Supreme Court No.: 93920-9
Court of Appeals No.: 72941-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARIO ONTIVEROS,

Appellant.

PETITION FOR REVIEW

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

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Mario Ontiveros, appellant below, requests this Court grant review of the decision of the Court of Appeals in *State v. Ontiveros*, No. 72941-1-I (Nov. 7, 2016). A copy of the opinion is attached as an Appendix.

B. ISSUES PRESENTED FOR REVIEW

1. In 2010 psychologists issued a white paper detailing the techniques police officers use that triple the likelihood of eliciting false confessions from innocent people. This Court should grant review to determine the admissibility of expert testimony to educate juries on the phenomenon of false confessions and the techniques likely to elicit them. RAP 13.4(b)(3), (4).

2. The Court should grant review because the Court of Appeals opinion conflicts with *State v. Caliguri*, 99 Wn.2d 501, 508, 664 P.2d 466 (1983), which held the defendant has a right to be present for all communications between the court and jury, by denying Ontiveros's personal presence for the formulation of responses to seven jury inquiries. RAP 13.4(b)(1), (3), (4).

3. Where no case from this Court is directly on point, this Court should grant review of the trial court's admission of prejudicial and irrelevant evidence of the alleged victim's self-harming behavior and her

opinion, bolstered by her therapist, that Ontiveros's conduct led her to induce harm upon herself. RAP 13.4(b)(4).

4. The Court should grant review to determine whether the trial court violated Ontiveros's right to a jury trial by forbidding defense counsel from asking prospective jurors questions about wrongful convictions. RAP 13.4(b)(3), (4).

C. STATEMENT OF THE CASE

Mario Ontiveros moved to Washington from Texas in 2004 to live with his sister and her husband while Ontiveros's mother was ill and he was having problems in high school. 10/27/14 RP 177; 10/28/14 RP 33, 42-43; Ex. 24 at 4. He obtained a job, paid rent, and helped with household chores. 10/24/14 RP 111-12; 10/28/14 RP 17-18.

The husband's daughter from a prior marriage, KW, lived primarily with her mother but spent every other weekend during the school year, some holidays, and various weeks during the summer with her father and stepmother. 10/24/14 RP 4, 5; 10/27/14 RP 19, 179. KW had a good relationship with Ontiveros, and they watched television and played video games together. 10/24/14 RP 7; 10/28/14 RP 4-5, 35.

In August 2006, when she was 11 years old, KW told her mother that Ontiveros was doing something she could not see, told her he was masturbating, asked her if she had ever masturbated, and suggested she

should try it. 10/24/14 RP 31; 10/27/14 RP 33-34. KW assured her mother that Ontiveros had not touched her. 10/27/14 RP at 59. KW's mother related the information to her father, who confronted Ontiveros. 10/27/14 RP 34, 57, 69; 10/28/14 RP 9. Ontiveros responded that he had the reported conversation with KW. 10/28/14 RP 9. Ontiveros left his sister's home that day and returned to Texas. *Id.* at 10, 37.

Years later, KW became withdrawn and depressed; she frequently missed school and began cutting herself. 10/24/14 RP 33-34. KW told her mother about her unhappiness and the self-harm, related that she had not told her mother everything that happened with Ontiveros, and asked for counseling. Id. at 46; 10/27/14 RP 73. Her mother arranged for KW to see a therapist, Logan Roth, who met with KW for about six months. 10/27/14 RP 37-38.

KW told Ms. Roth that someone who lived in her father's house had touched her breasts, and she reported to a high school counselor that she had been molested. 10/24/14 RP 48, 170; 10/27/14 RP 111-12. The school counselor called the police. 10/24/14 RP 171.

KW provided a written statement via email to Snohomish County Sheriff's Deputy Steven Martin and then sent him an amended statement in response to his questions and suggested additions. 10/28/14 RP 111-15. The Snohomish County Prosecutor charged Ontiveros with a single count

of child molestation in the first degree, later amended to four counts of child molestation in the first degree and one count of communicating with a minor for immoral purposes. CP 971-72, 1003.

At trial in 2014, 19-year-old KW testified that Ontiveros grabbed her, tickled her, and briefly touched her breasts when he tucked her into bed on the evenings she stayed at her father's home in Everett. 10/24/14 RP 3, 16-22. KW could not describe any particular incidents, explaining they all blended together. *Id.* at 20, 27. KW also related times when Ontiveros talked to her about masturbation. 10/24/14 RP 11-14, 22, 25-26, 28-29.

The jury heard a tape-recorded statement Detective Martin took from Ontiveros in August 2012. 10/28/14 RP 119-20; Ex. 23. Ontiveros denied masturbating in KW's presence, but he later admitted that KW may have seen him masturbating and he might have talked to her about it. Ex. 24 at 13-16, 17-18, 23, 36, 37-38, 40. Ontiveros denied touching KW's breasts, then agreed he could have accidentally touched her breasts one time when tickling her, and later admitted it was possible it happened two times or maybe a few times. Ex. 24 at 19-22, 26-31, 33-34, 45.

Before trial, the court excluded testimony from Deborah A. Connolly, a psychologist who would have testified about police interrogation tactics that lead to false confessions. CP 815-31. Dr.

Connolly reviewed the transcript of Ontiveros's interview, located suggestive tactics, and would have opined that Ontiveros's admissions should be viewed with extreme caution. CP 796-814.

