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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MIGUEL ANGEL ALBARRAN, Appellant.	No. 46162-5-II UNPUBLISHED OPINION

LEE, J. — Miguel Angel Albarran was convicted of second degree child rape, second degree attempted child rape, second degree rape, and second degree child molestation, for having sexual intercourse with then 13-year-old T.P. The trial court entered judgment and sentenced him on the second degree rape conviction, dismissing the other three convictions to avoid double jeopardy. On appeal, Albarran argues that (1) his right to confront witnesses against him was violated; (2) his right to present a defense was violated; and (3) he should have been sentenced on the second degree child rape instead of the second degree rape because the former is the specific statute and the latter is the general statute. We hold that Albarran's rights to confrontation and to present a defense were not violated. We further hold that Albarran should have been sentenced on

the second degree child rape conviction as it is the specific statute. Therefore, we reverse Albarran's conviction on second degree rape and remand to the trial court to vacate the conviction on second degree rape, reinstate the conviction for second degree child rape, and resentence.

FACTS

Miguel Albarran was charged, by third amended information, with (1) second degree child rape, (2) second degree attempted child rape, (3) second degree rape, and (4) second degree child molestation, for having sexual intercourse with then 13-year-old T.P.[1] The State also alleged three aggravating factors: violation of a position of trust,[2] invasion of the victim's privacy,[3] and the victim being less than 15 years old.[4] T.P. was the daughter of Albarran's girlfriend, Denise Domke.

A. THE CHARGED INCIDENT

Albarran began dating Domke in 2010, and lived with Domke and T.P. from July 2012 until the charged incident on April 1, 2013. Albarran and Domke's relationship was marred by repeated instances of Albarran's infidelity.

On April 1, 2013, Albarran and Domke got up for work. T.P. was on spring break, had stayed up late the night before, and was still asleep. Albarran claims he entered T.P.'s room to

[1] We use initials to protect the witness's identity. General Order 2011-1 of Division II, In Re The Use Of Initials Or Pseudonyms For Child Witnesses In Sex Crime Cases, available at: http://www.courts.wa.gov/appellate_trial_courts/

[2] RCW 9.94A.507(3)(c)(ii); RCW 9.94A.535(3)(n).

[3] RCW 9.94A.535(3)(p).

[4] RCW 9.94A.837.

turn off the lights and TV she had left on and to cover her up. At this point, Domke claims she passed by T.P.'s room, looked in, and saw Albarran partially on T.P.'s bed with his face in T.P.'s vaginal area.

Domke began yelling, Albarran covered T.P., and the two left T.P.'s room. T.P. woke up to Domke shouting at Albarran. Domke then called the police.

The police arrived and had T.P. go to the bathroom and take off the underwear she was wearing for inclusion in the sexual assault kit. T.P was then examined in the emergency room at Legacy Salmon Creek Hospital. There, Dr. Staci Kristin took swabs of T.P.'s external vaginal area, right inner thigh, and left inner thigh.

Those swabs, along with T.P.'s underwear, were examined by Teresa Shank of the Washington State Patrol Crime Lab. Shank compared the deoxyribonucleic acid (DNA) from the swabs and three different sections of T.P.'s underwear to a samples from T.P. and Albarran.

Shank's tests of the swabs revealed the following: the swabs from the external vaginal area and left inner thigh were positive for saliva; the external vaginal swab had male DNA, but not enough to create a DNA profile; the left inner thigh swab also had male DNA and had enough to create a DNA profile; the male DNA from the left inner thigh was 6.6 million times more likely to be from Albarran than from another person from the United States.

Shank tested T.P.'s underwear by taking three cutouts of the crotch area, labeling them A, B, and C. Shank found both semen and saliva on all three cutouts. Shank compared the DNA from the three cutout sections of T.P.'s underwear to T.P.'s and Albarran's DNA samples. The cutout labeled "A" had a DNA profile 210 trillion times more likely to come from Albarran than

from another person in the United States. The sperm taken from the underwear cutout labeled "C" matched Albarran's DNA with a probability of 1 in 780 quadrillion.

