No. 99454-4

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

TRAVIS MICHAEL DENBO,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 53307-3-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 18-1-00633-5
The Honorable Jack Nevin, Judge

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I. IDENTITY OF PETITIONER

The Petitioner is Travis Michael Denbo, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 2, case number 53307-3-II, which was filed on December 29, 2020. (Attached in Appendix) The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

1. Did the trial court abuse its discretion and deny Petitioner his right to present a defense, when it refused to allow Petitioner to present testimony that would have assisted the jury in evaluating the complaining victim's credibility?

2. Did the trial court commit prejudicial error when it excluded evidence that the complaining victim has in the past exaggerated or embellished facts to benefit herself, where such evidence was clearly pertinent to her credibility?

3. Should Petitioner's convictions be reversed where: there was evidence that the alleged victim's mother had previously accused another man of the same crime; where the underwear the alleged victim testified about was never found; the first search warrant had an incorrect address; petitioner was never completely read his *Miranda* rights; court documents had his name misspelled; and he was never told about a plea deal that the prosecution offered? (*Pro se* issues)

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Travis Michael Denbo with three counts of child molestation in the first degree and two counts of communication with a minor for immoral purposes. (CP 61-63) The State also alleged that the offenses were aggravated because Denbo used his position of trust to facilitate the crimes. (CP 61-63)

The trial court found that statements made by the alleged victim, S.B., to her family members and a child interviewer were admissible under the child hearsay statute. (RPII 18) But the trial court excluded testimony that on several occasions S.B. exaggerated or embellished facts related to certain events. (RP7 432-39, 497)

The trial court dismissed one count of child molestation because only two incidents were testified to during the State's case-in-chief. (RP6 403-05) The jury found Denbo guilty on the remaining charges and aggravating factors. (RP9 717-18)

The trial court declined the State's request for an exceptional sentence, and imposed a standard range sentence totaling 89 months to life. (RP10 751-52; CP 175, 178) The trial court imposed only mandatory fines and fees, and imposed standard

community custody conditions including a prohibition against possessing any pictures of minors including relatives. (CP 176, 187)

Denbo timely appealed. (CP 164) The Court of Appeals remand his case to the trial court to strike one improper community custody condition, but otherwise affirmed Denbo's conviction and sentence.

B. SUBSTANTIVE FACTS

Travis Denbo and Rochelle Dufrain knew each other in childhood, and reconnected through Facebook sometime around 2013-2014. (RP4 103, 104) At the time Dufrain had four children—one adult daughter, twin four-year old boys, and a five-year old daughter, S.B.. (RP4 105-06)

The twins spent every other weekend with their biological father. (RP4 106-07) S.B., whose biological father was out of the picture, was sad that she did not have similar weekend getaways. So eventually she began spending alternating weekends at Denbo's home. (RP4 58, 108, 109) She enjoyed the weekends with Denbo in part because she was able to watch whatever television programs and movies that she wanted. (RP4 54-55, 109) Those programs frequently included mature mystery and crime

shows. (RP4 95)

Dufrain testified that S.B. was usually a happy child, but she noticed a change in S.B.'s behavior towards the end of 2017. (RP4 117) S.B. began spending more time alone in her room, spent less time with her friends, and slept more than usual. (RP4 117) S.B. also started to express reluctance to spend weekends with Denbo. (RP4 83, 117-18)

By January of 2018, after about five years together, Dufrain and Denbo's relationship was "on the rocks," and Dufrain had decided to end it. (RP4 115, 118) Dufrain wanted to know if S.B. would be upset if Denbo was no longer in their lives, so one evening she asked S.B. how she felt about Denbo. (RP4 83, 118) S.B. began to cry and ran to her mother's bedroom. (RP4 83, 84-85, 118) S.B. eventually told Dufrain about several inappropriate incidents that took place at Denbo's home. (RP4 84-85, 119-20, 126, 127, 139)

At trial, S.B. testified about these incidents. First, she testified that Denbo took her shopping for a hand-held back massager that Denbo could use on his sore neck. (RP4 60-61) S.B. testified that on two specific occasions, Denbo sat next to her while she watched television on the couch, turned on the

massager, then placed it on her pubic area. On one occasion he touched her with the massager over her underpants, and on another he touched her inside her underpants. (RP4 61-63, 64, 66) After these incidents, Denbo told S.B. not to tell her mother what they had done. (RP4 68)

