SUPREME COURT NO. 97106-4

NO. 35294-3-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHNNY TALBERT, JR.,

Petitioner.

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

The Honorable Alexander Ekstrom, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Johnny Talbert, Jr. asks this Court to grant review of the court of appeals' unpublished decision in State v. Talbert, 2019 WL 852338, filed February 21, 2019 (Appendix A), and the subsequent Order Denying Motion for Reconsideration, filed March 22, 2019 (Appendix B).

B. ISSUES PRESENTED FOR REVIEW

This case presents the questions, what is the correct legal framework to evaluate a claim that evidence must be admitted under the constitutional right to present a defense? What is the correct standard of review on appeal?

1. Is this Court's review warranted under RAP 13.4(b)(1) because the decision of the court of appeals, and the legal standard articulated therein, conflict with this Court's decisions in State v. Duarte Vela, 200 Wn. App. 306, 402 P.3d 281 (2017), State v. Jones, 168 Wn.2d 713, 720-21, 230 P.3d 576 (2010), and State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002)?

2. Is this Court's review warranted under RAP 13.4(b)(3) because it presents a "significant question" of constitutional law under the Sixth Amendment to the U.S. Constitution and article I, section 22 of the Washington Constitution: that the right to present a defense supersedes application of other court-created rules of evidence that exclude hearsay?

3. Is this Court's review warranted under RAP 13.4(b)(4) because it presents a question of "substantial public interest": whether a trial court may disregard existing Washington Supreme Court jurisprudence to exclude evidence relevant to an accused's right to present a defense on the basis of hearsay rules where the State makes no showing of prejudice?

C. STATEMENT OF THE CASE

1. Charges & Defense

The Benton County Prosecutor's Office charged Johnny Talbert Jr. with one count of first degree child rape, two counts of first degree child molestation, and the aggravator abuse of position of trust. CP 7. The State alleged Talbert had engaged in sexual acts with seven-year-old J.Q., the daughter of Talbert's girlfriend. CP 7-8; 1RP 527, 529-30.[1]

Talbert asserted general denial and proceeded to a trial by jury.

2. Trial Evidence

At trial, the State presented testimony from J.Q., her mother, an elementary school counselor, a child interviewer, a nurse, and two detectives, as well as an expert in child interview techniques. The State also presented a recording of J.Q.'s forensic interview, body diagrams

[1] This Petition refers to the verbatim transcripts of proceedings as follows: 1RP (2/13/17, 2/15/17-2/17/17); 2RP (5/9/17).

referenced in the interview, and photographs of the home where the incidents allegedly took place. 1RP 191, 193-210; e.g. 1RP 152-59.

Talbert testified on his own behalf, offered testimony his own expert on child interviewing techniques, and recalled a State detective for rebuttal.

Nancy Dabney, J.Q.'s elementary school counselor, testified to the following. After hearing disclosures from another student, Dabney called J.Q. to her office for a 45-60 min. conversation. 1RP 123, 127-28. J.Q. had never been to her office before, her office was near the principal's office, and Dabney called over the intercom for J.Q. to be brought. 1RP 129-31. Dabney had no training or experience in child interviewing. 1RP 136-37.

During the conversation, J.Q. became upset and stated, "'My dad' or 'stepdad licked my pussy.'" 1RP 124. Dabney could not recall whether J.Q. said "dad" or "stepdad." 1RP 124. After further questioning, J.Q. said "John Talbert" but did not include a name in her written statement. 1RP 125, 138-39. On cross-examination, Dabney admitted that in a previous interview, she had answered that she did not recall whether J.Q. had provided a name or not. Dabney asked J.Q. when this occurred, but J.Q. had a difficult time discussing it. 1RP 125. Dabney testified that through further questioning "we figured out it was some time the previous school year when she was in the second grade," and narrowed the timeframe to

Sep. 2014 to Jun. 2015. 1RP 125, 138. Dabney then reported to Child Protective Services (C.P.S.). 1RP 128.

Detective Lee Cantu was assigned to the case and arranged for Muri Murstig, a child forensic interviewer employed by Benton County, to interview J.Q. at school. 1RP 145-46, 181. The State played a recording of J.Q.'s interview to the jury. 1RP 193-210; Exh. 17.

In the interview, J.Q. alleged various incidents of sexual contact, including rubbing and penetration of her vagina by Talbert's tongue, fingers, and penis, and her hand on Talbert's penis. Exh. 17, 19, 22, 38, 41-42, 45. She also stated Talbert showed her a pornographic video of girls performing oral sex on other girls. Exh. 17, p. 35. J.Q. provided graphic descriptions of various sexual acts, describing in detail her observations and feelings. Exh. 17, p. 13-14, 17-19, 20, 30, 39, 41, 44.

