

NO. 46521-3-II

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

STATE OF WASHINGTON, Respondent

v.

RICHARD PETER STAVRAKIS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-00801-7

BRIEF OF RESPONDENT

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A. ANSWERS TO ASSIGNMENTS OF ERROR

I. THE TRIAL COURT DID NOT DENY THE DEFENDANT A FAIR TRIAL WHEN IT PROPERLY REFUSED TO ALLOW THE DEFENSE TO CROSS-EXAMINE A.S. ABOUT IRRELEVANT MATTERS.

II. THE TRIAL COURT DID NOT DENY THE DEFENDANT A FAIR TRIAL WHEN IT PROPERLY REFUSED TO ALLOW THE DEFENSE TO IMPEACH A DEFENSE WITNESS ON A COLLATERAL MATTER.

B. STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Richard Stavrakis was charged by amended information with one count of Rape of a Child in the First Degree, or in the alternative, Child Molestation in the First Degree for an incident at A.S.'s home, and in the family hot tub, between January 1, 2006, and April 12, 2008. CP 195-96. The State also alleged the aggravating circumstance that Mr. Stavrakis used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the crime pursuant to RCW 9.94A.535(3)(n). CP 196.

The case proceeded to trial before The Honorable Scott Collier, which commenced with motions *in limine* on May 12, 2014, and concluded on May 15, 2014, with the jury's verdict. RP 139-1083. The jury found Mr. Stavrakis guilty of the alternative charge of Child

Molestation in the First Degree and the abuse of trust aggravator; and the trial court sentenced him to a standard range sentence of 120 months. CP 137-140, 164-175; RP 1080-83, 1166-67. Mr. Stavrakis filed a timely notice of appeal. CP 184-85.

II. STATEMENT OF FACTS

In September of 2006 the Stavrakis family had a barbeque at their Vancouver residence. Present were John and Angela Stavrakis, their children, eight-year-old A.S. and her older brother P.S., as well as John Stavrakis's mother Helen Stavrakis. RP 320, 456, 783-84. John's brother, the defendant, Richard Stavrakis,¹ was also invited and attended. RP 453-54, 783-84. This barbeque was shortly after the defendant had been released from prison in Oregon and was the first time the family had seen him in quite a while.² RP 268-279, 453-54, 456.

At some point during the afternoon of the barbeque, the defendant got into the Stavrakis' hot tub and A.S. joined him. RP 321-23, 455-57.

The defendant and A.S. were alone in the hot tub. RP 321-23, 455-57.

During the time period the defendant and A.S. were alone in the hot tub

¹ No disrespect is intended by referring to Mr. Stavrakis as "the defendant" throughout the appeal. It is not my standard practice, but I believe it will help keep clear who is being referenced. Similarly, I will reference the other adult members of the Stavrakis by their first names.

² The defendant's release from prison is what pinpointed the time period of when the crime was committed as the witnesses, including the defendant, relied on that fact as a reference point. RP 268-279. Nonetheless, in an attempt to sanitize the information the defendant's release from prison was termed an "event." RP 268-279, *see, e.g.*, RP 707.

both John and Helen came outside and spent some time out there, as John was barbequing and Helen was smoking and/or visiting. RP 325-27, 332, 460, 782-83. When P.S. came outside requesting his turn in the hot tub, A.S. got out and went inside. RP 330-31. P.S. then got into the hot tub with the defendant. RP 459.

Angela noticed her daughter was upset and asked her what was wrong. A.S., while crying, told her mother that the defendant had “touched her pee pee,” in a manner that made her uncomfortable. RP 333-34, 381-82, 461-62. Angela told A.S.’s father what she had learned, and those two confronted the defendant. RP 463, 781. Angela testified that the defendant responded by stating “[w]ell, it’s possible – she was sitting on one side of me and I lifted her up and put her on the other side, and it’s possible my hand slipped.” RP 463. John testified that his brother, the defendant, told him that his hand inadvertently went underneath A.S.’s swimsuit. RP 785.