B. TRIAL

At trial, the defense sought to cross-examine Domke regarding her anger and jealousy at Albarran's infidelity in an attempt to show her bias against Albarran and to suggest Domke fabricated the whole event. To do so, the defense made an offer of proof that it wanted to ask Domke about an incident occurring approximately two weeks before April 1, where Domke allegedly placed a GPS tracking device on Albarran's phone and then tracked him to the house of one of his paramours, at which point she allegedly assaulted him. The defense also wanted to ask Domke about one or more Facebook postings wherein she allegedly offered to help another paramour get Albarran in trouble. On this offer of proof, the trial court ruled:

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

2 Verbatim Report of Proceedings (VRP) at 240-41. The trial court reiterated that ruling when Albarran began to describe how Domke verbally and physically assaulted him. The trial court said:

> But anything having to do with somebody hitting or striking or taking specific actions, it was the Court's intent by our previous conversation by this to exclude this as not relevant and prejudicial. And the Court has not had a hearing that would allow such evidence. And, generally, specific acts of conduct are excluded by the rules of evidence in the impeachment of a witness.

2 VRP at 350.

To combat the DNA evidence, the defense sought to introduce evidence of a vibrator that Albarran and Domke used together. The defense wanted to argue that Albarran's DNA transferred onto T.P. because T.P. had used the vibrator herself or that the vibrator had been used to transfer Albarran's DNA onto T.P. as a way to frame Albarran. During pretrial motions, the trial court ruled that the defense would need to make an offer of proof before any reference to, or questions were asked regarding, T.P.'s use of the vibrator. To this end, the defense elicited from Shank that DNA can remain on inanimate objects for long periods of time and can be transferred from one inanimate object to another. The defense did not make an offer of proof, nor did it reference or ask questions, regarding the vibrator during its cross-examination of Domke. Rather, the defense made its offer of proof during its direct examination of Albarran:

> Q. [Defense counsel]. Mr. Albarran, did Denise Domke and yourself use various sexual toys?
> A [Albarran]. Yes, we did. Every time.
> Q. [Defense counsel]: Okay. And where were those sexual toys kept?
> A. [Albarran]: They were on the left side of the bed, where I would sleep. She had a special box for it.
> Q. [Defense counsel]: Okay. And they were in a drawer, or—
> A. [Albarran]: Yes, the top drawer.
> Q. [Defense counsel]: Okay. And are you aware if at any time either [T.P.] obtained or retrieved any of those sexual toys?
> A. [Albarran]: Well, I heard it from the mom. I was at work one day, and she had called me up and told me that her—something was missing. So I said, what are you missing? And she goes, well, you know, my toy. And I said, well, what am I going to do with that toy? She goes, because I went home on my break and the toy is not there, with the lube.

. . . .
Q. [Defense Counsel]: So did she imply or infer to you that she thought that [T.P.] had taken it?
A. [Albarran]: Yes, because she—[T.P.] was the only one at the house that day.
Q. [Defense Counsel]: Do you—did you ever see [T.P.] take the—any of the sexual toys?
A. [Albarran]: Never—I never seen her.
Q. [Defense Counsel]: Did Ms. Domke ever advise you that she had given [T.P.] any of the sexual toys?
A. [Albarran]: No, but she allowed her to play with herself with the toy.
Q. [Defense Counsel]: And how do you know that?
A. [Albarran]: Because we had a conversation about—and she told me, what should I do? And I said, that's—that's something that you need to talk to with his—you know, her father—you and her—you and him talk to—because that had—I didn't want to talk about that. I felt uncomfortable.
Q. [Defense Counsel]: And do you have an opinion as to whether or not that sexual—any of those sexual toys were used to transfer DNA from you to [T.P] or her underwear?
A. [Albarran]: I believe so, yes.

2 VRP at 352-53.

The trial court ruled that Albarran's testimony was hearsay and would be excluded. Regarding whether T.P. had used the toy, the trial court ruled that because Albarran had not seen T.P. use it, it was not something Albarran was allowed to testify about.