During the interview, J.Q. displayed ambiguity regarding the identities of Talbert and her former step-father, Michael Talmage. J.Q. referred to John Talbert as "Popeye," "papa," "my dad," and "my step-dad." Exh. 17, p. 7. She explained "Michael" was her "old dad" and she did not see him anymore. Exh. 17, p. 7. At two points in the interview, J.Q. became confused between Talbert and Michael. Exh. 17, pp. 7, 32. Both times, Murstig corrected J.Q. to emphasize they were discussing Talbert, not Michael. Exh. 17, pp. 7, 32. For example, when discussing when the

alleged abused occurred, J.Q. stated, "Yeah, sometimes um … my mom's gone, my … my dad, my step-dad Michael, he like … [.]" Exh. 17, p. 31. Murstig interrupted stating, "You said your step-dad Michael." Exh. 17, p. 31. J.Q. then altered her statement to say, "Oh, not Michael uh… John … John Talbert." Exh. 17, pp. 31-32.

J.Q.'s interview also displayed ambiguity in the number, location, and dates of the incident(s). At various points, she stated that only one incident of sexual contact occurred. E.g. Exh. 17, pp. 15, 22. When specifically asked if a particular act occurred more than once, J.Q. stated ""I get confused a bunch." Exh. 17, p. 16. However, she described incidents of abuse or pornography viewing occurring in the kitchen, the master bedroom upstairs, and the T.V. room downstairs. Exh. 17, pp. 32-33 (kitchen), 20, 22, 27, 46 (bedroom), 35 (viewing pornography "downstairs"). She also stated, "I get confused a lot." Exh. 17, p. 27.

In discussion locations, J.Q. described two different homes including a home on Ida Street where she lived prior to the dates identified by the counselor. Exh. 17, pp. 14-15, 24, 46. She initially stated only one incident of abuse occurred in the Ida house, but then stated conclusively that the abuse occurred only at the red house on Fig Street. Exh. 17, pp. 25-26.

After the interview Detective Cantu called J.Q.'s mother, Michelle Talmage, and asked her to bring herself, Talbert, and J.Q. to the Sheriff's

Office. 1RP 150. Upon their arrival, the parties were separated and Talbert and Talmage were each interviewed. 1RP 151, 171.

Detective Smith later searched a hard drive connected to the T.V. in Talbert's home, and testified that he uncovered a pornographic video matching the description provided by J.Q. in her interview. 1RP 385.

Several days later, J.Q. was examined by a nurse practitioner who testified J.Q. showed no physical indications of sexual abuse, but 90% of abused female children showed no physical signs, so this result was inconclusive. 1RP 273-74.

Talmage testified to the following. She and Talbert had met several years prior, but broke up shortly before her marriage to Michael Talmage. 1RP 328-29. She and Michael Talmage later separated, and in September 2014 she and Talbert rekindled their relationship. 1RP 329. Michael Talmage had a goatee. 1RP 374. She did not agree that Talbert never had any facial hair during the time they were together. 1RP 373.

In February 2015, she and her two daughters, J.Q. and J.S., moved in together to the house on Ida. 1RP 333. J.Q. is known to be developmentally delayed. 1RP 348. J.S. later went to live with her grandmother. 1RP 334. Then in in September 2015, Talbert, Talmage, and J.Q. moved to the house on Fig Street. 1RP 335.

Talbert wanted her to stay home to spend time with her daughters while he provided financial support. 1RP 345. They shared a bank account and both signed the lease on the Fig Street house. 1RP 335-36, 368. During this time, she attempted to start a Mary Kay business and started a small computer repair business. 1RP 360-61. Talmage insisted that although Talbert provided the primary financial support through his day labor work, he did not provide the primary financial support for her computer businesses. 1RP 360-61.

She testified she was "shocked" to learn the allegations. 1RP 349-50. Things then became difficult as she had to financially support herself and J.Q. RP 374. She used the money in the joint bank account to pay for basic expenses and there was not enough left to pay rent. RP 378. She received some financial assistance from an aid organization, got a job, and moved into a trailer where she and J.Q. now live. RP 374-74, 378.

Talmage did not agree that two weeks prior to the allegations, she and Talbert had argued, that Talbert was frustrated that she was not bringing in money, or that Talbert had told her she had to get a job or move out of the house. 1RP 374.

Talbert testified as follows on his own behalf. When he was informed of the allegations against him, he felt like he had been hit by a truck. 1RP 465. Cantu also described that on hearing the allegations,

Talbert "appeared dumbfounded." 1RP 495. Talbert was then interrogated for over an hour. 1RP 172.

He never had any sexual contact with J.Q., never asked her to engage in sexual acts, never showed her pornography, and consistently told the detectives this during his interrogation. 1RP 465-66, 467-68.

Both he and Talmage maintained their own pornography collections on the hard drive of their computer, but they mainly watched her collection because it was newer. 1RP 459-60. Talbert was not aware of the children ever watching pornography. 1RP 460.

Talbert became aware of Talmage's financial difficulties and invited her and her two daughters to move into his house on Ida. 1RP 455-56. They moved to Fig Street because he was unable to keep up expenses on Ida and the rent was cheaper on Fig Street. 1RP 456-57. Talmage brought two pickup truck-loads and one car-load worth of household items for herself and her children. 1RP 458. However, the majority of the furnishings and household items were his. 1RP 457-58.

During this time, Talmage did not have a "real job." 1RP 457. Talbert financially supported her efforts to start a Mary Kay business and a computer business, but both "petered out." 1RP 457. When they moved to Fig Street, there was a financial strain in their relationship given Talmage's lack of work. 1RP 461. Talbert wanted her to contribute financially, either

by getting a job or getting her computer business going. 1RP 461. Approximately two weeks before his incarceration, they argued and he told Talmage, "Either you get a job or you're gonna have to get out." 1RP 462.