S.B. also testified that she would take baths at Denbo's home, and that he called it "tubby time." (RP4 72) S.B. would wear a swimsuit, and Denbo would sit beside the tub in shorts and a tank-top. (RP4 72-73) One time, Denbo put a rag over her eyes and put whipped cream into her mouth. (RP4 74-75) S.B. told her mother that the whipped cream was placed into her mouth by what felt like Denbo's tongue. (RP4 139)

During another visit, Denbo showed S.B. a web page with pictures of underwear for sale. He asked her opinion about a pair that S.B. described as having white beads down the middle of the front, and then he purchased them. (RP4 79-80) After they were delivered, Denbo asked S.B. to try them on. (RP4 81) She put them on and showed them to Denbo, but they were uncomfortable and she felt weird wearing them. (RP4 81-82) This occurred after Denbo had told S.B. not to talk to her mother about their activities, so she "started getting a little skeptical about things." (RP4 81, 82)

Dufrain called the police and reported S.B.'s allegations. (RP4 123) S.B. was later interviewed by a child forensic interview, and made similar disclosures. (RP4 124; RP6 362; Exh. P1) Police executed a search warrant at Denbo's apartment and collected the massager, but did not find the underpants that S.B. described. (RP5 215-16, 252-53, 275, 280)

Denbo's mother, Barbara Murphy, lived with Denbo during this time. (RP7 537) She would have been present in the home when most of these incidents took place. (RP7 537) Dufrain testified that Murphy is nearly bed-ridden and rarely leaves her bedroom. (RP4 110-11) But Murphy testified that she has no trouble moving around her apartment because it is small and she uses a walker. (RP7 539-40) Murphy also testified that the walls are "paper thin," and she can easily hear conversations occurring in other rooms of the apartment. (RP7 537-38, 545)

Denbo's daughter, Tieren Stokes, and his cousin, Toni Sherry, both testified that S.B. always seemed happy to be with Denbo and they never saw her act uncomfortable around him. (RP7 448, 449, 485, 489, 490) They also both confirmed that Murphy's mobililty issues did not prevent her from moving freely about the apartment whenever she wanted. (RP7 448, 482-83)

Stokes also testified that she observed S.B. watching the television program Law & Order SVU, which regularly featured sexual assault storylines. (RP7 502)

Tests performed on the massager identified presence of DNA belonging to S.B., Denbo, and an unknown third person. (RP5 302) But this is not surprising, considering that S.B. and Murphy both testified that Murphy once caught S.B. alone, using the massager to masturbate by herself. (RP4 89; RP7 546-47) Murphy yelled at S.B. and told her that behavior was inappropriate. (RP4 89; RP7 547-48)

V. ARGUMENT & AUTHORITIES

The issues raised by Denbo's petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme Court. RAP 13.4(b)(1) and (2).

A. DENBO'S CONVICTIONS SHOULD BE REVERSED BECAUSE THE TRIAL COURT'S EXCLUSION OF EVIDENCE THAT WAS DIRECTLY RELEVANT TO S.B.'S CREDIBILITY WAS AN ABUSE OF DISCRETION AND DEPRIVED DENBO OF HIS RIGHT TO PRESENT A DEFENSE.

The Court of Appeals was incorrect when it found that the trial court did not abuse its discretion in denying the admission of the evidence and that the trial court did not violate Denbo's right to

present a defense. (Opinion at 3-7)

Before the defense presented its case to the jury, the State asked the trial court to forbid Denbo's daughter, Tiernen Stokes, from testifying about a prior incident where S.B. exaggerated and made false statements in order to minimize her responsibility or bad behavior. (RP7 432-33)

Denbo's counsel explained what the evidence was and why it was relevant:

> [T]his witness has seen [S.B.] take a simple story that's true and add a bunch of facts to it. Not saying she's lying. She exaggerates and blows the story -- make it bigger than it was. She's witnessed this event more than once or twice. That has nothing to do with the fact that she's lying. We're not saying that [S.B.] is lying. We're not going into that under 405, under character, because you have to use general reputation in the community. She's witnessed several times [S.B.] take a story that [she's] witnessed herself and watched her just add stuff to it, ad lib it and make it exaggerated.

(RP7 433)

The trial court then demanded that counsel "tell me, under the evidence rules, why it's admissible." (RP7 434) Counsel explained that it was simply relevant to S.B.'s credibility and therefore admissible under ER 401 and 402. (RP7 434-35)

The trial court stated that ER 401 was "just our jumping off

point," and because defense counsel could not point to a specific rule allowing such testimony, it would not be admitted. (RP7 438, 439, 497-98) The trial court's refusal to allow the testimony was an abuse of discretion because it was admissible under the rules of evidence and because its exclusion denied Denbo his constitutional right to present a defense.

A defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. U.S. Const. amend. VI, XIV; *State v. Kim*, 134 Wn. App. 27, 41, 139 P.3d 354 (2006). Washington's evidence rules also provide that "[a]ll relevant evidence is admissible[.]" ER 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

The credibility of a witness often is "'an inevitable, central issue'" in cases in which the witness is a child victim of sexual molestation. *State v. Hakimi*, 124 Wn. App. 15, 25, 98 P.3d 809 (2004) (quoting *State v. Petrich*, 101 Wn.2d 566, 575, 683 P.2d 173 (1984)). The credibility of the complaining witness is generally an issue in cases involving crimes against children, especially if the

defendant denies the acts charged and the child asserts their commission. *Hakimi*, 124 Wn. App. at 25.

The jury's assessment of S.B.'s credibility was a critical component in this case. As the prosecutor repeatedly told the jury during closing arguments, "If you believe the testimony of [S.B.], the State has already met its burden beyond a reasonable doubt." (RP8 645) Thus, any evidence that assisted the jury in assessing S.B.'s credibility was highly relevant, and should have been admitted under ER 401 and ER 402.

Despite this, the trial court refused to allow Denbo to present evidence of prior instances where S.B. was obviously exaggerating or embellishing facts to benefit herself. Rather than admitting this relevant evidence under ER 401 and ER 402, the trial court found that the testimony should be excluded because it did not meet the requirements of any other rules of evidence. (RP7 438, 439, 497-98) The court was wrong because this testimony was not excluded by other evidence rules and in fact is specifically allowed under ER 404.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." ER 404(b). However, such evidence may be

admissible for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b); *State v. Kidd*, 36 Wn. App. 503, 505, 674 P.2d 674 (1983). Evidence of prior bad acts is permissible under ER 404(b) when offered to assist the jury in evaluating the credibility of a victim. *See State v. Magers*, 164 Wn.2d 174, 186, 189 P.3d 126 (2008). Accordingly, the trial court was wrong to believe that there was no other rule of evidence that would permit the proffered testimony.

The trial court's error in excluding this testimony was not harmless. The only substantive evidence of the crimes came from S.B.'s testimony and prior out of court statements. The State's entire case rested on the jury's willingness to believe S.B. And the State relied heavily on the lack of evidence questioning her credibility when it encouraged the jury to return guilty verdicts. For example, the prosecutor argued:

- And I submit to you that she gave compelling, honest testimony to you about exactly what that man did to her. (RP8 645)
- [S.B.'s] testimony is credible, and therefore it's been proven beyond a reasonable doubt the defendant is guilty of those charges. (RP8 662)
- You also saw that there's no embellishment in her

> story. No exaggeration. … And she gave the naked truth, even when it was uncomfortable. (RP8 664)
>
> • [T]here's just simply no credible evidence to believe that [S.B.] would want to make this up, let alone that she was capable of doing that[.] And it's not reasonable to believe that [S.B.] made this up on her own. There's no evidence to support that. (RP8 665-66)

Denbo was improperly forbidden from presenting testimony to support an inference that S.B. was capable of embellishing and exaggerating, and that would have questioned her credibility. Then the State used this lack of evidence to argue for conviction. The trial court's error in excluding the evidence was an abuse of discretion and highly prejudicial. Denbo's convictions should be reversed and his case remanded for a new trial.

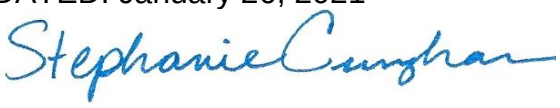
B. *PRO SE* ISSUES

In his *pro se* Statement of Additional Grounds for Review (SAG), Denbo raised several procedural and substantive challenges to his conviction. The arguments and authorities pertaining to these issues are contained in his SAG, which is hereby incorporated by reference. The Court of Appeals found that these challenges are without merit. (Opinion at 9) This Court should review these *pro se* issue as well.

VI. CONCLUSION

The trial court abused its discretion and denied Denbo his constitutional right to present a defense when it refused to allow Denbo to present evidence of prior instances where S.B. was obviously exaggerating or embellishing facts to benefit herself. This Court should accept review, reverse Denbo's convictions, and remand for a new trial.