The jury found Ontiveros guilty of two counts of first degree child molestation, two counts of the lesser-included crime of fourth degree assault, and one count of communicating with a minor for immoral purposes. CP 261-63, 268-69. The Court of Appeals affirmed. Slip Op. at Appendix.

D. ARGUMENT

1. The Court should grant review to rule on the admissibility of expert testimony on the phenomenon of false confessions and the techniques police use that increase the rate of false confessions.

The State introduced Ontiveros's tape-recorded interview with a police detective, but the trial court prevented the defense from calling an expert witness who would have testified that, due to interview techniques utilized by the detective, the resulting admissions should be viewed with caution. The trial court ruled the expert testimony was irrelevant because the expert did not know if Ontiveros was innocent. 10/23/14 RP 8-9. The Court of Appeals recognized the trial court overreached in its ruling and misstated precedent, yet the Court of Appeals affirmed the trial court's exclusion of expert testimony on false confessions. Slip Op. at 7-8.

Without the expert, the jury had no reason to doubt the detective's approach or Ontiveros's admissions.

Confessions are extremely powerful evidence, and the accused must be permitted to present reliable evidence bearing on the credibility of a confession. *Crane v. Kentucky*, 476 U.S. 683, 690-91, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); *see* U.S. const. amends. VI, XIV; Const. art. I, § 22; *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (defendant is guaranteed "a meaningful opportunity to present a complete defense"). As this Court has held, "If the evidence is of high probative value . . . 'no state interest can be compelling enough to preclude its introduction constituent with the Sixth Amendment and Const. art. 1, § 22.'" *State v. Jones*, 168 Wn.2d 713, 723-24, 230 P.3d 576 (2010) (quoting *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)).

Psychology professor Deborah Connolly reviewed Detective Martin's interview with Mario Ontiveros and concluded that it was a guilt-presumptive interview that should be "treated with great caution." CP 806-07. In her written report, Dr. Connolly explained that when an interviewer like Detective Martin assumes a person is guilty, he is likely to ignore or reject evidence to the contrary. CP 806. She pointed out where Detective Martin rejected Ontiveros whenever he denied guilt and continued to question him about allegations he had denied. CP 804, 806.

Dr. Connolly's report relied on a 2010 Scientific Review Paper by the American Psychology-Law Society, a division of the American Psychological Association, summarizing the research regarding false confessions. CP 799 (citing Saul M. Kassin et. al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law & Hum. Behav. 3, 4 (2010) (hereafter *White Paper*)).[1]

Experts have concluded that minimization and other techniques, used by Detective Martin, are three times or more likely to lead to a false confession by an innocent person. CP 255, 774-75, 802. For example, here, Detective Martin asked Ontiveros why KW would say that he had molested her, but rejected Ontiveros's explanation as nonsensical. CP 804. The detective also used sequential requests for admissions combined with statements minimizing the seriousness of the actions or providing excuses for them. CP 805-06. The detective praised Ontiveros for any incriminating statements. *Id.* The detective later encouraged Ontiveros to "take responsibility" and "get it off his chest," and he presented options for Ontiveros to explain his actions, but all of the options were consistent with guilt. CP 806.

Dr. Connolly noted that Ontiveros was susceptible to the detective's interview techniques, as many of his admissions occurred

[1] The White Paper can be found at CP 757-94.

immediately or shortly after a statement by the detective minimizing the actions or posing options. CP 807. Ontiveros was also willing to agree to at least one of Detective Martin's statements even if he did not understand all of the words. CP 806. She concluded that his statement should be viewed with "great caution." CP 807.

The Court of Appeals opinion holds defendants to a more stringent standard for admissibility in this area than mandated by ER 401 and 402. *See State v. Franklin*, 180 Wn.2d 371, 325 P.3d 159 (2014) (reversing where trial court imposed a higher burden for admissibility of other suspect evidence than established by evidentiary rules or precedent). The Court of Appeals opinion apparently presumes that jurors are aware of the fact and frequency of false confessions—innocent persons admitting to an act they did not commit. But research shows lay jurors are not aware of this phenomenon. *White Paper* at 23-24; CP 307-08 (Decl. of Kelly Canary, ¶¶ 4-6).[2] Dr. Connolly's testimony would have been an education

[2] *Accord* Mark Costanzo et. al., *Juror Beliefs About Police Interrogation, False Confessions, and Expert Testimony*, 7 J. Empirical Legal Studies 231 (June 2010); Richard A. Leo & Brittany Liu, *What do Potential Jurors Know About Police Interrogation Techniques and False Confessions?*, 27 Behav. Sci. & Law 381 (2009); Iris Blandón-Gitlin et. al., *Jurors Believe Interrogation Tactics Are Not likely to Elicit False Confessions: Will Expert Witness Testimony Inform them Otherwise?*, 17 Psych., Crime & Law 239 (2011); Danielle E. Chojnacki et. al., *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 Ariz. St. L.J. 1, 3-4, 40 (2008) (survey results showed that

to the jury. The fact that false confessions exist and the circumstances under which they exist was also relevant because Ontiveros's telephonic statement was admitted at trial, and the jury was tasked with determining whether that statement was true.