C. VERDICT AND SENTENCING

The jury found Albarran guilty on all four charges and all three aggravating factors applied. At sentencing, the defense argued that the first count—the second degree rape of a child—was the specific statute, and that the third count—the second degree rape—was the general statute. Therefore, the defense moved that a conviction be entered for the second degree rape of a child charge and not the second degree rape charge.

The trial court denied this motion, and instead entered a conviction and sentence on the second degree rape charge. Upon a joint motion of the parties, the trial court dismissed the other three convictions based on double jeopardy concerns. Albarran appeals.

ANALYSIS

A. CONFRONTATION CLAUSE

Albarran claims the trial court violated his right to confrontation when it prevented the defense from introducing testimony regarding specific acts Domke had engaged in. Specifically, Albarran wanted to elicit testimony relating to Domke's installation of a GPS tracker on his cell phone, her subsequent assaultive behavior, and her Facebook posts where she agreed to help another woman get Albarran into trouble.

The trial court did not violate Albarran's right to confront witnesses because the defense was allowed to ask questions exposing the cause and existence of Domke's anger and bias towards Albarran for his infidelity despite the excluded evidence. Also, Albarran failed to establish the relevancy of the alleged Facebook posts. Therefore, Albarran's claims fail.

1. Standard of Review

Our federal and state constitutions guarantee criminal defendants the right to confront witnesses. *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). "The primary and most important component" of the confrontation clause "is the right to conduct a meaningful cross-examination of adverse witnesses." *Id.* "[G]reat latitude must be allowed in cross-examining an essential prosecution witness to show motive for his testimony." *State v. Knapp*, 14 Wn. App. 101, 107, 540 P.2d 898, *review denied*, 86 Wn.2d 1005 (1975). But, a party's right to cross-examine adverse witnesses is not absolute. *Darden*, 145 Wn.2d at 620. "The confrontation right

and associated cross-examination are limited by general considerations of relevance." *Id.* at 621. The constitutional right to present a defense is not absolute and does not extend to irrelevant or inadmissible evidence. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). "The trial court retains the authority to set boundaries regarding the extent to which defense counsel may delve into the witness' alleged bias 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *State v. Fisher*, 165 Wn.2d 727, 752, 202 P.3d 937 (2009) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)).

Although Albarran raises the confrontation clause issue, in actuality this court is being asked to review the trial court's ruling on the admissibility of Albarran's proposed cross-examination of Domke. We therefore apply the basic rules of evidence to determine if the trial court violated Albarran's confrontation rights when it denied him the opportunity to cross-examine Domke about her alleged installation of a tracking device on Albarran's cellphone, her assault on Albarran when she found him at another woman's house, and her Facebook posts about Albarran. *Darden*, 145 Wn.2d at 619, 624.

"A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion." *Id.* at 619. Abuse of discretion exists when the trial court's exercise of discretion is "'manifestly unreasonable or based upon untenable grounds or reasons.'" *Id.* (quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). Similarly, a trial court's limitation on the scope of cross-examination will not be disturbed unless it is the result is a manifest abuse of discretion. *Id.*[5]

[5] There is some disagreement in the case law as to what standard of review is to be used. *Compare Darden*, 145 Wn.2d at 619 ("Although the dispositive issue before us concerns the confrontation

2. Testimony Relating to the Alleged GPS Tracker and Specific Acts of Assault

Albarran argues testimony regarding Domke's specific actions was essential to his defense because "[o]nly by showing [Domke's] specific actions—the use of a GPS tracker, showing up at another woman's house, and assaulting [Albarran] in front of others—could the jury begin to understand the extent of [Domke's] rage and jealousy." Br. of Appellant at 16. We disagree.