Based on what happened, Angela and John told the defendant and Helen that he was no longer allowed to be around A.S. or at the home when they were not present. RP 338, 384, 464-65, 789. The police were not then involved and in years that followed the defendant came over to the Stavrakis’ home on occasion for family get-togethers. RP 345-46, 790-92.

In March of 2011, A.S. was in a school-offered peer-support group when a fellow group member talked about the fact that she (the group member) had been sexually abused. RP 340. When the counselor noticed that A.S. was crying she inquired as to what was the matter, and A.S. disclosed to the counselor what had happened to her back in 2006. RP 340-41, 625. The counselor, a mandatory reporter, reported what A.S. disclosed to CPS and the police, and referred her for counseling. RP 701. A.S. began counseling on April 21, 2011, at the Children's Center with a child and family therapist. RP 617, 620-21, 623. She completed her counseling at the Children's Center on June 12, 2012. RP 621, 642-43.

As part of this counseling, A.S. disclosed that the defendant digitally penetrated during the incident in the hot tub in 2006 and spoke about her concerns about how this disclosure would affect her family. RP 622-633. On November 30, 2011, A.S. participated in a forensic interview at the Children's Justice Center with Detective Jennifer Hubenthal. RP 704. When A.S. testified at trial on May 13, 2014, she explained that back in 2006 when she got into the hot tub with the defendant that he told her to come over to him, that she was sitting or laying on top of him, and that his hand went into her pants and touched her vagina. RP 322-23, 391-92. A.S. testified that there was penetration by his fingers and that he moved them around. RP 324-25.

Detective Hubenthal, who interviewed the defendant about the incident on January 26, 2012, testified that he told her that he remembered the day and remembered getting into the hot tub. RP 705-08. When Detective Hubenthal asked him who was in the hot tub when he was in it he replied that P.S. and A.S. were. RP 708. When she asked him if everyone was in the hot tub at the same time or at different times the defendant said that as A.S. was getting into the hot tub he was getting out. RP 708. He clarified that they were in the hot tub together for four or five minutes. RP 708. Detective Hubenthal testified that she asked the defendant who was left in the hot tub when he got out and he replied that P.S. and A.S. remained. RP 708.

Detective Hubenthal asked the defendant if at any time he was alone with A.S. in the hot tub and he said no. RP 709. Upon being confronted by Detective Hubenthal that she had heard differently, the defendant repeatedly stated that he was pretty sure that he and A.S. had not been alone together in the hot tub, but eventually he guessed that maybe they were “for about ten seconds.” RP 709. Upon being asked, the defendant initially denied that he had moved A.S. when she was in the hot tub with him, but upon being told by Detective Hubenthal that she, again, had heard differently, he said, “[y]eah well, she got on my lap and so I lifted her off by putting my hands under the back of her thighs and I

moved her.” RP 710. The defendant then demonstrated how he moved A.S. by putting his hand on the back of his thighs, near his bottom. RP 710. The defendant stated that A.S. played in the water for a minute before getting on his lap. RP 711. The defendant, however, in speaking with Angela and John, contemporaneous to the incident, and with Detective Hubenthal in 2012, maintained that he did nothing wrong. RP 712. The defendant elected not to testify. *See generally* RP.

III. EVIDENTIARY ISSUES

At trial, the defendant sought to (1) introduce into evidence the reason that A.S. attended a school, peer-support group at which, in 2011, she talked about what the defendant did; and (2) impeach John Stavrakis with the statements he made in a defense interview in which he stated he was told by A.S. that there were other incidents where the defendant sexually assaulted A.S. in the Stavrakis home. The State objected to defendant’s plan to do either of these things and the trial court agreed with the State. On appeal, the defendant asserts these rulings were in error.

a. The peer-support group

On November 29, 2010, a then twelve years-old A.S. got in trouble at school for possessing stolen property and being a minor in possession of alcohol, marijuana, and tobacco. CP 58-60, 66-76. The police were involved and charges were referred. CP 58-60, 66-76. A.S. was not

charged with any crimes, however, as she resolved her case through the diversion process which was completed on March 7, 2011. CP 58.