DATED: January 26, 2021



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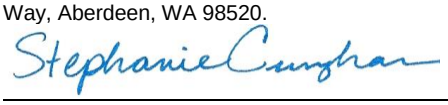
CERTIFICATE OF MAILING

I certify that on 01/26/2021, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Travis Michael Denbo, DOC# 414075, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.



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APPENDIX

Court of Appeals Opinion in *State v. Travis Michael Denbo*, No. 53307-3-II

Filed
Washington State
Court of Appeals
Division Two

December 29, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TRAVIS MICHAEL DENBO, Appellant.	No. 53307-3-II UNPUBLISHED OPINION

MELNICK, J. — A jury convicted Travis Denbo of two counts of child molestation in the first degree, each with an aggravating factor, and two counts of communicating with a minor for an immoral purpose. Denbo argues that the trial court improperly excluded impeachment evidence of the victim, SB. Additionally, Denbo challenges a community custody condition that prohibits him from possessing any photograph of a minor. Denbo also submitted a statement of additional grounds (SAG). We affirm the convictions and remand to the trial court to strike the portion of community custody condition 17 that prohibits him from possessing photographs of minors.

FACTS

Denbo had a dating relationship with SB's mother when he sexually assaulted SB. Although SB lived with her mother, her two half-brothers, and her grandparents, she would spend weekends with Denbo. Denbo lived in a fairly small apartment with his mother, who was present in the apartment when the sexual assaults occurred. She heard nothing even though the apartment had thin walls and quiet sounds could be heard through them.

SB testified that during her visits with Denbo, multiple incidents of sexual assault occurred. On two occasions, Denbo placed a handheld massager on her genital area. During a bath, Denbo placed whipped cream in her mouth using his tongue. On another occasion, Denbo showed SB a webpage containing photographs of underwear. Denbo later purchased two pairs of underwear and asked SB to model them for him, which she did.

SB's mother called the police after SB told her about Denbo's conduct. The State charged Denbo with three counts of child molestation in the first degree, all with an aggravating factor, and two counts of communicating with a minor for immoral purposes.[1]

The case proceeded to trial, and Denbo sought to impeach SB's credibility through the testimony of another witness. Denbo wanted to question the witness about an incident at a fireworks stand where SB allegedly exaggerated the circumstances of the incident to avoid punishment for harming one of her half-brothers. Even though SB had testified, Denbo never questioned her about this incident.

Denbo argued the evidence was "relevant to this case because [SB's] credibility [was] relevant." 7 Report of Proceedings (RP) at 434. The trial court asked Denbo to specify what evidence rule allowed it to be admitted, even assuming the evidence was relevant.

Denbo stated the credibility of a witness could be attacked under either ER 608 or ER 607, but that he was not relying on either of those rules. Denbo also stated he was not seeking to admit the testimony as character evidence or habit evidence under ER 405 or ER 406. After a discussion about the issue, the court told Denbo he would have a later opportunity to further explain why this impeachment evidence should be admitted.

[1] One of the child molestation in the first degree counts was dismissed and the jury did not consider it.

After additional witnesses had testified, the court again invited Denbo to provide support for the admission of the impeachment evidence. Denbo stated that the evidence could have been admitted under ER 608(b), but because he had not questioned SB about it during cross-examination, the rule did not apply.

The court then listed seven reasons for not admitting the evidence. Although Denbo did not proffer the evidence under ER 404(b), the court explained that rule was not a basis for admission. The court excluded the evidence.

A jury convicted Denbo of two counts of child molestation in the first degree with an aggravating factor, and two counts of communication with a minor for immoral purposes. The court sentenced Denbo to prison and imposed community custody conditions. During the sentencing hearing, the court imposed several community custody conditions, including one that stated Denbo shall "[h]ave no direct and/or indirect contact with minors, nor pictures of any minors at all, to include relatives." Clerk's Papers (CP) at 187. Denbo objected to this condition, but the court imposed it.

Denbo appeals.

ANALYSIS

I. EXCLUDED EVIDENCE

Denbo argues that the trial court abused its discretion by excluding Denbo's proffered impeachment evidence and that the exclusion of the evidence violated his right to present a defense. Denbo argues that because the evidence was relevant, it should have been admitted. We disagree.