Albarran was allowed to elicit testimony regarding the extent of Albarran's infidelity and the extent of Domke's knowledge about that infidelity. Albarran was also allowed to testify about Domke's assault of him on April 1st. Thus, Albarran was allowed to present evidence that

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clause, ultimately we are asked to review the trial court's ruling on the admissibility of [evidence]," which is reviewed for abuse of discretion.), with *State v. Turnipseed*, 162 Wn. App. 60, 68, 255 P.3d 843 ("A confrontation clause challenge to the admission of evidence is reviewed de novo, not for an abuse of discretion as urged by the State."), *review denied*, 172 Wn.2d 1023 (2011). *See also State v. Berniard*, 182 Wn. App. 106, 124-25, 327 P.3d 1290 (2014) ("Appellate courts review confrontation clause challenges de novo."). Despite Division Three's and this court's more recent application of a de novo standard of review, we apply the abuse of discretion standard for two reasons.

First, the evidentiary dispute in this case is more similar to that in *Darden*. In this case, as in *Darden*, the appellant is arguing that his right to confront was violated because the trial court refused to admit certain evidence. Whereas, in both *Turnipseed* and *Berniard*, the trial court admitted evidence that appellant claimed violated his right to confrontation.

Second, *Darden* is the law as stated by our Supreme Court; whereas *Turnipseed* and *Berniard* are from the Court of Appeals. *See also State v. Garcia*, 179 Wn.2d 828, 844, 318 P.3d 266 (2014) ("Garcia argues that the trial court violated his confrontation rights by limiting his cross-examination of Wilkins. An impermissible limitation on the scope of cross-examination is a violation of a defendant's right to confrontation. The scope of cross-examination is within the discretion of the trial court and will not be disturbed unless there is a manifest abuse of discretion." (citations omitted)).

In applying the abuse of discretion standard in this case, we do not suggest that all confrontation clause challenges are necessarily subject to an abuse of discretion standard of review.

permitted the jury to draw reasonable inferences as to the extent of Domke's anger towards Albarran's infidelity.

Albarran analogizes the trial court's exclusion of testimony to the limitations placed on the defendant in *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). In *Davis*, the United States Supreme Court considered a conviction for stealing a safe from a bar. *Id.* at 309. The primary witness for the prosecution was a teenager, who was on probation for burglarizing two cabins and who claimed to have found the safe in the same location as he had seen the defendant earlier in the day. *Id.* at 310-11. The trial court ruled that the defense could not reference the witness's juvenile record on cross-examination, despite the defense's theory that the witness' claim was a result of his fear that his probation might be revoked. *Id.* at 311. The trial court's ruling was problematic because, as the Supreme Court noted:

> Since defense counsel was prohibited from making inquiry as to the witness' being on probation under a juvenile court adjudication [the witness's] protestations of unconcern over possible police suspicion that he might have had a part in the Polar Bar burglary and his categorical denial of ever having been the subject of any similar law-enforcement interrogation went unchallenged. . . . Since it is probable that [the witness] underwent some questioning by police when he was arrested for the burglaries on which his juvenile adjudication of delinquency rested, the answer [that he had never been similarly questioned by police regarding a burglary] can be regarded as highly suspect at the very least. The witness was in effect asserting, under protection of the trial court's ruling, a right to give a questionably truthful answer to a cross-examiner pursuing a relevant line of inquiry; it is doubtful whether the bold "No" answer would have been given by [the witness] absent a belief that he was shielded from traditional cross-examination. It would be difficult to conceive of a situation more clearly illustrating the need for cross-examination.

Id. at 313-14. Consequently, the Court held:

> We cannot accept the Alaska Supreme Court's conclusion that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury. While counsel was permitted to ask [the witness] *whether* he was biased, counsel was unable to make a record from which to argue

> *why* [the witness] might have been biased *or* otherwise lacked that degree of impartiality expected of a witness at trial. . . . On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.

Id. at 318.

Albarran's case is different than the situation presented in *Davis*. In *Davis*, when the trial court entirely prohibited references about the witness's prior burglary arrests, it removed the defense's only avenue to show the witness's potential for bias. *Id.* at 314, 318.