The above incident also resulted in A.S.'s expulsion from her school and she would end up going to a new school in the Evergreen School District. CP 58; RP 569, 585, 847-849. The Evergreen School District employs an Intervention Specialist, hereinafter "counselor," who does educational groups at the school for kids who have been experimenting with drugs or alcohol or who have family members who are using. RP 848-49, 866. These peer-support groups that Evergreen School District offered were not mandatory or court ordered. RP 848-50.³ Students enter these groups through self-referral, a referral through the school, or, if an expelled student is coming into the district with these types of problems, the school administration may recommend the group. RP 848-850. This latter way is how it appears that A.S. ended up in the peer-support group. RP 230-31, 286-87, 866.

The counselor who leads these peer-support groups is a mandatory reporter such that if a student discloses abuse the counselor must contact CPS and the police. RP 852, 865-68. A.S. did not know the peer-support group counselor was a mandatory reporter or that she would make a report the authorities if A.S. disclosed sexual abuse. RP 395.

³ It appears, however, that participation in the group may have been a precondition required for A.S. to attend her new school. RP 230-31.

In March of 2011 at one of these peer-support group sessions, A.S. disclosed what the defendant did to her. CP 60; RP 339. She did so when the counselor noticed A.S. crying following another girl's disclosure of sexual abuse and asked her what was the matter. RP 340, 375-76. Following A.S.'s disclosure, the counselor told her that she (the counselor) would have to report what she was told. RP 341.

A.S. testified that she did not disclose prior to this time (the additional details that she did not originally share with her parents) because she was afraid her father would get upset and that her disclosure would cause more fighting within the family. RP 341. Even after A.S. disclosed in the peer-group and learned that a report was going to be made she was still afraid to tell her parents what had happened and they had to find out weeks later when Detective Hubenthal contacted them. RP 342, 377-78, 380, 701-03. A.S. denied that she disclosed in the peer-group as a way to get attention and stated that she did not get much attention from the group anyway. RP 377.

Following her disclosure, A.S. was referred to and participated in sexual abuse treatment at the Children's Center beginning on April, 21, 2011. RP 561-63, 617, 620-23, 642-43. One of A.S.'s largest concerns in treatment and at the time of the disclosure was the impact of the disclosure on her family. RP 566, 568, 622. A.S. was worried about how her parents

would react, e.g., if they would be mad at her, how it would put pressure on them, and how it would affect Helen. RP 568-69, 605, 622, 626-27, 632. A.S. also felt shame and embarrassment, and since she was new at school, she feared other kids would find out and was worried about how they would treat her if they did. RP 569, 623. As a result, she wanted the information kept private. RP 569, 623. Additionally, as part of her treatment, A.S. dealt with issues she had with her brother and boyfriend. RP 591, 675-76. A.S. successfully completed her treatment on June 12, 2012. RP 621, 642-43.

The defendant sought to elicit from the State's witnesses the fact of the November 29, 2010, incident that resulted in A.S. getting in trouble and expelled and/or what led her to attend the peer-support group. RP 208-220, 229-232, 235-37, 281-90, 597-99.⁴ The defendant's theory of admissibility, however, was vague; he argued that "it would be a failure of justice for all the evidence not to come out;" that "it would be a failure of justice for the story to not be told in its entirety;" and that regarding the peer-support group "juries want to know why." RP 209, 232, 284. When asked specifically by the trial court what "the legal basis" was "for impeaching [A.S.]" with the diversion incident, the defendant responded:

⁴ The defendant also repeatedly claimed that A.S. was required to attend the peer-support group as part of probation and/or diversion and that this was a salient fact, but no evidence elicited at trial or in the offers of proof supports that supposition. *See generally* RP.

“When they load up the cartridge and send [the treatment counselor] at me, at my client. That's the basis. Because we now have to figure out how do we get to from that step to the step of [the treatment counselor] being in the picture – using the same information.” RP 233. The defendant continued later in the same vein: “So again, I'm just going back to the phrase ‘a failure of justice.’ Every story has a beginning, a middle, and an end, alright? You can't just ask this jury to get to the end of the story and say we want a conviction without showing the beginning and how we got there. I mean, he's entitled to that.” RP 235. The defendant also asserted, in passing, that in the peer-support group, A.S. went “from being in trouble to being a victim, immediately.” RP 210.

