engaged in behavior disapproved of by her parents. Thus, the statute precluded the proffered text messages.

Darryl Pond seeks to draw parallels between his prosecution and *State v. Horton*, 116 Wn. App. 909, 920, 68 P.3d 1145 (2003). In *Horton*, this court reversed Thomas Ray Horton's conviction because the trial court disallowed evidence of his alleged victim's past sexual behavior and statements she made to police officers regarding her past sexual behavior. During direct examination, the victim testified she had not engaged in sexual intercourse with anyone else and her testimony implied that the trauma from the rape ripped her hymen. Horton sought to show the victim provided inaccurate testimony at trial. The Court of Appeals ruled that the exception to the rape shield statute, found in RCW 9A.44.020(4), applied.

The State of Washington never introduced evidence of A.B.'s past sexual behavior or lack thereof in Darryl Pond's prosecution. Thus, *State v. Horton* affords Pond no aid.

Darryl Pond mentions that the legislature directed the rape shield statute at the misuse of prior sexual conduct evidence based on an antiquated and illogical premise that a woman's promiscuity relates to her truth telling. *State v. Hudlow*, 99 Wn.2d 1, 8, 659 P.2d 514 (1983). Pond impliedly contends that the exclusion of his proffered evidence fails to fulfill this legislative purpose. No Washington decision limits application of the rape shield statute to such circumstances, however. Pond directly sought to challenge the credibility of A.B. by indirectly impugning her motives based on a sexual relationship.

We also observe that the trial court permitted Darryl Pond to elicit testimony that A.B. maintained a cell phone to communicate with a friend against her parents' instructions, which evidence would relate to the purported ulterior motive.

We question whether the text message "I love you" pertains to sexual behavior. No Washington case has defined the phrase "past sexual behavior" for purposes of the rape shield statute. *State v. Jones*, 168 Wn.2d 713, 722, 230 P.3d 576 (2010). Nevertheless, Darryl Pond does not contend that this one text is unrelated to sexual behavior. The message could be wrapped in romantic feelings and physical attraction of a young woman for a young man rather on sexual behavior.

Right to a Defense

The Sixth Amendment to the United States Constitution and Wash. Const. art. I, § 22 provide that a defendant has the right to present evidence to support his defense. *State v. Strizheus*, 163 Wn. App. 820, 829-30, 262 P.3d 100 (2011). This right extends only to relevant and admissible evidence. *State v. Strizheus*, 163 Wn. App. 820, 830 (2011). ER 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The trial court even holds discretion to exclude relevant evidence "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." ER 403.

Darryl Pond argues that evidence of the reason behind A.B.'s parents ordering her to counseling after they discovered her secret cell phone and secret relationship with S.M. bears relevance to his defense theory that A.B. maintained a motive to falsely accuse him of molestation. While the trial court did not deem this evidence relevant to the disclosure A.B. made to her counselor during her first counseling session, the trial court allowed Pond to present evidence establishing that A.B.'s parents ordered her to see a counselor after they discovered the cell phone she hid from them, which she had used to arrange secret meetings with a "friend." The trial court excluded the offered evidence of A.B. and S.M.'s relationship to explain why A.B.'s parents ordered her to see a counselor because it determined aspects of that relationship were highly prejudicial and Pond could present the same argument without them. By limiting Pond's desired defense theory argument in this manner, the trial court permissibly filtered out the prejudicial aspects of A.B. and S.M.'s relationship while still permitting Pond to present the argument that A.B.'s parents ordered her to see a counselor because she broke their rules by being secretive with a cell phone and meeting with a friend without their permission. The trial court did not abuse its discretion.

Even with the court's permission to present evidence of A.B. breaking parental rules, Darryl Pond conceded at trial that this evidence lacked relevance to his defense if

the State did not introduce testimony that A.B. first revealed Pond's abuse to the counselor. The State did not introduce such testimony.

Darryl Pond argues that evidence of A.B.'s mother's misleading of the defense as to the location of A.B.'s cell phone and its disposition once discovered is relevant to his defense theory that A.B. had a motive to make a false accusation against him. Pond asserts this argument at the beginning of his brief, but fails to address in his analysis why the evidence bears relevance to his motive theory. We need not consider arguments that a party fails to develop in his briefs. *American Federation of Teachers, Local 1950 v. Public Employment Relations Commission*, 18 Wn. App. 2d 914, 921, 493 P.3d 1212 (2021), *review denied*, 198 Wn.2d 1038, 501 P.3d 146 (2022); *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P.3d 232 (2004).

STATEMENT OF ADDITIONAL GROUNDS

On appeal, Darryl Pond forwards two grounds in his statements of additional grounds. He complains that the trial court prohibited him from mentioning his restless limb syndrome, which occasionally caused him to wake up during the night. He also protests the trial court's preclusion of evidence that he took pills for the syndrome. Nevertheless, Pond does not cite the page or pages in the record that document the trial court's ruling. Nor does Pond argue the relevance of this evidence in his statement of additional grounds. Although a defendant is not required to provide citations to the record or to authorities in his statement of additional grounds, this court "will not

consider a defendant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors." RAP 10.10(c). Furthermore, this court need not search the record in support of claims made in an accused's statement of additional grounds for review. RAP 10.10(c).

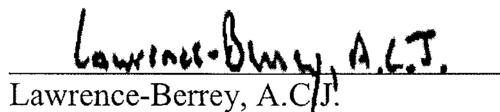
CONCLUSION

We affirm Darryl Pond's conviction.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR: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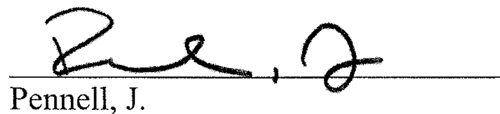
Pennell, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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