In contrast, here, the trial court prohibited questions relating specifically to the alleged installation of a tracking device and Domke's hitting Albarran after she found him, but said questions regarding Domke's anger at Albarran's infidelity would be allowed. And, subsequently, questions regarding Domke's anger towards Albarran for his infidelity were allowed.

Both sides were allowed to explore the number of women Albarran had been with while dating Domke, along with the names of the women, their relationship to Domke, and whether Domke knew of Albarran's relations with each woman. Albarran was also allowed to testify that Domke punched him on April 1st. Therefore, we hold that the exclusion of evidence about a GPS tracker being installed on Albarran's cell phone and Domke's hitting Albarran when she found him at another woman's house does not rise to the level of a manifest abuse of discretion because, unlike the situation in *Davis*, the defense here was allowed to ask questions exposing the cause and existence of Domke's anger and bias against Albarran despite the excluded evidence. *Darden*, 145 Wn.2d at 619.[6]

[6] Albarran also argues it was error for the trial court to exclude the testimony of a "potential defense rebuttal witness, who had witnessed one of the assaults." Br. of Appellant at 19. However, Domke

3. The Facebook Posts

Albarran claims that the trial court erred in excluding evidence relating to Facebook posts made by Domke about him. He argues the exclusion constitutes error for two reasons. First, he argues, "whether the defense produced the actual Facebook [posts] prior to trial merely limits the use of that document at trial," so he should have been allowed to ask questions regarding the subject matter of the Facebook posts. Br. of Appellant at 18. Second, he argues that the trial court's statement, that the Facebook post would not be relevant if it was made after Albarran's arrest, was incorrect because "'[b]ias includes that which exists at the time of trial.'" Br. of Appellant at 19 (quoting *State v. Dolan*, 118 Wn. App. 323, 327, 73 P.3d 1011 (2003)). We disagree.

With regard to Albarran's claim that the trial court should have allowed questions regarding the Facebook posts and the subject matter of the posts, Albarran does not cite any authority for this position. Because Albarran fails to cite to any authority to support his claim, we do not consider this claim. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

With regard to Albarran's claim that the trial court erred in finding the Facebook posts not relevant because it was made after Albarran's arrest, Albarran argues that he should have been allowed to explore Domke's bias as it existed at the time of trial, not just up to his arrest. The trial court ruled:

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was never asked about the instance of alleged assault, so there was no testimony to rebut. Therefore, the trial court could not have abused its discretion in prohibiting the "rebuttal witness's" testimony.

> [F]irst of all, it hasn't been disclosed, contrary to the Court's direction that that be disclosed; and also happened after the incident, so would not be relevant here. It's also difficult for the Court to evaluate, since we haven't actually had something specific to look at. So at this point, I'd exclude any question about some Facebook posting.

2 VRP at 240-41.

Albarran is correct that evidence showing Domke's bias against him, whether the evidence arose before or after April 1st, is relevant. *Dolan*, 118 Wn. App. at 328. However, where the trial court has concerns about the marginal relevancy of evidence, the trial court has considerable authority in limiting the "extent to which defense counsel may delve into the witness' alleged bias." *Fisher*, 165 Wn.2d at 752. Because Albarran's offer of proof for the content of the postings was vague at best and Albarran did not disclose the content of the postings to the trial court, despite the court's request[7], the trial court was unable to weigh the postings' potential relevance against its potential prejudice, and was unable to evaluate its admissibility under other rules of evidence. Thus, we hold that the trial court did not abuse its discretion.

B. RIGHT TO PRESENT A DEFENSE

Albarran claims the trial court violated his right to present a defense by excluding evidence of an alternative explanation for how the DNA got on T.P. and her underwear. We hold that Albarran's constitutional right to present a defense was not violated because the trial court properly denied his attempt to admit evidence supporting his defense through inadmissible hearsay.

The United States Constitution and the Washington State Constitution guarantee the right to present a defense. U.S. CONST. amend. VI; WASH. CONST. art. I § 22; *State v. Wittenbarger*,

[7] The parties appeared to agree that the Facebook posts that were eventually disclosed to the State did not indicate Domke was going to help get Albarran in trouble.