The trial court ultimately ruled that (1) the diversion incident was irrelevant; (2) another student making a disclosure just prior A.S.'s disclosure was relevant; and (3) the allowed testimony was that A.S. was taking part in a peer-support group for reasons unrelated to the disclosure. RP 238, 284-90, 599, 860-61.

b. The impeachment of John Stavrakis

John Stavrakis participated in a defense interview on November 21, 2013. During that interview, John told the defense investigator that A.S., after her disclosure to the peer-support group counselor, had told him that the defendant, on more than one occasion after the hot tub

incident and contemporaneous to it, came over to the Stavrakis' home and "raped" her in her bedroom. RP 414-420. She also told him that she had told her counselor this information. RP 414-420. John confirmed in an offer of proof that he told the defense investigator these things during the interview. RP 414-420. In that same offer of proof, John testified that he does not believe the things he said were true, that A.S. did not specifically tell him those things, but rather he misinterpreted what she said to him and misinterpreted or misunderstood what A.S. said to his wife when he overheard them talking. RP 420-430. A.S., Angela, and A.S.'s treatment counselor all denied that A.S. had made any additional allegations of sexual abuse by the defendant. *See generally* RP, 119. 249-50.

The defendant sought to impeach John with his statements in the interview to show that he was not a credible witness. RP 120, 122, 248-49, 308. The defendant characterized this evidence as "crucial to [John's] credibility as a witness in this proceeding." RP 303. When the trial court commented to the defendant: "now I have a clearer understanding, is [sic] basically attacking his credibility as a witness," the defendant responded: "Correct." RP 305-06.

The State chose not to call John as a witness, but the defendant did so elect. RP 436, 776. The trial court allowed the defendant to question John about the hot tub incident but ruled he could not impeach John on the

collateral issue of the statements he made at the defense interview. RP 693-96.

C. ARGUMENT

The trial court properly excluded the irrelevant evidence the defendant sought to introduce and properly prevented the defendant from impeaching John Stavrakis on a collateral matter.

“Questions of relevancy and the admissibility of testimonial evidence are within the discretion of the trial court, and we review them only for manifest abuse of discretion.” *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010); *State v. Martin*, 169 Wn.App. 620, 628, 281 P.3d 315 (2012) (“The admissibility of evidence is within the sound discretion of the trial court and an appellate court will not disturb that decision unless no reasonable person would adopt the trial court's view.”) (citations omitted). “Abuse exists when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). (quotation and citation omitted). When a trial court’s ruling on such matters of evidence is in error, reversal will only be required “if there is a reasonable possibility that the testimony would have changed the outcome of trial.” *Aguirre*, 168 Wn.2d at 361 (citing *State v. Fankhouser*, 133

Wn.App. 689, 695, 138 P.3d 140 (2006)). In addition, a reviewing court “can affirm on any grounds supported by the record.” *State v. Huynh*, 107 Wn.App. 68, 74 26 P.3d 290 (2001) (citing *State v. Bryant*, 97 Wn.App. 479, 490-91, 983 P.2d 1181 (1999)); *State v. Bobic*, 140 Wn.2d 250, 259, 996 P.2d 610 (2000); RAP 2.4(a), 5.1(d).

I. PEER-SUPPORT GROUP EVIDENCE

Like with other testimonial evidence, “a court's limitation of the scope of cross-examination will not be disturbed unless it is the result of manifest abuse of discretion.” *Darden*, 145 Wn.2d at 620 (citing *State v. Campbell*, 103 Wn.2d 1, 20, 691 P.2d 929 (1984)). A defendant’s right to confront and meaningfully cross-examine “adverse witnesses is guaranteed by both the federal and state constitutions.” *Id* at 620 (citations omitted). Confrontation in the form of cross-examination assures “the accuracy of the fact-finding process” by testing the “perception, memory, [] credibility,” and bias of witnesses. *Id.* (citations omitted). Thus, “the right to confront must be zealously guarded.” *Id.* Indeed, “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 (1975).