During cross-examination, the State used a transcript of Talbert's interrogation to impeach his testimony. 1RP 469. Specifically, the State questioned Talbert as follows:

> Q. And throughout that interview you were asked multiple times, 'Isn't it true? You know, why would she make this up? Isn't that true?'
> A. I don't remember. If you're saying it is, it is.
> …
> Q. I don't want to put words in your mouth. So, let's go through how many times you were asked that question. I ask that you turn to page 13 of the document in front of you. "Okay. Why would Jasmine say that you do?" "That I do what?" Detective Cantu asks you, "So, you lick her pussy, and that you do that with your wife or girlfriend. Why would she say something like that?" And you say, "I don't know."
> A. I don't -
> Q. Isn't that true?
> A. Yeah. I don't know why she'd say that.
> Q. You didn't say, "Oh. It's because I'm kickin' her mom out in two weeks;" isn't that true?
> A. No, I didn't say it then.

1RP 476-77 (emphasis added).

The prosecutor then said, "Okay. Well let's see if you said it at a different time" and proceeded to point out another instance on page 14 of the transcript of the interrogation where Talbert responded that he did not know why J.Q. would make false accusations against him. 1RP 478.

The prosecutor again stated "You didn't tell Detective Cantu at that time 'Oh, maybe it's because I'm gonna kick her mom out.'" 1RP 478. Talbert responded that he said "I have no idea" because at the time, he did not have any idea why the accusation was being made, that he was "overwhelmed" with "being charged with a disgusting crime" and so "the last thing I'm thinkin' about was kickin' someone out." 1RP 478-79. The State then asserted, "But you've had 15 months to think about it since then, haven't you Mr. Talbert." 1RP 479 (emphasis added).

The State then referred to pages 18 and 37 of the interrogation transcript, where Talbert again responded that he did not know why J.Q. would make these allegations, and later offered the possibility that J.Q. might be motivated by thinking, "It's going to help get rid of her mom or something. I have no idea. I have -- I don't know." 1RP 479-82.

On re-direct, defense counsel sought to play the entire recording of Talbert's interrogation as a prior consistent statement and to rebut the State's allegation of recent fabrication, and it would be unfair to defense to exclude the entirety of the transcript. 1RP 486, 487, 488. The State objected, saying her impeachment method did not open the door to the entire recording. 1RP 486-87.

The court denied the defense motion to play the entire recording, reasoning the State "did not imply a fabrication that can be disproved by

consistent statement… in that recorded statement." 1RP 490-91 (citing ER 801(d)(1)(ii)).

Both parties called expert witnesses to evaluate whether Murstig had used proper interview techniques during J.Q.'s forensic interview.

The State called Laura Merchant, the Assistant Director at the Harborview sexual assault center, who testified that she had been involved in the development of Washington's child forensic interview protocols for the past 16-18 years. 1RP 231, 234. Merchant testified that although Murstig had used direct questions at some points, this was in line with the "gentle persistence" permitted by the protocols and was not undue leading. 1RP 249. Murstig spent too much time clarifying dates with J.Q. because children are "notoriously bad" at recalling these details. 1RP 251-53. She concluded that Murstig "generally" followed the protocols. 1RP 251.

The defense called Daniel Reisberg, a cognitive psychologist and professor at Reid College, who testified that he conducted scientific research on the best ways on the mechanisms of memory and reporting. 1RP 283. He conducted training for actors within the justice system in order to "make the science as useful as possible." 1RP 285. Reisberg testified that while Murstig's interview had both good and bad points, she had generally asked too many yes/no questions, offered her own interpretation of the child's responses, introduced new ideas, such as asking "Did he put

his hands on you[,]" and asked "confrontational" questions in order to point out ambiguities, which allowed J.Q. to modify her statements so as to reduce inconsistencies. 1RP 290-300.

The risk of these poor interviewing techniques was that direct yes/no questions could "feed information to the child," introduction of new ideas and interpretations from the interviewer meant that the information was not flowing from the child, and confrontational questions could lead to alterations in testimony, making the child's statement appear more consistent than it actually was. 1RP 291-301. Reisberg stated such "coaching" could "absolutely" be "inadvertent." 1RP 300. However, these techniques risked polluting the testimony, such that a child could end up with a "distorted report," regardless of whether the child was attempting to lie or attempting to tell the truth. 1RP 312-13.

J.Q. testified at trial to many of the same incidents described in her forensic interview, including external touching and penetration of her vagina by Talbert's fingers, tongue and penis, and the pornographic video. 1RP 398, 404, 407, 408-09, 410, 412. However, she also testified for the first time that Talbert had touched her vagina with a purple vibrator, and had showed her more than five videos, rather than just one. 1RP 432-33, 440. Notably, J.Q. mentioned the vibrator for the first time after the attorneys and court had conducted a side bar to discuss the potential

admissibility of questions regarding whether J.Q.'s mother had showed her a vibrator. 1RP 437, 440.