124 Wn.2d 467, 474, 880 P.2d 517 (1994). Again, although Albarran argues his right to present a defense was violated, the alleged violation occurs as a result of an evidentiary ruling made by the trial court. The constitutional right to present a defense is not absolute and does not extend to irrelevant or inadmissible evidence. *Jones*, 168 Wn.2d at 720; *State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010) (although defendant has "a constitutional right to present a defense, the scope of that right does not extend to the introduction of otherwise inadmissible evidence"); *State v. Mee Hui Kim*, 134 Wn. App. 27, 41, 139 P.3d 354 (2006) (defendant has right to present a defense "'consisting of relevant evidence that is not otherwise inadmissible'") (quoting *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022 and *cert. denied*, 508 U.S. 953 (1993)). Accordingly, where evidence is inadmissible, excluding that evidence does not violate a defendant's constitutional right to present a defense.

We review a trial court's rulings on evidentiary matters for an abuse of discretion. *State v. Myers*, 133 Wn.2d 26, 34, 941 P.2d 1102 (1997). Abuse of discretion exists when the trial court's exercise of discretion is "'manifestly unreasonable or based upon untenable grounds or reasons.'" *Darden*, 145 Wn.2d at 619 (quoting *Powell*, 126 Wn.2d at 258). If the excluded evidence is relevant, the court balances "[t]he State's interest in excluding prejudicial evidence" against "'the defendant's need for the information sought,' and relevant information can be withheld only 'if the State's interest outweighs the defendant's need.'" *Jones*, 168 Wn.2d at 720 (quoting *Darden*, 145 Wn.2d at 622).

Albarran relies heavily on *Jones*, 168 Wn.2d 713. However, *Jones* is of only limited utility. In *Jones*, the Supreme Court held that the trial court's exclusion of the evidence under the rape shield statute was improper because the rape shield statute did not apply, and even if it did, the

statute could not be used to bar evidence of high probative value. *Id.* at 722. The statute did not apply because it only excluded evidence of a victim's "*past* sexual behavior," which meant prior sexual encounters and not the circumstances surrounding the charged sexual encounter. *Id.* at 722-23. The court continued that, even if the rape statute did apply, it would not bar evidence of consensual sex because the statute was based on the rationale that a woman's prior sexual behavior is evidence that "'is usually of little or no probative value in predicting the victim's consent to sexual conduct on the occasion in question.'" *Id.* at 723 (quoting *State v. Hudlow*, 99 Wn.2d 1, 9, 659 P.2d 514 (1983)). This, the court noted, "does not mean that evidence of past sexual behavior is never relevant." *Id.* The *Jones* court reasoned, evidence of consensual sex "is evidence of extremely high probative value; it is Jones's entire defense. Jones's evidence, if believed, would prove consent and would provide a defense to the charge of second degree rape." *Id.* at 721.

Here, the potential for the vibrator to be an alternative means of transferring Albarran's DNA onto T.P.'s thigh and underwear makes any such evidence relevant. If Albarran's theory that T.P. might have used the vibrator were believed, that theory would provide the jury with at least an alternative explanation for how his DNA was found on T.P. and her underwear, and lend some credence to Albarran's claims of innocence. Thus, evidence showing T.P.'s potential use of the vibrator was relevant.

The next inquiry is whether the evidence, as the defense sought to have it admitted, was admissible. Here, during pretrial motions, the trial court ruled that the defense would need to make an offer of proof before any reference to, or questions were asked regarding, T.P.'s use of the vibrator. Without objection, the defense was allowed to elicit from Shank, the DNA expert, that DNA can remain on inanimate objects for long periods of time and can be transferred from one

inanimate object to another without the DNA expert knowing of such a transfer. The defense did not make an offer of proof, nor did it reference or ask questions, regarding the vibrator during its cross-examination of Domke. The defense made its offer of proof during its direct examination of Albarran. The trial court ruled that because Albarran had not seen T.P. use the vibrator and Albarran's knowledge about T.P.'s use of the vibrator was based solely on what Domke had told him, Albarran's testimony was hearsay and so would be excluded.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). "Hearsay is not admissible except as provided by these rules, by other court rules, or by statute." ER 802.