The right to cross-examine adverse witnesses, however, is not absolute as the scope of the examination can be limited by the trial court.

Id.; *State v. Robbins*, 35 Wn.2d 389, 396, 213 P.2d 310 (1950) (“Where the right [to cross-examination] is not altogether denied, the scope or extent of cross-examination for the purpose of showing bias rests in the sound discretion of the trial court.”); As *State v. Jones*, has stated:

Although the law allows cross-examination into matters which will affect the credibility of a witness by showing bias, ill will, interest or corruption . . . the evidence sought to be elicited must be material and relevant to the matters sought to be proved and specific enough to be free from vagueness; otherwise, all manner of argumentative and speculative evidence will be adduced.

67 Wn.2d 506, 512, 408 P.2d 247 (1965). Consequently, where a defendant’s “offer of proof . . . vaguely tend[s] to show bias in the most indefinite and speculative way,” it would be “too remote to meet the purpose for which it was offered, and [a] trial court [could] properly h[o]ld it to be immaterial and irrelevant.” *Id.* Simply put, “[t]here is no right, constitutional or otherwise, to have irrelevant evidence admitted.” *Darden*, 145 Wn.2d at 624. Furthermore, the trial court may limit “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)). When a defendant offers extrinsic evidence

that only has an indirect bearing on the bias or prejudice of a witness, the trial court can exclude that evidence under the rule that extrinsic evidence cannot be used to impeach a witness on collateral issues. *State v. Carlson*, 61 Wn.App. 865, 876, 812 P.2d 536 (1991).

Here, the defendant claims that his theory at trial was that “when A.S. was present in the group therapy session she saw the sympathy that the claim of abuse garnered her fellow group therapy member and she decided to make up her own claim of abuse as a method to garner the same type of sympathy and thereby deflect the result of her own bad actions that had landed her in group therapy: her theft of two cell phones, her illegal possession of marijuana, her expulsion from [sic] school and her referral to juvenile court.” Br. of App. at 14. First, the defendant was allowed to cross-examine A.S. on whether she “saw the sympathy that the claim of abuse garnered her fellow group therapy member and she decided to make up her own claim of abuse as a method to garner the same type of sympathy” and he did so. RP 286, 375-77.

Second, other than giving great weight to the fleeting reference made by defendant that A.S. went “from being in trouble to being a victim, immediately,” the record belies that the defendant’s theory of admissibility was based on the victim disclosing as a means to deflect from the diversion incident. RP 209-210, 232-33, 235, 284. Even if that

was his theory, however, such an inference from the evidence presented would be pure speculation and not anchored at all in the facts elicited at trial or in the offers of proof. For one, there was no need for A.S. to deflect as it appears her mother blamed an older friend of A.S.'s for getting A.S. into trouble for the diversion incident, claimed that A.S. was acting in self-defense for previous school discipline, and thought A.S. was treated unfairly by the police and by the school when she was expelled. RP 579, 583-585. Furthermore, all the evidence elicited shows that A.S. was most concerned about how her family would react to her disclosure; she feared anger and stress and did not expect sympathy. RP 566-69, 605, 622, 626-27, 632. That explains why, even though she found out from her peer-support counselor that a report of the disclosure would be made, she still did not tell her parents about her disclosure and they had to find out from the detective. RP 342, 377-78, 380, 701-03.

Moreover, A.S. felt shame and embarrassment about the abuse and was worried other kids at her new school would find out—she wanted to keep her disclosure private. RP 569. Under these circumstances, established by multiple witnesses and treatment records, the defense theory on appeal that A.S. hoped to deflect from the diversion incident and gain sympathy by disclosing sexual abuse by the defendant is far too far-fetched to be considered realistic let alone relevant. This conclusion is

buttressed by the fact that A.S. (1) did disclose when she was eight years old in 2006; (2) had no ill-will towards defendant prior to the incident and never had motive to falsely accuse him; and (3) testified consistently at the time of trial, three years after the peer-support group disclosure. *See generally* RP.