The exclusion interfered with Ontiveros's constitutional rights to due process and to present a defense. Ontiveros was denied his "prerogative to challenge the confession's *reliability* during the course of [his] trial." *Crane*, 476 U.S. at 688. Due process and the right to present a defense mandate that Ontiveros could "familiarize" his jury "with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness." *Id.* (quoting *Lego v. Twomey*, 404 U.S. 477, 485-86, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972)). Because the trial court's ruling "stripped" Ontiveros "of the power to describe to the jury the circumstances that prompted his confession," he was "effectively disabled from answering the one question every rational juror needs answered: If [Ontiveros] is innocent, why did he previously admit his guilt?" *Id.* at 689.

"the body of knowledge on false confessions is . . . well outside of the common knowledge of jury-eligible citizens" and 73% of respondents believed that an innocent person would "never confess" or would confess only after "strenuous interrogation pressure").

This Court denied review of the trial court's exclusion of expert testimony on false confessions in *State v. Rafay*, 168 Wn. App. 734, 285 P.3d 83 (2012), *rev. denied* 176 Wn.2d 1023 (2013). While that Court of Appeals opinion is distinguishable in several respects[3] and the trial court did not have the benefit of the *White Paper* when it issued its ruling in 2004, the appellate court relied on *Rafay* here. Slip Op. at 3, 5. The lower courts need guidance from this Court on the admissibility of expert testimony related to false confessions and false confession techniques.

Admission of testimony regarding false confessions cannot be limited to cases where the defendant has a specific personality or mental disorder that makes him or her particularly susceptible to coercive interrogation techniques because the research is clear that everyone is susceptible to certain interrogation methods. *Compare* Slip Op. at 7 (testimony might be admissible in cases where defendant exhibits susceptibility characteristics) *with* CP 772-75 (*White Paper* at 16-19). The fact is that innocent people falsely confess on a regular basis when

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[3] Unlike in *Rafay*, Dr. Connolly would show where Ontiveros showed susceptibility to the detective's techniques. *Compare* 168 Wn. App. 734, 786-87 *with* CP 806-07. Ontiveros knew he was speaking with a detective here, whereas the "confession" at issue in *Rafay* was the result of an undercover operation. 168 Wn. App. at 749-54, 785. Moreover, due in part to advances in scientific study, Dr. Connolly could link the detective's coercive interrogation techniques to an increased rate of false confessions. *See id.* at 786 (faulting lack of expert correlation between coercive interview techniques and false confessions); CP 255, 774, 802.

confronted with the interrogation tactics at issue in this case, even if that person is not particularly young or cognitively limited. *E.g.*, CP 255, 774, 802. Courts in other states have held that expert testimony on the phenomenon and techniques of false confessions is admissible; this Court should grant review and hold the same. *E.g.*, *Jimerson v. Indiana*, 56 N.E.3d 117 (Ind. Ct. App. 2016) (upholding trial court's ruling admitting expert testimony "about the phenomena of false confessions and about the problematic practices" generally employed by law enforcement interviewers where suspect exhibited no individual susceptibility characteristics) (internal quotation marks omitted); *Shelby v. State*, 986 N.E.2d 345, 367-70 (Ind. Ct. App. 2013) (experts may testify on "general subjects of coercive police interrogation and false or coerced confessions" as well as "techniques the police used in a particular interrogation"); *Utah v. Perea*, 322 P.3d 624, 633, 637-44, 647-48 (Utah 2013) (trial court erred in excluding expert testimony about the situational risk factors that contribute to false confessions where defendant apparently lacked any individual susceptibility characteristics).

2. Review should be granted to hold that discussions of jury inquiries and the formulation of responses to those inquiries, particularly on factual matters, are critical stages for which the defendant is entitled to be present.

In *State v. Caliguri*, this Court held "there should be no communication between the court and the jury in the absence of the defendant." 99 Wn.2d 501, 508, 664 P.2d 466 (1983); *see* Const. art. I, § 22 (providing the right to "appear and defend in person"). Yet here, the trial court discussed and answered seven questions from the jury regarding the evidence, lack of evidence, and charging decisions without Ontiveros. CP 270-76; 10/31/14RP 2-5, 7.

The Court of Appeals distinguished *Caliguri* in a footnote and held Ontiveros's exclusion appropriate in part because it found the subject matter of the questions was not factual. Slip Op. at 10 n.6, 11. Our state constitutional right to be present, however, does not turn on whether the matter is factual or legal, rather the defendant has a right to be present at all critical stages. *State v. Irby*, 170 Wn.2d 874, 880-81, 246 P.3d 796 (2011).

The seven jury questions, moreover, did involve factual matters. The jury queried why no one contacted the internet service provider to retrieve deleted emails between KW and the detective; why KW's therapist did not submit a report; what were the contents of KW's 5th grade

sex education class; what videos games did KW and Ontiveros play; and why KW's physical development was significant. CP 271-74, 276. As the court's response demonstrates, these were factual inquiries for the response to which Ontiveros should have been present to assist counsel. *Id.* (characterizing the jury's inquiries as "Questions about the facts of the case concern[ing] evidence"). The jury's additional two questions involving the prosecutor's charging decisions also has factual components for which Ontiveros's presence was required. *See* CP 270, 275.

The Court of Appeals opinion finds "Providing the jury with requested information on a point of law is not a critical stage that required Ontiveros's personal presence." Slip Op. at 10. But the Court does not reconcile *Caliguri*'s holding that the defendant has a right to be present for all communications between the court and the jury. 99 Wn.2d at 508. Additionally, as set forth above, the jury's questions were factual in nature, accordingly the appellate court's reliance on "points of law" is misplaced.