The trial court ruled that the evidence Albarran proffered constituted inadmissible hearsay. Although the evidence arguably could have been admitted in another fashion, no other mode was pursued by Albarran. Here, the defense tried to lay the foundation on inadmissible hearsay. The trial court ruled on the admissibility of the evidence as it was presented, not on the admissibility of evidence that could have been presented in a different way.[8]

The constitutional right to present a defense does not extend so far as to require a trial court to admit inadmissible evidence. *See Jones*, 168 Wn.2d at 719-20; *Aguirre*, 168 Wn.2d at 363; *Mee Hui Kim*, 134 Wn. App. at 41; *Rehak*, 67 Wn. App. at 162. Albarran's proffered testimony about

[8] In *Jones*, the trial court prevented the defendant from cross-examining the victim about whether she had "consented to sex during an all-night, drug-induced sex party." 168 Wn.2d at 721. In contrast, here, Albarran did not try to cross-examine Domke on T.P.'s potential use of the vibrator. As the alleged declarant, Domke could have testified about her statements relating to the vibrator because the testimony would not have been hearsay, per ER 801(d)(1), and the Albarran might have been able to challenge her answer in his testimony, per ER 607.

T.P.'s use of the vibrator was based solely on hearsay testimony. Therefore, we hold Albarran's right to present a defense was not unconstitutionally denied because he attempted to introduce the evidence supporting his defense through inadmissible hearsay.

C. GENERAL/SPECIFIC RULE OF CONSTRUCTION

Albarran claims the trial court erred in not dismissing his second degree rape charge based the general/specific rule of construction. Albarran relies on *State v. Hughes*, 166 Wn.2d 675, 212 P.3d 558 (2009), "to argue that a defendant who commits Child Rape in the Second Degree necessarily commits Second Degree Rape under the incapacity prong." Reply Br. of Appellant at 15. We agree.

When a specific statute and a general statute punish the same conduct, the statutes are concurrent. *State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d 237 (1984); *State v. Presba*, 131 Wn. App. 47, 52, 126 P.3d 1280 (2005), *review denied*, 158 Wn.2d 1008 (2006). We review de novo the question of whether two statutes are concurrent. *State v. Wilson*, 158 Wn. App. 305, 314, 242 P.3d 19 (2010). When a more specific statute is concurrent with a general statute, the defendant must be prosecuted under the more specific statute. *Wilson*, 158 Wn. App. at 313-14.

We determine if two statutes are concurrent by examining whether someone can violate a specific statute without violating the general statute. *Shriner*, 101 Wn.2d at 583. Two statutes are not concurrent if the specific statute can be violated without violating the general statute. *State v. Chase*, 134 Wn. App. 792, 800, 142 P.3d 630 (2006), *review denied*, 160 Wn.2d 1022 (2007). Whether statutes are concurrent involves examining the elements of the statutes, not the facts of the particular case. *Id.* at 802-03.

Albarran was charged and convicted of second degree child rape, under RCW 9A.44.076, and second degree rape, under RCW 9A.44.050(1)(b). Under RCW 9A.44.076,

> A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

And, under RCW 9A.44.050(1)(b),

> A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person: . . . When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated.