J.Q. testified the sexual contact occurred in the living room, kitchen, bedroom, and basement of the house on Fig Street. 1RP 417-18, 418, 419, 421. She also identified Talbert and during trial, did not confuse him with her former step-father, Michael Talmage. 1RP 397, 429.

3. Closing Arguments

In closing, the State argued the following. Evidence showed J.Q.'s statements in court and the forensic interview were credible and showed multiple acts of child rape and molestation. 1RP 528-29, 544. Her testimony was corroborated by the video found on the hard drive. 1RP 547. The State's expert validated the forensic interview results and the defense expert was unqualified. 1RP 534-36. J.Q.'s ability to describe sex acts in graphic detail arose from her personal experiences. 1RP 536-44.

The defense closing argument emphasized the lack of corroborating evidence; without D.N.A., video, or medical history, the entire case hinged on J.Q.'s statements. 1RP 567-68. Expert testimony, the inconsistencies in J.Q.'s statements, and the difference between J.Q.'s initial allegations and her trial testimony all showed J.Q. had been influenced, even if inadvertently, by the poor interviewing techniques of her school counselor and Murstig. 1RP 553-54, 562-64, 565-67. J.Q.'s statements were

consistent with a child describing pornography she had watched, and J.Q. had unrestricted access to such pornography in her home. 1RP 560.

4. Verdict & Sentence

The jury found Talbert guilty of all three counts, including one count of first degree child rape (count I) and two counts of first degree child molestation (counts II & III). CP 49-51. The jury also returned three special verdict forms, finding Talbert had used a position of trust. CP 52-54.

The court sentenced Talbert to an indeterminate life sentence on all three counts with mandatory minimum sentences above the standard ranges. CP 75; 2RP 21-22. The court also imposed various restrictive community custody conditions. CP 81-83.

5. Appellate Arguments & Decision

Talbert timely appealed four issues including: (i) whether his right against double jeopardy had been violated, (ii) whether the court's exclusion of his interview transcript violated his right to present a defense, (iii) whether several community custody conditions were unconstitutionally vague and overbroad, and (iv) whether his trial counsel provided ineffective assistance. CP 93; Br. App. 1-2; Statement of Additional Grounds (SAG).

The Court of Appeals found double jeopardy had been violated, and remanded to strike one of the two counts of first degree child molestation. Talbert, 2019 WL 852338, at *5. The court also noted the State largely had

conceded community custody conditions 8, 9, 10, and 15 were overbroad. Id. The court directed the sentencing court to revisit the issue on resentencing and apply this Court's recent opinions. Id. (citations omitted).

Regarding the right to present a defense, the Court of Appeals reasoned Talbert's claim was an evidentiary ruling properly evaluated under the abuse of discretion standard. Id. at *3. It further reasoned the right to present a defense "'does not extend to otherwise inadmissible evidence.'" Id. (quoting State v. Aguirre, 168 Wn.2d 350, 363, 229 P.3d 669 (2010)). The court then reasoned Talbert's statement to law enforcement "was not admissible as a prior consistent statement under ER 801(d)(1)(ii)" because the his prior statement "was not materially consistent with his trial testimony" and "was not made prior to a motive to fabricate." Id.

The court rejected Talbert's SAG claims of ineffective assistance of counsel (IAC) as unsupported by the record, precluded by case law, or requiring a supported a personal restraint petition. Id. at *5.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THIS COURT'S REVIEW IS WARRANTED TO CORRECT THE COURT OF APPEALS' MISAPPREHENSION OF THE STANDARDS RELEVANT TO THE RIGHT TO PRESENT A DEFENSE.

1. The court of appeals' decision conflicts with published Supreme Court decisions under RAP 13.4(b)(1).

The court of appeals' decision conflicts with this Court's decisions in Duarte Vela, 200 Wn. App. 306, Jones, 168 Wn.2d at 720-21, and Darden, 145 Wn.2d at 620.

The Sixth Amendment and article I, section 22 grant an accused two separate but related rights: (1) the right to present testimony in one's defense and (2) the right to confront and cross-examine adverse witnesses. U.S. CONST., Amend. VI; WASH. CONST., art. I, §22; State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983) (citing Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 1925, 18 L. Ed. 2d 1019 (1967); Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed .2d 297 (1973)). Taken together, these rights constitute the right to present a defense. Duarte Vela, 200 Wn. App. at 317 (citing Jones, 168 Wn.2d at 720-21).

These rights are not absolute. Darden, 145 Wn.2d at 620. Evidence "must be of at least minimal relevance." Id. at 622. "[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. 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." Id. Where evidence has "*high* probative value 'it appears no state interest can be compelling enough to preclude its introduction.'" Jones, 168 Wn.2d at 720 (emphasis in original) (quoting Hudlow, 99 Wn.2d at 16).

Generally, a trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. Diaz v. State, 175 Wn.2d 457, 462, 285 P.3d 873 (2012). However, a violation of the constitutional right to present a defense is reviewed *de novo*. Jones, 168 Wn.2d at 719.

As noted above, Darden, Jones, and most recently Duarte Vela set forth this Court's framework for assessing the admissibility of evidence in light of a defendant's right to present a defense. These cases also define this Court's standard of review for such claims on appeal. Although Talbert raised such a claim, the court of appeals did not cite to any of these three foundational decisions in its opinion.