The Court of Appeals further contends even if the questions were factual, the court's responses were not. Slip Op at 11. But the inquiry on review must consider what the court's answer might have been if Ontiveros had been present for the discussion and composition of the answers, not what transpired without him. In fact, once Ontiveros was

informed of the jury inquiries, defense counsel proposed different instructions. 10/31/14 RP 2-7; CP 81; 12/23/14 RP 18-24.

The Court should grant review to resolve the lower court's conflict with *Caliguri* and to hold that Ontiveros was guaranteed the right to be present while the trial court discussed responses to seven jury inquiries.

3. The Court should grant review to determine whether trial courts must exclude irrelevant and prejudicial evidence of an alleged victim's self-harm and her lay opinion on its cause.

The Court should grant review because, over objection, the trial court admitted irrelevant evidence from KW and her therapist that she engaged in self-harm due to Ontiveros's conduct, which created undue sympathy for KW and prejudiced Ontiveros. CP 733-34; 10/21/14 RP 201-10; 10/24/14 RP 33-34, 44 (objection renewed during trial).

At trial KW testified that she started cutting herself when she was about 15 years old in order to cope with depression and "trauma." 10/24/14 RP 33-34, 44. Over Ontiveros's renewed objection, KW defined "trauma" as "what Mr. Ontiveros had done to me and the lingering feelings I had about it." *Id.* at 34-42, 44. KW also linked her problems in school and work to the purported abuse. 10/24/14 RP 116-17

Therapist Roth then disclosed what KW told her about her cutting behavior and her inability to sleep; KW linked her inability to sleep to the

abuse. 10/27/14 RP 114-15, 119-22, 124. Ms. Roth declined to given an opinion about why KW was harming herself; she believed "it's better to come directly from the person themselves." *Id.* at 172-73. According to Ms. Roth, KW believed her behavior occurred because she felt disappointed by people, felt intense internal pain, and found emotional release in cutting. *Id.* at 174. In closing argument, the State argued that KW's self-harm and problems in school were directly related to the alleged offenses. 10/30/14 RP 90-91, 93-94, 116-17.

The Court of Appeals simply held the trial court's ruling was fairly debatable. Slip Op. at 13. But the lower court's lacked on point case law in this area. This Court should grant review and hold the admission of such evidence violates our evidentiary rules and this Court's related case law interpreting them. ER 401, 402, 403; *State v. Luvene*, 127 Wn.2d 690, 706, 903 P.2d 960 (1995). KW's problems in school and self-harming behavior after the events at issues were not relevant to the jury's determination of whether Mario Ontiveros molested or communicated with her for immoral purposes in 2006. The evidence was also prejudicial, as it was likely to cause an emotional response and produce added sympathy for KW. The State also used the testimony to bolster KW's credibility by showing her "nose dive" was caused by the alleged offenses. In essence, the prosecutor was eliciting KW's psychological problems and

problems in school so that the jury would conclude they were characteristics of abused children and proof that KW was abused.

The Court of Appeals also held defense counsel elicited the opinion testimony, opening door for the State to inquire as to same, Slip Op. at 14, but if the trial court had properly excluded KW's testimony, Ontiveros would have had no reason to inquire of Roth. Ontiveros did not open the door, but cross-examined Roth to minimize the harm from the court's admission of KW's self-harm behavior. *See* 10/27/14 RP 167-70, 172.

4. Review should be granted to determine whether a violation of the right to jury trial transpires where the trial court curtails a defendant's ability to question prospective jurors.

The Court should grant review to determine whether a defendant's right to a jury trial is violated where defense counsel is prohibited from asking questions in voir dire about wrongful convictions. The lower courts lack authority in this area, as is clear from the Court of Appeals opinion which cites only directly to other Court of Appeals opinions. Slip Op. at 14-16.

The federal and state constitutions protect Ontiveros's right to t a jury trial. U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22. To ensure the right to an impartial jury, the defendant has the right to move to

exclude a potential juror for cause or exercise a limited number of peremptory challenges without giving reason. *State v. SaintCalle*, 178 Wn.2d 34, 62, 309 P.3d 326 (2013) (Madsen, C.J., concurring); *State v. Latham*, 100 Wn.2d 59, 70, 667 P.2d 56 (1983). While the trial court has the discretion to set the limits and extent of examination, the defendant "should be permitted to examine prospective jurors carefully, 'and to an extent which will afford him every reasonable protection.'" *State v. Laureano*, 101 Wn.2d 745, 757-58, 682 P.2d 889 (1984).

The trial court prohibited Ontiveros's attorneys from asking questions about well-known wrongful conviction cases unless the cases were first brought up by a prospective juror. 10/20/14 RP 85-87. Ontiveros's defense depended upon convincing the jury that his admissions to Detective Martin were not reliable due to the interview techniques the detective utilized. Learning the prospective jurors' feelings and beliefs about a famous case where an innocent person was exonerated would have assisted the defense in exercising their peremptory challenges and may even have revealed a bias that was deserving of a peremptory challenge or a challenge for cause. It is through intense and expansive voir dire that bias and prejudice are revealed and the changes of seating an impartial jury improved. Sydney Gibbs Ballesteros, *Don't Mess With Texas Voir Dire*, 39 Hous. L. Rev. 201, 215 (2002).