Consequently, the trial court did not abuse its discretion when it prohibited the defendant from introducing into the evidence how the diversion incident or expulsion from school related to the peer-support group in which A.S. disclosed abuse by the defendant. Even if the trial court did err, however, there is not a reasonable possibility that the introduction of such evidence would have changed the outcome of trial. A.S.'s disclosure in 2006, together with her lack of motive to fabricate in 2006, 2011, or 2014, the defendant's initial explanations to A.S.'s parents and his evasive and morphing answers to the detective, and A.S.'s treatment statements consistent with her trial testimony were strong evidence that would not become less strong to any measurable degree upon the introduction of the fact that A.S. got into trouble as a 12 year old. Thus, any error was harmless.

II. THE IMPEACHMENT OF JOHN STAVRAKIS

Washington long has excluded evidence that attempts to impeach a witness on collateral matters as it "is a well-recognized and firmly

established rule in this jurisdiction, and elsewhere, that a witness cannot be impeached upon matters collateral to the principal issues being tried.” *State v. Oswalt*, 62 Wn.2d 118, 120–21, 381 P.2d 617 (1963) (citing *State v. Myers*, 47 Wn.2d 840, 290 P.2d 253 (1955)). Moreover, extrinsic evidence of collateral matters may not be offered to impeach a witness. *State v. Fisher*, 165 Wn.2d 727, 750, 202 P.3d 937 (2009); *State v. Carlson*, 61 Wn.App. 865, 876, 812 P.2d 536 (1991). Evidence pertains to a collateral matter if it lacks direct relevance to the issues being tried and serves only to contradict a witness. *State v. Descoteaux*, 94 Wn.2d 31, 37–38, 614 P.2d 179 (1980).

Here, the defendant recasts his attempt to impeach John at the trial court with explanation that “what the defense was attempting to do was impeach A.S.’s claim made during the trial that incident in the hot tub was the only claim of abuse that she made.” Br. of App. at 22. But the defendant was explicit at trial that the issue of John’s inconsistent statements regarding what A.S. reported to him was “crucial to [John’s] credibility as a witness in this proceeding.” RP 303; *see also* RP 120, 122, 248–49, 305–06, 308. Moreover, if the defendant wanted to impeach A.S. about any claims of abuse she made to John, the proper procedure to introduce such evidence would have been to confront her with those statements and then if denied them to impeach her with the testimony of

another witness. The defendant made no argument suggesting he sought to do that and made no attempt to do that, most likely because nobody believed she ever made additional disclosures of sexual abuse to John. *See generally* RP. As a result, the trial court ruled correctly when upon the defendant calling John to the stand it prevented him from impeaching John on the collateral matter of his inconsistent statements, which would only serve to contradict him and were not germane to any issue at trial.

Even if, however, the trial court erred by not allowing the defendant to impeach John with his inconsistent statements, the introduction of said statements did not have a reasonable possibility of changing the outcome of the case. Evidence of other allegations of rape, even though appearing to be of a dubious nature, may have actually prejudiced the defendant if any members of the jury believed there to be some underlying truth. Moreover, it would be complimentary to say that credibility of John was even on the periphery of the State's case; he was not called as a witness, he did not see the 2006 incident and he was not the person to whom A.S. initially disclosed in 2006 or 2011. Consequently, even if the defendant established that John had no credibility as a witness, the outcome of this case would have remained the same. Thus, any error was harmless.

D. CONCLUSION

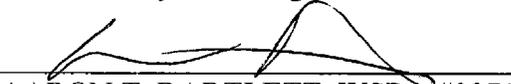
For the reasons argued above, Mr. Stavrakis's conviction should be affirmed.

DATED this 29th day of June, 2015.

Respectfully submitted:

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Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Abby Rowland - Email: abby.rowland@clark.wa.gov

A copy of this document has been emailed to the following addresses:

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