Instead of applying the proper standard, the court of appeals quoted *dicta* from Aguirre. Id. at *2 (quoting Aguirre, 168 Wn.2d at 363). However, Aguirre involved a defendant's request to admit testimony involving the irrelevant sexual history of an alleged rape victim regarding her relationship with another man. Aguirre, 168 Wn.2d at 362. Thus, the testimony in Aguirre was inadmissible because it failed to meet the

minimum threshold for relevance, not because it was inadmissible under the rape shield statute (or other rules of evidence).

To hold otherwise conflicts with the express holding of Jones, 168 Wn.2d at 717-18, 721. Jones held that regardless of the rape shield statute, the right to present a defense framework must be applied, and where met, the evidence must be admitted regardless of purported exclusion by other non-constitutional evidentiary rules. Id.

Although this Court recently accepted review of a right to present a defense case in Duarte Vela, Talbert's case illustrates why this Court should nonetheless accept review again under RAP 13.4(b)(1). Doing so is necessary to clarify the reasoning of Duarte Vela, Jones, and Darden, to set forth the proper framework for admissibility and the proper standard of review on appeal, to clarify these decisions in light of the dicta here cited from Aguirre, and to correct the court of appeals' misapprehension of this Court's existing jurisprudence.

2. This case presents a significant question of federal and State constitutional law under RAP 13.4(b)(3).

As discussed above, this case addresses the correct legal standards to be applied to evidence admissibility and appellate review for claims of the right to present a defense. As such, it presents a significant question of law under Washington's Constitution, article I, section 22 and the Sixth

Amendment to the U.S. Constitution defining the rights of an accused to present evidence and cross-examine witnesses.

This Court should accept review under RAP 13.4(b)(3). Doing so presents the opportunity to clarify the proper legal standards, correct the court of appeals' misapplication of existing law, and prevent dicta from Aguirre from undermining this Court's recent mandate in Duarte Vela.

3. This case presents an issue of substantial public interest under RAP 13.4(b)(4).

This case creates a compelling issue of substantial public interest because left unchecked, the court of appeals' flawed reasoning will erode important constitutional protections for all individuals in Washington accused of crimes.

Under the reasoning of the court of appeals, an accused lacks a constitutional right to present a defense where the evidence is otherwise inadmissible under court- or legislatively-created rules. Talbert, 2019 WL 852338, at *1. This reasoning completely eradicates the right to present a defense. The constitutional right to present a defense is meaningful only where it operates as a check against evidentiary rules created by courts and legislatures. If the right does not exist unless evidence is otherwise admissible, then the right ceases to exist entirely.

This Court should accept review under RAP 13.4(b)(4), to prevent such tautological reasoning from proliferating, and to preserve the constitutional right to present a defense for all accused persons in Washington.

E. CONCLUSION

For the aforementioned reasons, Talbert respectfully asks this Court to grant review under RAP 13.4(b)(1), (3), and (4).

Talbert also respectfully requests that this Court grant review of his IAC claims under RAP 13.4(b)(4) because a decision accepting his claims would be likely to impact a large number of petitions in Washington State.

DATED this 22nd day of April, 2019.

Respectfully submitted,

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Appendix A

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February 21, 2019

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CASE # 352943
State of Washington v. Johnny Narvin Talbert, Jr.
BENTON COUNTY SUPERIOR COURT No. 151013592

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Washington Supreme Court. RAP 13.3(b), 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact that the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. RAP 12.4(b). Please file the motion electronically through the court's e-filing portal or if in paper format, only the original need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of the opinion (may also be filed electronically or if in paper format, only the original need be filed). RAP 13.4(a). The motion for reconsideration and petition for review must be <u>received</u> (not mailed) on or before the dates each is due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:btb
Attachment

c: **E-mail** Honorable Alexander C. Ekstrom

c: Johnny Narvin Talbert, Jr. #398686
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FILED
FEBRUARY 21, 2019
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, Respondent, v. JOHNNY NARVIN TALBERT, Appellant.	)))))))))	No. 35294-3-III UNPUBLISHED OPINION

PENNELL, A.C.J. — Johnny Narvin Talbert appeals his convictions for one count of first degree rape of a child and two counts of first degree child molestation. The conviction for first degree rape of a child is affirmed. However, one of Mr. Talbert's two child molestation convictions must be vacated based on double jeopardy concerns. This matter is remanded for resentencing.

FACTS

In November 2015, 8-year-old J.Q. reported to her school counselor that she had been sexually assaulted by her mother's live-in boyfriend, Johnny Talbert. The

information was then relayed to the authorities. Less than a week after J.Q.'s disclosure, Mr. Talbert voluntarily went to the Benton County Sheriff's Office and participated in a recorded interview. After the interview, Mr. Talbert was arrested and taken into custody.

Mr. Talbert was charged in superior court with one count of first degree rape of a child and two counts of first degree child molestation. His case proceeded to trial.

J.Q. testified at trial and described several sexual interactions she had with Mr. Talbert while she and her mother were living with him from February 2015 until November 25, 2015. J.Q. did not specify the number of times she had been assaulted by Mr. Talbert.