The trial court's discretion to limit the scope of voir dire is limited "by the need to assure a fair trial by an impartial jury." *State v. Brady*, 116 Wn. App. 143, 147, 64 P.3d 1258 (2003), *rev. denied*, 150 Wn.2d 1035 (2004). The trial court here acknowledged the parties were entitled to find out what the jurors were thinking, but did not think a discussion of other cases could begin with a lawyer. 10/20/14 RP 86. The court therefore illogically ruled that wrongful conviction cases could be discussed, but only if first mentioned by a prospective juror. *Id.* at 86-87. There is thus no logical reason that the court's limitation assisted the process of selecting an impartial jury.

Our lower courts, and the parties, would benefit from this Court's ruling on the matter. The issue is likely to reoccur in light of the increased focus on coercive interrogation techniques and wrongful convictions. Therefore, review is also in the substantial public interest.

E. CONCLUSION

The Court should grant review because the lower courts set an unconstitutionally high bar to the admission of expert testimony on false confessions relevant to Ontiveros's defense. The Court should also grant review to consider whether the court violated Ontiveros's right to be present, admitted irrelevant and unduly prejudicial evidence of the alleged

victim's self-harming behavior, and whether the trial court impermissibly restricted the scope of voir dire.

DATED this 7th day of December, 2016.

Respectfully submitted,

s/ Marla L. Zink
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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MARIO ALBERTO ONTIVEROS, Appellant.	DIVISION ONE No. 72941-1-I UNPUBLISHED OPINION FILED: November 7, 2016

DWYER, J. — Mario Ontiveros appeals from the judgment entered on a jury's verdict finding him guilty of two counts of child molestation in the first degree, two counts of assault in the fourth degree, and one count of communicating with a minor for immoral purposes. He contends that the trial court violated his constitutional right to present a defense, violated his constitutional right to be present at all critical stages of the trial, admitted irrelevant and prejudicial testimony, and violated his right to a jury trial. Finding no error, we affirm.

I

In 2004, 16-year-old Ontiveros moved from Texas to Washington to live with his sister, Autumne, and her husband, Brad West.[1] Ontiveros resided in

[1] Because Autumne and Brad share a surname they are referred to by their first names for clarity.

Washington for approximately two years. During this time, Brad's daughter from a previous marriage, K.W., also stayed with her father every other weekend during the school year, some holidays, and various weeks during the summer.

One afternoon in 2006, when she was 11 years old, K.W. called her mother and asked to be picked up early from her father's house. During the drive home, K.W. told her mother that, earlier that same day, Ontiveros told her that he was masturbating, asked her if she knew how to masturbate, and suggested that he could show her how. At that time, K.W. stated that Ontiveros had not touched her. When they arrived home, K.W.'s mother called Brad, her ex-husband, and discussed what K.W. had told her. Brad confronted Ontiveros, who, Brad testified, admitted to having the aforementioned conversation with K.W. Brad told Ontiveros to leave the house. Ontiveros returned to Texas soon after.

K.W. testified that she struggled with depression in high school and, as a result, began to cut herself. K.W. revealed her self-harm to her mother, explaining that she had not told her mother about everything that Ontiveros did to her when she was younger. K.W. asked her mother for counseling. K.W. began seeing a therapist, Logan Roth, and, during their first session, told Roth that a man living in her father's house had touched her breasts and entered her room every night when she was younger. Roth did not report the abuse to the police or child protective services. K.W. voluntarily ended her treatment with Roth and later reported to her high school counselor that she had been molested. This counselor reported the allegations to the police.

In August of 2012, police questioned Ontiveros about the incidents over the telephone. Ontiveros first denied having any sexual contact with K.W. but, after repeated questioning, later admitted that K.W. may have seen him masturbating once and that he may have touched her breasts a few times while tickling her. Two years later, Ontiveros was charged with four counts of child molestation in the first degree and one count of communication with a minor for immoral purposes.

The jury found Ontiveros guilty of two counts of child molestation in the first degree, two counts of assault in the fourth degree, and one count of communication with a minor for immoral purposes. The trial court imposed a standard-range sentence of 78 months to life in prison on the child molestation convictions. No jail time was imposed on the assault or communication convictions. Ontiveros timely appealed.

II

Ontiveros first contends that the trial court violated his constitutional right to present a defense. This is so, he asserts, because the court excluded his expert witness's testimony regarding false confessions. Ontiveros's argument is unavailing.

Trial courts have broad discretion in determining whether expert testimony should be admitted. We review such rulings for abuse of discretion. State v. Rafay, 168 Wn. App. 734, 783-84, 285 P.3d 83 (2012). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the

factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). While the right to present defense witnesses is a fundamental element of due process, State v. Franklin, 180 Wn.2d 371, 382, 325 P.3d 159 (2014); State v. Ellis, 136 Wn.2d 498, 527, 963 P.2d 843 (1998), the right is not absolute. The proffered evidence must be relevant and helpful to the trier of fact. Ellis, 136 Wn.2d at 533.

ER 702 regulates expert witness testimony and provides, in pertinent part, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Prior to trial, Ontiveros sought to introduce the trial testimony of Dr. Deborah Connolly. Connolly was prepared to testify about false confessions generally. Additionally, Ontiveros contended that Connolly would have testified specifically to: (1) various interrogation techniques used by the detective during his interview with Ontiveros, including the "guilt presumptive" and "minimization and sequential requests" techniques; (2) her opinion that Ontiveros "appeared to be receptive to minimization and option-posing strategies"; and (3) her opinion that Ontiveros's confession should be "treated with great caution."[2]

[2] Connolly's written report discusses several studies and academic papers, which together constituted the offer of proof before the trial court. The portions of these studies that related to Ontiveros's confession, and to which Connolly was prepared to testify, were included in her report. At no time prior to preparing the report did Connolly speak to Ontiveros.