Pursuant to *State v. Arndt*, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019), and *State v. Clark*, 187 Wn.2d 641, 648-56, 389 P.3d 462 (2017), we review constitutional challenges to evidentiary rulings utilizing a two-step process. We first review the evidentiary ruling under an abuse of discretion standard. *Arndt*, 194 Wn.2d at 797-98; *Clark*, 187 Wn.2d at 648-49. We then review the constitutional question of whether the court violated the defendant's right to present a defense. *Arndt*, 194 Wn.2d at 797-98; *Clark*, 187 Wn.2d at 648-49. "If the court excluded relevant defense evidence, we determine as a matter of law whether the exclusion violated the constitutional right to present a defense." *Clark*, 187 Wn.2d at 648-49.

A trial court abuses its discretion when its decision is based on untenable grounds, an erroneous view of the law, or if it is manifestly unreasonable. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). Appellate courts defer to the trial court's rulings unless "'no reasonable person would take the view adopted by the trial court.'" *Clark*, 187 Wn.2d at 648 (internal quotation marks omitted) (quoting *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001)).

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401; *see also State v. Farnsworth*, 185 Wn.2d 768, 782-83, 374 P.3d 1152 (2016). "Evidence which is not relevant is not admissible." ER 402. Relevant evidence that is excluded by other rules, is not admissible. ER 402.

Here, the court did not abuse its discretion by excluding the proposed evidence. This impeachment evidence had minimal relevance; however, the Evidence Rules preclude its admission.

Denbo acknowledged below that the evidence should not be admitted under ER 607 or 608. We agree. "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility . . . may not be proved by extrinsic evidence." ER 608(b). In some circumstances, and at the discretion of the court, they may be inquired into on cross-examination of the witness. ER 608(b). Here, Denbo failed to cross-examine SB on this subject and instead sought to admit the proffered evidence through extrinsic evidence in violation of ER 608(b).

Denbo argues for the first time on appeal that the court erred in excluding the testimony because it "is specifically allowed under ER 404." Appellant's Br. at 11. He further argues that evidence of prior bad acts is admissible "when offered to assist the jury in evaluating the credibility of a victim." Appellant's Br. at 11. We disagree.

Denbo did not attempt to admit this impeachment evidence at trial pursuant to ER 404; however, the court stated this rule did not allow its admission. Therefore, we address it.

ER 404(b) does not allow for the admission of prior bad acts "to prove the character of a person in order to show action in conformity therewith." It applies to the admission of substantive evidence. Here, Denbo sought to admit the evidence for the limited purpose of impeaching SB. Denbo sought to use this evidence to improperly impeach SB on a collateral matter. *See State v.* Wilson, 60 Wn. App. 887, 891, 808 P.2d 754 (1991). He also improperly sought to admit the evidence to prove a character trait of SB, in contravention of ER 404(b).

In addition, Denbo's reliance on *State v Magers*, 164 Wn.2d 174, 189 P.3d 126 (2008), is misplaced. In *Magers*, evidence of the defendant's prior bad acts, including prior domestic violence incidents as well as those that lead to his arrest for domestic violence, were properly admitted. They were relevant to an element of the charged crime. They also allowed the jury to

assess the credibility of the victim and understand why she told conflicting stories. Here, the proffered evidence related not to Denbo, but to the victim. The court did not abuse its discretion in denying the admission of the evidence.

Next, Denbo argues that the trial court's failure to admit the proffered evidence violated his right to present a defense.

Criminal defendants have a constitutional right to present a defense. U.S. CONST. amends. V, VI, XIV; WASH. CONST. art. I, §§ 3, 22; *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

"The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). A defendant's right to present a defense is subject to "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers*, 410 U.S. at 302; *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 296, 359 P.3d 919 (2015).

Appellate courts must balance a defendant's need for the evidence with the state's interest in excluding it. *Arndt*, 194 Wn.2d at 812. Under certain circumstances where the evidence is of high probative value, "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and [Washington] Const[itution] art[icle] 1 § 22." *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983).

A trial court may violate a defendant's right to present a defense if it refuses to admit evidence that represents the defendant's "entire defense." *State v. Jones*, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). In *Jones*, the court held that the defendant's right to present a defense was violated because of the exclusion of evidence relating to the rape victim's consent to sex. 168

Wn.2d at 721. The court concluded that such evidence was of "extremely high probative value" because, if believed, it would have proved consent. *Jones*, 168 Wn.2d at 721. Therefore, the evidence was the defendant's "entire defense" and should have been admitted. *Jones*, 168 Wn.2d at 721.