Mr. Talbert testified in his defense. Mr. Talbert explained that approximately two weeks prior to his arrest, he and J.Q.'s mother got into an argument about finances. J.Q.'s mother was not working and Mr. Talbert told her that she would either need to get a job or move out. Mr. Talbert averred that he could not think of any reason, "other than being faced with moving out" that would cause J.Q. to make these allegations against him. 3 Report of Proceedings (Feb. 16, 2017) at 468.

During cross-examination, the State followed up on Mr. Talbert's theory regarding J.Q.'s motive to lie. The State questioned Mr. Talbert about his pretrial interview with law enforcement. The State pointed out that, during the interview, Mr. Talbert had been

given four opportunities to explain why J.Q. might have fabricated sexual assault allegations against him. Yet on each of the four occasions, Mr. Talbert failed to mention the argument over finances or the idea that J.Q. might have been lying because she feared eviction.

On redirect, defense counsel moved to introduce into evidence the entire recording of law enforcement's interview with Mr. Talbert as a prior consistent statement. The State objected, claiming Mr. Talbert's prior statement was inadmissible hearsay. The trial court sustained the State's objection and precluded introduction of the recording.

After the close of evidence, the jury was provided a standard instruction regarding separate consideration of counts. It was also instructed that although the State presented evidence that Mr. Talbert committed acts of first degree child rape on multiple occasions, it must unanimously agree to a specific act that had been proved to support a rape conviction. The court's instructions for Mr. Talbert's two child molestation charges were worded identically, except that one was identified as pertaining to count 2 and one was identified as pertaining to count 3.

During the course of deliberations, the jury submitted the following written questions to the court: "Why are there two separate molestation counts?" and "How is the jury supposed to distinguish between counts with apparently identical charges?" Clerk's

Papers (CP) at 48. Counsel for the State, defense counsel, and the trial court agreed to refer the jury back to their instructions. The court sent the jury's inquiry back with the response, "Please refer to your jury instructions." *Id*.

The jury found Mr. Talbert guilty as charged. At sentencing, the trial court imposed several community custody conditions. In relevant part, the court imposed the following as "Other Conditions":

> 8) Do not possess or view material that includes images of nude women, men and/or children;
> 9) Do not possess or view material that includes images of children wearing only undergarments and/or swimsuits;
> 10) Do not attend X-rated movies, peep shows, or adult book stores;
> . . . .
> 15) Inform the Community Corrections Officers of any romantic relationships to verify there are no minor aged children involved.

Id. at 82-83.

Mr. Talbert appeals.

ANALYSIS

Right to present a defense

Mr. Talbert contends the trial court denied him the opportunity to present a defense when it excluded from evidence the recording of his law enforcement interview. We disagree.

A defendant has a constitutional right to present a defense. However, this "right does not extend to the introduction of otherwise inadmissible evidence." *State v. Aguirre*, 168 Wn.2d 350, 363, 229 P.3d 669 (2010). We review a trial court's ruling on the admissibility of evidence for abuse of discretion. *State v. Burnam*, 4 Wn. App. 2d 368, 375, 421 P.3d 977, *review denied*, 192 Wn.2d 1003, 430 P.3d 257 (2018).

Here, the trial court correctly determined that Mr. Talbert's out-of-court statement to law enforcement was not admissible as a prior consistent statement under ER 801(d)(1)(ii). For one thing, Mr. Talbert's prior statement was not materially consistent with his trial testimony. At trial, Mr. Talbert suggested that J.Q. was motivated to lie because Mr. Talbert had threatened to oust J.Q.'s mother from his home. But in the prearrest interview, Mr. Talbert never advanced this theory, despite being provided four opportunities to do so. In addition, Mr. Talbert's statement to law enforcement was not made prior to a motive to fabricate. At the time of the prearrest interview, Mr. Talbert was at the sheriff's office and had been informed of the nature of J.Q.'s allegations. Because Mr. Talbert already had a motive to fabricate at the time of his prearrest interview, his statement was not relevant to rebutting the State's claim of fabrication during trial. *State v. Makela*, 66 Wn. App. 164, 168-69, 831 P.2d 1109 (1992).

Jury instructions

Mr. Talbert argues that the court's instructions failed to protect him from double jeopardy[1] because the instructions did not inform the jury that he could not be convicted of multiple counts of child molestation based on a single act. Although Mr. Talbert did not object to the court's instructions during trial, his argument is one that can be raised for the first time on appeal. *State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 803 (2011). Reviewing the matter de novo, *id*. at 661-62, we find Mr. Talbert's claim meritorious.

Four of the court's jury instructions are relevant to Mr. Talbert's double jeopardy claim:

> INSTRUCTION NO. 4
>
> A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP at 21.[2]

> INSTRUCTION NO. 13
>
> The State alleges that the defendant committed acts of Child Molestation in the First Degree on multiple occasions. To convict the defendant on any count of Child Molestation in the First Degree, one particular act of Child Molestation in the First Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act

[1] U.S. CONST. amend. V; WASH. CONST. art. I, § 9.

[2] The language in this instruction was taken, verbatim, from Washington's pattern instructions. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 3.01, at 80 (3d ed. 2008).