We have previously examined expert testimony regarding false confessions in State v. Rafay, 168 Wn. App. 734, a case referenced by the trial court in ruling Connolly's testimony inadmissible. In Rafay, we upheld the trial court's order excluding expert testimony on false confessions, in part, because the testimony would not "provide any method for the trier of fact to analyze the effect of the general concepts on the reliability of the defendants' confessions." 168 Wn. App. at 789.

Connolly's report describes guilt presumptive, confrontational, and minimization/option-posing interrogation techniques and briefly explains the relevant research relating to such techniques. Connolly opines that Ontiveros was susceptible to the interrogation techniques used by the detective who questioned him, and offers that "some individuals interpret [minimization and sequential requests] as implicit offers of leniency. When it becomes clear to an individual that continued denial is futile, and when the individual is offered a way to minimize culpability, a confession or admission is a reasonable option."

Connolly's report also includes a study on academic dishonesty in which various interrogation techniques—or no techniques at all—were used on participants in order to determine which techniques produced higher rates of false confessions. When no tactics were used, 46 percent of the guilty participants confessed and 6 percent of the innocent participants confessed. When the interrogators used minimization and leniency tactics, 87 percent of the

guilty participants confessed and 43 percent of the innocent participants confessed.[3]

Although Connolly opines that Ontiveros "was amenable" to these strategies, the report does not state (1) that Ontiveros was susceptible to falsely confessing, or (2) that any interrogation technique used on Ontiveros was more likely to produce false confessions than legitimate confessions. The minimization and leniency techniques Connolly was prepared to testify to may produce more false confessions than other techniques, but the report indicates that they also produce more legitimate confessions.

There is nothing in the record to indicate that Connolly would have testified that, in her opinion, Ontiveros's confession was false. At most, the testimony would have been that the criticized techniques result in more confessions (both true and false). Because of this, the testimony would have merely advised the jury to treat the confession with caution.[4] Ontiveros has not identified anything in Connolly's report that would have assisted the jurors in analyzing the evidence before them.

In reaching a verdict, the jury was tasked with deciding whether Ontiveros was guilty or not guilty and, thus, whether his confession was true or false. Connolly's testimony would not have assisted the jury in making such a determination. Moreover, although Connolly would have testified that the

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[3] The report presumes—but does not explain how—the results of a study on academic dishonesty are relevant to police interrogations.

[4] Although courts may instruct juries to treat certain testimony with caution, such as accomplice testimony, State v. Harris, 102 Wn.2d 148, 685 P.2d 584 (1984), such an instruction sets forth a legal principle. This differs from the testimony as to facts expected from a witness.

interview techniques used on Ontiveros are likely to increase the frequency of confessions, this testimony would not have provided the jury with a method to distinguish between false confessions and legitimate confessions. Such testimony does not make the existence of a fact at issue more or less likely to be true. ER 401. Thus, it was irrelevant. ER 402.

The trial court's ruling purported to exclude Connolly's testimony on the basis that Connolly does not know if Ontiveros is innocent: "[s]o the testimony is only relevant if the person, in fact, was innocent. And that is, of course, the ultimate question for the jury anyway, and so it is not useful to the trier of fact." Although the trial court relied on Rafay in issuing its ruling, its stated reason for excluding the testimony misstates the scope of Rafay's holding.

Under the trial court's reasoning, expert testimony regarding false confessions might never be admissible. To the contrary, such testimony may be properly admitted in certain circumstances. For instance, such testimony may be helpful to the jury in situations where the defendant has a specific personality or mental disorder that renders them particularly vulnerable to coercive interrogation methods. See United States v. Shay, 57 F.3d 126, 133 (1st Cir. 1995) ("[W]hether or not the jury had the capacity to *generally* assess the reliability of these statements in light of the other evidence in the case, it plainly was unqualified to determine without assistance the *particular* issue of whether [the defendant] may have made false statements against his own interests because he suffered from a mental disorder.").

We do not go so far as to say that expert testimony on false confessions may only be admitted in matters in which the defendant suffers from a personality or mental disorder. However, Connolly's proposed testimony would not have presented the jury with any information that would have aided the jurors in determining a fact in issue. Thus, the trial court's ruling was within the range of acceptable choices afforded to it. State v. Sisouvanh, 175 Wn.2d 607, 623, 290 P.3d 942 (2012); Littlefield, 133 Wn.2d at 47. There was no error.

III

Ontiveros next contends that the trial court violated his constitutional right to be present during all critical stages of the trial. This is so, he asserts, because the trial court and the attorneys discussed and formulated answers to questions from the deliberating jury at a time when Ontiveros was not in the courtroom.

Both the federal and state constitutions provide criminal defendants with a right to be present during critical stages of the trial. U.S. CONST. amend. XIV, § 1; WASH. CONST. art. I, § 22. Pursuant to Washington's constitution, this right applies at any stage of the trial when the defendant's substantial rights may be affected. State v. Irby, 170 Wn.2d 874, 885-86, 246 P.3d 796 (2011). A defendant does not have a right to be present during a conference between the court and counsel on legal matters, unless those matters require the resolution of disputed facts. In re Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994).