In *Hughes*, the Supreme Court addressed whether identical convictions to those presented in Albarran's case—second degree child rape and second degree rape due to nonconsent by reason of mental incapacity or physical helplessness—violated double jeopardy protections where the victim was 12 years old and had cerebral palsy. 166 Wn.2d at 679, 681. The court made clear its decision was case-specific, holding that "[f]or the purposes of double jeopardy analysis, we hold that, in this case, the two offenses are the same in fact and law." *Id.* at 683-84. The court came to this conclusion using the following analysis:

> Here, the two offenses are the same in fact because they arose out of one act of sexual intercourse with the same victim. Here, both offenses are also the same in law. Although the elements of the crimes facially differ, both statutes require proof of nonconsent because of the victim's status. Regardless of whether nonconsent is proved by the age of the victim and the age differential between the victim and the perpetrator or by the mental incapacity or physical helpless of the victim, both statutes protect individuals who are unable to consent by reason of their status. Therefore, these crimes do not pass the same elements analysis. The legislature's intent to preclude multiple punishments for the crimes of rape and rape of a child arising out of one act of sexual intercourse is confirmed by considering other indicia legislative intent.

Id. at 684.

Here, we are addressing whether Albarran should have been convicted of second degree child rape instead of second degree rape due to nonconsent by reason of mental incapacity or physical helplessness because it is not possible to commit second degree child rape without committing the second degree rape as well. *Shriner*, 101 Wn.2d at 583 ("So long as it is not possible to commit the special crime without also committing the general crime, the special supersedes the general."). Both statutes require sexual intercourse with the victim. RCW 9A.44.076, .050(1)(b). Where the statutes differ is in the description of the "victim's status." *Hughes*, 166 Wn.2d at 684.

The *Hughes* court recognized that "the crimes facially differ," in that second degree child rape requires a showing of respective ages and marital status and second degree rape requires a showing of nonconsent. *Id.*; RCW 9A.44.076, .050(1)(b). But, the *Hughes* court also recognized that "nonconsent [can be] proved by the age of the victim and the age differential between the victim and the perpetrator or by the mental incapacity or physical helpless of the victim." *Hughes*, 166 Wn.2d at 684. Under *Hughes*, T.P. was "unable to consent" by reason of her age and the age differential between her and Albarran. *Id.* Thus, Albarran could not be convicted of second degree child rape without also meeting the elements to be convicted of second degree rape.

However, this conclusion does not end the inquiry. For statutes to be concurrent, all violations of second degree child rape must necessarily be violations of second degree rape. *Chase*, 134 Wn. App. at 802-03. With respect to second degree child rape (RCW 9A.44.076) and

second degree rape (RCW 9A.44.050(1)(b)), our Supreme Court in *Hughes* held that "each statute establishes strict liability based on the inability to consent due to victim's status," and that "nonconsent is proved by the age of the victim and the age differential between the victim and the perpetrator or by the mental incapacity or physical helpless of the victim." *Hughes*, 166 Wn.2d at 685, 684. Consequently, whenever the State proves that the victim was "at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim," it necessarily proves that the victim did not consent. RCW 9A.44.076; *Hughes*, 166 Wn.2d at 684, 685. Thus, pursuant to the holding in *Hughes*, convictions for second degree child rape are necessarily violations of second degree rape; and, because they are concurrent statutes, convictions for second degree child rape supersede convictions of second degree rape.[9] Therefore, the trial court erred in dismissing second degree child rape and entering a conviction on second degree rape.

[9] The State attempts to argue that legislative intent dictates that these two crimes do not fall into the general/specific rule of construction realm by pointing to the punishments under the SRA. However, as the appellant correctly notes in his reply brief:

> [T]he State argues, "if Albarran is correct, the portion of RCW 9.94A.537 which allows this aggravator to be applied to Rape in the Second Degree would be rendered meaningless." [Br. of Resp't at 32]. This is incorrect. There are many ways of committing Rape in the Second Degree, only one of which relates to incapacity. Thus a defendant who commits the crime of Rape in the Second Degree by [forcible] compulsion against a 13 year old would still be subject to the 25-year enhancement. Appellant's argument does not render RCW 9.94A.537 meaningless.

Reply Br. of Appellant at 18. Accordingly, the State's argument on this point fails.

We reverse Albarran's conviction on second degree rape and remand to the trial court to vacate the conviction on second degree rape, reinstate the conviction for second degree child rape, and resentence.

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.

Lee, J.

We concur:

Bjorgen, A.C.J.

Melnick, J.