> has been proved. You need not unanimously agree that the defendant committed all the acts of Child Molestation in the First Degree.
>
> If you unanimously agree that the defendant committed a particular act of Rape of a Child in the First Degree as charged in Count I, you may not use that act as that particular act that constitutes Child Molestation as charged in Counts II and III.

Id. at 30.

Instructions 15 and 16 are worded identically except for instruction 15 referenced count 2 and instruction 16 referenced count 3:

> To convict the defendant of the crime of child molestation in the first degree as charged in count [2/3], each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That intervening between the 1st day in November, 2014, and the 25th day of November, 2015, the defendant had sexual contact with [J.Q.];
>
> (2) That [J.Q.] was less than twelve years old at the time of the sexual contact and was not married to the defendant;
>
> (3) That [J.Q.] was at least thirty-six months younger than the defendant; and
>
> (4) That this act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Id. at 32, 33.

Our double jeopardy analysis involves a two-step inquiry. First, we consider whether the jury instructions given were flawed and could have allowed the jury to

convict the defendant of multiple counts based on a single act. *Mutch*, 171 Wn.2d at 661-63. Second, if the instructions are faulty, we examine the entire trial record, in a rigorous fashion in favor of the defendant, to determine whether there are potentially redundant convictions. *Id*. at 664.

Reviewing the court's instructions, one might surmise that instruction 4 should have prevented the jury from issuing two child molestation convictions based on the same act. But the Supreme Court's decision in *Mutch* precludes this assessment. *Mutch* held that language identical to that of instruction 4 is insufficient, alone, to guard against a double jeopardy violation. *Id*. at 662-63. This is because the instruction only requires proof of separate "crimes." It does not explain that each "crime" requires proof of a different act. *Id*. To avoid a double jeopardy problem, *Mutch* explained that the separate act requirement should be explained to the jury either in a stand-alone instruction or in sufficiently distinctive to-convict instructions. *Id*. at 662.

Mr. Talbert's to-convict instructions (15 and 16) were insufficient to address the separate act requirement identified in *Mutch*. As noted previously, the two instructions were worded nearly identically and contained the same offense conduct dates. Nothing in either of the two to-convict instructions explained that the act forming the basis of count 2 had to be separate from an act proved for count 3. *See State v. Noltie*, 116 Wn.2d 831,

849, 809 P.2d 190 (1991) (The to-convict instruction properly stated, "That during [the intervening time period] the defendant engaged in sexual intercourse with [the victim] *in an incident separate from and in addition to any incident that may have been proved in* [any other] *count*.").

The State argues that instruction 13 was sufficient to advise the jury of the separate act requirement. We disagree. The first paragraph of instruction 13 addressed the unanimity requirement of *State v. Petrich*, 101 Wn.2d 566, 572-73, 683 P.2d 173 (1984), *overruled in part on other grounds by State v. Kitchen*, 110 Wn.2d 403, 406 n.1, 756 P.2d 105 (1988). The paragraph made clear that the jurors had to unanimously agree that a particular act had been proved beyond a reasonable doubt in order to enter a conviction for child molestation. However, the paragraph did not discuss the issue of multiple counts or clarify that each conviction must be based on a separate act. Unlike the first paragraph, the second paragraph of instruction 13 does address the concept of separate acts. However, this discussion is limited to differentiating between rape of a child and child molestation. The second paragraph of instruction 13 specifies that the act used to convict the defendant of rape cannot also serve as a basis for a child molestation conviction. But it fails to clarify that the separate act requirement applies not only to the

two types of charges lodged against Mr. Talbert, but also to the two child molestation charges.

We turn, then, to the question of prejudice. Our review in this context is exacting. We must vacate a potentially redundant conviction unless the trial record, as a whole, indicates that it "was '*manifestly apparent* to the jury'" that each count charged had to be based on a separate act. *Mutch*, 171 Wn.2d at 664 (quoting *State v. Berg*, 147 Wn. App. 923, 931, 198 P.3d 529 (2008)). Only in a "rare circumstance" will the record be sufficient to overcome deficient jury instructions that fail to take into account double jeopardy concerns. *Id*. at 665.

Mr. Talbert's two child molestation convictions cannot withstand this rigorous level of scrutiny. This is not a case where the victim identified a specific number of assaults that matched up to the number of counts. *See id*. (The victim testified to five separate episodes of rape, which matched the number of counts.); *State v. Hayes*, 81 Wn. App. 425, 438-39, 914 P.2d 788 (1996) (The defendant was charged with four counts of child rape and the victim testified to being raped on at least four occasions.). Nor did the prosecutor clarify that the jury had to find more than one separate act of molestation in order to justify two convictions. *See Noltie*, 116 Wn.2d at 849 (The prosecutor explained

two counts of statutory rape by stating, "[Y]ou have to find he did it twice in order to convict him of the second one. Okay?") (internal quotation marks omitted).