During its deliberations, the jury sent seven written inquiries to the trial judge. The various inquiries asked about the prosecutor's charging decisions

and inquired about specific pieces of evidence. The trial court notified the attorneys, who appeared in court, and the judge and counsel formulated answers to the jury's questions. Ontiveros was not present during this discussion. After receiving input from counsel, the court responded to the jury's questions regarding the prosecutor's charging decisions by stating, "[t]he Court cannot comment on charging decisions." Regarding the jury's evidentiary questions, the court answered, "[q]uestions about the facts of the case concern evidence. The parties having rested, no further evidence will be introduced."

After the trial court sent these responses to the jury, Ontiveros's counsel requested that the court provide additional answers to the jury. Specifically, Ontiveros's counsel requested that the court instruct the jury that the charges are not evidence, that the jury can consider both the evidence and lack of evidence, and that the State has the burden to prove all elements of each offense beyond a reasonable doubt.[5] The court did not respond to this request because, at that time, the jurors indicated that they had reached a verdict. Before hearing the verdict, counsel for Ontiveros stated that Ontiveros had not been present for the formulation of the court's responses to the jury's questions. There was no objection interposed at this time, as counsel for Ontiveros was unsure whether such a discussion constituted a critical stage of the trial requiring Ontiveros's presence. After the adverse verdicts, Ontiveros moved for a new trial on the ground that he was not present for the formulation of the answers which, he

[5] The trial court properly issued these instructions before deliberations began. Ontiveros's counsel thus requested that the court instruct the jury on these matters a second time.

asserted, constituted a critical stage of the trial. The motion for a new trial was denied.

On appeal, Ontiveros again asserts that the trial court's formulation of the responses to the jury's inquiries outside of his presence violated his constitutional right to be present for all critical stages of the trial. This is so, he contends, for two reasons: (1) because any communication between a judge and the jury during a critical stage of the trial is prohibited, and (2) because the jury's questions were factual in nature and formulating a proper answer required a knowledge of the facts of the case. Ontiveros is wrong on both counts.

Ontiveros's first contention is without merit. Ontiveros has not established that this was a critical stage of the trial that required his personal presence. The trial court's responses to the jury questions herein were akin to supplemental jury instructions, which may properly be given during deliberation. CrR 6.15(f); State v. Becklin, 163 Wn.2d 519, 529-30, 182 P.3d 944 (2008). A trial court's decision to give or decline to give supplemental jury instructions is within its discretion. State v. Brown, 132 Wn.2d 529, 612, 940 P.2d 546 (1997). Providing the jury with requested information on a point of law is not a critical stage that required Ontiveros's personal presence in addition to that of his counsel. State v. Brown, 29 Wn. App. 11, 16, 627 P.2d 132 (1981); State v. Jury, 19 Wn. App. 256, 270, 576 P.2d 1302 (1978).[6]

[6] Ontiveros relies on State v. Caliguri, 99 Wn.2d 501, 664 P.2d 466 (1983), to support his assertion that any communication between a judge and the jury outside of the presence of the defendant is prohibited. The comparison is inapposite. In Caliguri, the trial court replayed tape recordings for the deliberating jury—essentially giving the jury an opportunity to perceive the evidence anew out of the presence of the defendant, including statements that had originally been redacted. The trial court herein provided the jury with no such opportunity.

As for Ontiveros's second contention, although the jury asked questions regarding the facts, the trial court's responses were not factual in nature. Rather, the court's answers set forth legal principles. Moreover, the trial court's responses were "entirely neutral". State v. Russell, 25 Wn. App. 933, 948, 611 P.2d 1320 (1980). The court's responses to the jury's inquiries were "negative in character and conveyed no affirmative information." State v. Safford, 24 Wn. App. 783, 794, 604 P.2d 980 (1979). Thus, there was no error.

Ontiveros asserts that, were he personally present when the trial court formulated its answers to the jury's questions, his attorney may have consulted with him and may have asked for additional instructions before the jury finished deliberating. This is pure speculation. Indeed, the supplemental jury instructions eventually requested by defense counsel were duplicative of instructions already given. The trial court could have properly refused to reissue those instructions even if the request to do so had been timely made. State v. Hightower, 36 Wn. App. 536, 549, 676 P.2d 1016 (1984). Finally, the event itself (issuing supplemental jury instructions) is not a critical stage. Jury, 19 Wn. App. at 270. The trial court did not err in responding to the jury's inquiries.

IV

Ontiveros next asserts that the trial court erred by permitting testimony by K.W. and her therapist, Roth, regarding K.W.'s self-harm and K.W.'s opinion as to why she engaged in self-harm. This is so, he contends, because permitting the aforementioned testimony was prejudicial, irrelevant, and materially affected the outcome of the case.

The trial court has broad discretion in balancing the probative value of evidence against its prejudicial impact and we will not reverse the trial court's decision absent a manifest abuse of that discretion. State v. Rivers, 129 Wn.2d 697, 710, 921 P.2d 495 (1996); State v. Greathouse, 113 Wn. App. 889, 918, 56 P.3d 569 (2002).

Pursuant to ER 402, only relevant evidence is admissible at trial. 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 evidence." However, even relevant evidence must be excluded when its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. "'"[U]nfair prejudice" is that which is more likely to arouse an emotional response than a rational decision by the jury'" and "suggest[s] a decision on an improper basis." State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000) (first alteration in original) (quoting State v. Gould, 58 Wn. App. 175, 183, 791 P.2d 569 (1990)).