The trial court here did not violate Denbo's right to present a defense because the court's evidence ruling did not prevent Denbo from presenting a defense. Denbo sought to admit the impeachment evidence because it related to SB's credibility. Unlike the evidence in *Jones*, the evidence here would not have disproved any of the charges against Denbo; it would only have helped the jury assess SB's credibility. This evidence is not the type of highly probative evidence that the court in *Jones* determined must be admitted. 168 Wn.2d at 721.

More importantly, Denbo was still able to attack SB's credibility through other testimony, thus the fireworks stand testimony was not his entire defense. For example, Denbo's mother testified that she was present in the apartment and could hear even quiet noises due to thin walls. This testimony rebutted SB's credibility by challenging her version of events.

To the extent that Denbo is arguing all relevant evidence should be admitted, notwithstanding the rules of evidence, we reject that argument. It is contrary to well-settled law. *Taylor*, 484 U.S. at 410.

We conclude that the trial court neither abused its discretion nor violated Denbo's right to present a defense.

II. COMMUNITY CUSTODY CONDITION

Denbo challenges the portion of community custody condition 17 that prohibits him from possessing photographs of minors. He argues the condition is not crime related, is constitutionally

overbroad, and is not necessary to accomplish the essential needs of the State. We agree that the condition is not crime related.

"Conditions of community custody are set forth as part of the Sentencing Reform Act of 1981 (SRA) [chapter 9.94A RCW], and include conditions that are mandatory, conditions that are presumptively imposed but are waivable, and conditions that are wholly discretionary." *State v. Lee*, 12 Wn. App. 2d 378, 401, 460 P.3d 701 (2020) (footnote omitted); RCW 9.94A.703(1)-(3). "A court is authorized to impose discretionary community custody conditions as part of a sentence." *Lee*, 12 Wn. App. 2d at 401; RCW 9.94A.703(3). We review the imposition of community custody conditions for an abuse of discretion. *State v. Wallmuller*, 194 Wn.2d 234, 238, 449 P.3d 619 (2019). "A trial court necessarily abuses its discretion if it imposes an unconstitutional community custody condition, and we review constitutional questions de novo." *Wallmuller*, 194 Wn.2d at 238.

A crime-related prohibition must directly relate to the circumstances of the crime for which the offender was convicted. RCW 9.94A.030(10). "To resolve crime-relatedness issues, a court will review the factual basis for the condition under a 'substantial evidence' standard." *State v. Padilla*, 190 Wn.2d 672, 683, 416 P.3d 712 (2018) (internal quotation marks omitted) (quoting *State v. Irwin*, 191 Wn. App. 644, 652, 364 P.3d 830 (2015)). Under this standard, we strike a community custody condition if there is no evidence connecting the crime to the condition. *Padilla*, 190 Wn.2d at 683. A condition restricting access to certain materials must be "reasonably necessary to accomplish the essential needs of the state and public order." *Padilla*, 190 Wn.2d at 684. When a community custody condition implicates constitutionally protected material, the condition must be "narrowly tailored to further the State's legitimate interest." *Padilla*, 190 Wn.2d at 683.

When the record contains no evidence connecting the crime to an imposed community custody condition, courts will conclude that the condition is not crime related. *State v. Johnson*, 4 Wn. App. 2d 352, 359, 421 P.3d 969 (2018).

Here, the challenged portion of the community custody condition that prohibits Denbo from possessing photographs of minors is not crime related. The record does not contain evidence that Denbo used or possessed photographs of minors. While evidence exists that Denbo showed SB photographs of underwear on the Internet, it is not related to possessing photographs of minors.

Because the condition is not crime related, we conclude it is improper.[2]

III. STATEMENT OF ADDITIONAL GROUNDS (SAG)

Denbo asserts three additional issues in his SAG. First, Denbo asserts there was evidence that SB's mother had previously accused her half-brothers' biological father of child molestation. Second, he asserts that the underwear SB testified about was never found. Finally, he argues the following errors occurred during the investigation and trial: the first search warrant had an incorrect address, he was never completely read his *Miranda*[3] rights, court documents had his name misspelled, and he was never told about a plea deal that the prosecution offered.

RAP 10.10(c) provides that "[r]eferences to the record and citation to authorities are not necessary or required," but the appellant must "inform the court of the nature and occurrence of the alleged errors." We reject Denbo's assertions because they are outside our record, vague, or not errors.

[2] Because of our resolution of this issue, we do not address Denbo's other arguments on this issue.

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

We affirm the convictions and remand to the trial court to strike the portion of community custody condition 17 that prohibits him from possessing photographs of minors.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Worswick, P.J.

Glasgow, J.

January 26, 2021 - 3:35 PM

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