The question submitted by the jury during deliberations underscores our concerns regarding the ambiguity of the court's instructions. The jury specifically asked the trial court why Mr. Talbert was facing two identical counts of child molestation. Instead of substantively answering this question, the court merely directed the jury to review its instructions again. During the hearing to address the jury question, the parties noted that the instructions had advised the jury of the *Petrich* unanimity requirement. This observation was accurate. But it did not address the concern for double jeopardy. *Petrich*'s unanimity requirement is based on the idea that all jurors must agree on the act that is used as a factual basis for a particular count. In contrast, double jeopardy is rooted in the idea that the act forming the basis of one conviction cannot also be used as the basis for another conviction for the same crime. The fact that the trial court instructed the jury regarding unanimity was insufficient to also advise the jurors of double jeopardy's separate act requirement.

Because the record before us shows it was not manifestly apparent to an average juror that Mr. Talbert's two child molestation convictions must be predicated on separate acts, one of the two convictions must be vacated.

Community custody conditions

Mr. Talbert challenges community custody conditions 8, 9, 10, and 15 as overbroad and vague. The State largely concedes error, but claims that at least one of the challenged conditions can be reworded.

Because Mr. Talbert must be resentenced based on our disposition of his double jeopardy claim, the arguments regarding community custody conditions may be raised at resentencing. On resentencing, the trial court can ensure that Mr. Talbert's community custody conditions comply with constitutional standards set by our current case law. *See State v. Nguyen*, 191 Wn.2d 671, 678-79, 425 P.3d 847 (2018); *State v. Johnson*, 4 Wn. App. 2d 352, 358-60, 421 P.3d 969, *reviewed denied*, 192 Wn.2d 1003, 430 P.3d 260 (2018).

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Mr. Talbert has filed a statement of additional grounds for review, arguing his trial attorney provided ineffective assistance of counsel. To succeed on his claim, Mr. Talbert must show both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The failure to satisfy either prong ends our inquiry. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

The majority of Mr. Talbert's ineffective assistance of counsel claims fail because they are not supported by the current record. To the extent Mr. Talbert wishes to supplement the record with evidence that was not presented to the trial court, his recourse is to file a personal restraint petition. *McFarland*, 127 Wn.2d at 335.

The remainder of Mr. Talbert's claims do not warrant relief apart from what has already been provided. Mr. Talbert's arguments regarding double jeopardy have been addressed. The claim that trial counsel was ineffective for failing to present an opening statement is precluded by our case law. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 715, 101 P.3d 1 (2004) ("A defense counsel's decision to waive an opening statement does not constitute deficient performance."). And Mr. Talbert's argument that his attorney should have recorded a pretrial interview with J.Q. fails based on a lack of a showing of prejudice.

As a final matter, Mr. Talbert alleges his trial counsel has been ineffective because counsel has not provided Mr. Talbert a copy of his case file. At this point in the proceedings, we are unable to discern any prejudice that would warrant relief from conviction based on this circumstance. The contents of the file are likely more relevant to a potential personal restraint petition, as opposed to a direct appeal. In any event, Mr. Talbert is entitled to a copy of his case file, subject to appropriate redactions and

withholdings. *State v. Padgett*, 4 Wn. App. 2d 851, 854-56, 424 P.3d 1235 (2018). Mr. Talbert should endeavor to work with trial counsel to facilitate appropriate disclosure of his file. If his efforts are unsuccessful, his remedy is to seek to compel production in the superior court. *Id.*

CONCLUSION

This matter is remanded to the superior court with instructions to vacate one of Mr. Talbert's convictions for child molestation, and for resentencing consistent with the terms of this decision. Mr. Talbert's remaining convictions are affirmed.

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.

Pennell, A.C.J.

WE CONCUR:

Siddoway, J.

Fearing, J.

Appendix B

Renee S. Townsley
Clerk/Administrator

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March 22, 2019

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CASE # 352943
State of Washington v. Johnny Narvin Talbert, Jr.
BENTON COUNTY SUPERIOR COURT No. 151013592

Counsel:

Enclosed is a copy of an order denying the appellant's motion for reconsideration of this court's February 21, 2019, opinion.

A party may seek discretionary review by the Washington Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a petition for review in this court within 30 days after the order denying reconsideration is filed. RAP 13.4(a). Please file the petition electronically through the court's e-filing portal or if in paper format, only the original need be filed. The petition for review will then be forwarded to the Supreme Court. The petition must be received (not mailed) on or before the date it is due. RAP 18.5(c).

If the party opposing the petition for review wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service on the party of the petition. RAP 13.4(d).

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:btb
Attachment

c: Johnny Narvin Talbert, Jr. #398686
Coyote Ridge Corrections Center
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	No. 35294-3-III
Respondent,	)	
	)	ORDER DENYING MOTION
v.	)	FOR RECONSIDERATION
	)	
JOHNNY NARVIN TALBERT,	)	
	)	
Appellant.	)	

THE COURT has considered appellant Johnny Narvin Talbert's motion for reconsideration of our February 21, 2019, opinion, and the record and file herein.

IT IS ORDERED that the appellant's motion for reconsideration is denied.

PANEL: Judges Pennell, Siddoway and Fearing

FOR THE COURT:

Lawrence-Berrey, C.J.

ROBERT LAWRENCE-BERREY
Chief Judge

NIELSEN, BROMAN & KOCH P.L.L.C.

April 22, 2019 - 2:56 PM

Filing Petition for Review

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