Prior to trial, Ontiveros moved to exclude evidence that K.W. had engaged in self-harm, as well as K.W.'s opinion that her self-harm was a result of her sexual abuse. The trial court ruled that K.W. could testify as to her self-harm, and what she believed to be her reasons for harming herself, in order to explain why she entered therapy. At trial, K.W. testified that she engaged in self-harm to cope with the trauma of her sexual abuse. Similarly, Roth testified at trial that K.W. disclosed her self-harm during their first therapy session and that K.W.

believed her depression, self-harm, and inability to sleep were caused by her sexual abuse.

On cross-examination, counsel for Ontiveros questioned Roth as to why some people might engage in self-harm. Roth responded, "[t]hat would have to come from them directly." On re-direct, Roth stated that she had not reached any conclusions as to why K.W. was harming herself, but believed that a person is able to determine for themselves why they are doing so.

Ontiveros asserts that the aforementioned testimony was irrelevant and prejudicial. He also takes issue with the opinion testimony offered by Roth despite the trial court's ruling in limine that Roth could not testify as an expert witness.[7]

We review the trial court's decisions on this testimony to determine whether the decisions were manifestly unreasonable, based on untenable grounds, or made for untenable reasons. Sisouvanh, 175 Wn.2d at 623; Gould, 58 Wn. App. at 180. The trial judge ruled that K.W.'s testimony regarding her self-harm was admissible on the question of why she entered therapy.[8] Roth's testimony was limited to that which K.W. told her during therapy and was admitted for the same purpose as K.W.'s testimony. The trial court's ruling is at least "fairly debatable" and, thus, does not constitute an abuse of discretion. Walker v. Bangs, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979).

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[7] Although Roth was not permitted to testify as an expert, the State conceded at trial that Roth's testimony regarding why people might engage in self-harm was opinion testimony that required a jury instruction on the use of expert testimony.

[8] This is a case of delayed reporting. That a person delays in reporting a sexual assault can give rise to an inference that the traumatic event likely did not happen. K.W.'s testimony on her need for therapy also served to rebut that inference.

With regard to the opinion testimony given by Roth, the only such testimony was first elicited by Ontiveros's own counsel. When defense counsel asked Roth's opinion as to why some people engage in self-harm, the door was opened for the State to inquire on the same subject on redirect. See, e.g., State v. Jones, 111 Wn.2d 239, 248-49, 759 P.2d 1183 (1988) (holding that questioning by defense counsel opened the door for the prosecution to ask about otherwise inadmissible evidence).

There was no trial court error.

V

Finally, Ontiveros contends that the trial court denied him his right to a jury trial. This denial, he asserts, arose from the trial court's ruling prohibiting Ontiveros from questioning potential jurors about specific wrongful conviction cases.

Trial courts have broad discretion in determining the scope and extent of voir dire. CrR 6.4(b); State v. Frederiksen, 40 Wn. App. 749, 752, 700 P.2d 369 (1985). "The trial court's exercise of discretion is limited only by the need to assure a fair trial by an impartial jury." Frederiksen, 40 Wn. App. at 752 (citing United States v. Jones, 722 F.2d 528, 529 (9th Cir. 1983)). We will reverse a trial court's ruling on the scope of voir dire only for an abuse of discretion and only if the defendant shows that the abuse substantially prejudiced him. State v. Brady, 116 Wn. App. 143, 147, 64 P.3d 1258 (2003) (citing State v. Davis, 141 Wn.2d 798, 825-26, 10 P.3d 977 (2000)). "The refusal to permit specific questions is not reversible error absent an abuse of discretion, which will be

found only if the questioning is not reasonably sufficient to test the jury for bias or partiality." Frederiksen, 40 Wn. App. at 752.

Prior to conducting voir dire, the trial court prohibited Ontiveros's attorneys from questioning potential jurors about specific cases involving wrongful convictions. The court clarified that general questions about a potential juror's concerns, including concerns about a person's guilt or innocence, would be permitted, stating, "I will only preclude lawyers from raising specific questions either by name or by particular facts".

Ontiveros contends that such a prohibition was an abuse of discretion that resulted in substantial prejudice to his cause. In support of this proposition, Ontiveros cites to State v. Brady, 116 Wn. App. 143. However, the comparison is inapt. In Brady, the trial court allotted time for all attorneys to use for voir dire, but then ended voir dire before that time expired. We held in Brady that the trial court abused its discretion because it "changed the rules" part way through the voir dire. 116 Wn. App. at 148-49. The trial court in Brady abused its discretion because the parties had initially set aside important questions, only to later discover that they would be unable to pursue those lines of questioning.

This is not such a case. The trial court here set the rules for voir dire beforehand and did not alter those rules thereafter. Counsel was permitted to question jurors about concerns they may have had regarding a party's guilt or innocence and respond to any juror questions about specific cases.

Ontiveros speculates that, had his counsel been permitted to ask about specific, wrongful conviction cases, a juror may have revealed a bias deserving

of a preemptory challenge. However, Ontiveros has not demonstrated why the line of permitted questioning—regarding a juror's concerns about guilt or innocence—was insufficient to explore these biases. Consequently, Ontiveros does not establish that the trial court's prohibition substantially prejudiced him. There was no error.

Affirmed.

Duggan, J.

We concur:

Lapelwick, J.

Becker, J.

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72941-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Washington Appellate Project

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