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*78043-9*

No. 230414

IN THE COURT OF APPEALS OF THE  
STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON,

Respondent,

vs.

DANIEL ALFRED POSEY, JR,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT  
OF YAKIMA COUNTY, WASHINGTON

---

THE HONORABLE SUSAN L. HAHN, JUDGE

---

BRIEF OF RESPONDENT

---

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## I. ASSIGNMENTS OF ERROR

### A. ISSUES PRESENTED BY THE ASSIGNMENTS OF ERROR BY APPELLANT.

1. Whether the trial court lacked jurisdiction over the appellant when it sentenced him?
2. Whether the automatic decline provisions of RCW 13.04.030(1)(e)(v) violate the appellant's equal protection rights?
3. Whether application of automatic decline provisions of RCW 13.04.030(1)(e)(v) violate the appellant's due process rights?
4. Whether the trial court erred in precluding the defense from presenting evidence under the rape shield law?

### B. ANSWERS TO ASSIGNMENTS OF ERROR

1. The trial court had jurisdiction over the appellant and the subject matter when it sentenced him as an adult.
2. RCW 13.04.030(1)(e)(v) does not violate the equal protection provisions of the constitution.
3. Application of RCW 13.04.030(1)(e)(v) to the appellant did not violate his rights to due process.

4. The trial court properly denied the defense's request from presenting certain evidence under the rape shield law.

## II. STATEMENT OF THE CASE

### A. PROCEDURAL HISTORY.

The appellant, Daniel Alfred Posey, Jr., was charged by amended information in Yakima County Superior Court with the crimes: count 1, second degree rape; count 2, second degree rape; count 3, first degree assault; and count 4, second degree rape.

The jury found the appellant guilty of second degree rape in counts 1 and 4. (CP 42, 35). The standard range for the two offenses is life, with a minimum of 102-135 months. (CP 5). The trial court sentenced the appellant to a life sentence with a minimum term of 119 months of confinement. (CP 5). This appeal timely followed. (CP 12).

### B. STATEMENT OF FACTS.

In the fall of 2002, H.A.H., and the appellant, Daniel Posey, were sophomores at Selah High School, in Selah, Washington. (01-20-2004 RP 107-08). At the beginning of the school year, both were 15 years of age. (01-20-2004 RP 105; 01-27-2004 RP 733). They had classes together and they developed a romantic and sexual relationship. (01-20-2004 RP 108-09). On the day they first engaged in intercourse, it was also the first time

H.A.H. had smoked marijuana. (01-20-2004 RP 110). She testified that had it not been for the marijuana, she would not have consented to sexual intercourse with the appellant. (01-20-2004 RP 110).

By late November of 2002, H.A.H. had decided to end her relationship with the appellant due to incompatibility and the fact that he was doing drugs. (01-20-2004 RP 110-11). H.A.H. had told the appellant that she wanted to end their relationship, but she did not feel that her words alone were sufficient. (01-20-2004 RP 112). H.A.H. thought that if her mother told him that that would put an end to it. (01-20-2004 RP 112). H.A.H. then asked her mother to end the relationship for her by telling the appellant that it was over. (01-20-2004 RP 112).

Both H.A.H. and her mother went to the school and her mother went to the gym and told the appellant that H.A.H. wanted to break up with him. (01-20-2004 RP 112; 01-22-2004 RP 336). The appellant reacted by being quiet and put his head down and said okay. (01-22-2004 RP 337).

After that, the appellant began to threaten H.A.H. He told her that he would hurt her or her family, and told her that he had cousins in New York that were gangsters and that if she didn't go out with him he would have them kill her family and take her away. (01-20-2004 RP 113). The

appellant also threaten to shoot her parents or rob her house. (01-20-2004 RP 113).

The appellant also called H.A.H. on the telephone and contacted her at the school. (01-20-2004 RP 117). The appellant called the home of H.A.H. so many times that she eventually put a block on their phone so that he could not call. (01-22-2004 RP 291). The appellant then responded by an email, which said "Did you fucking block my phone number? If you did, that's it[.]" (EX SE 69; 01-22-2004 RP 292-93).

The threats and violent behavior began in late November of 2002 and continued through March of 2003. (01-20-2004 RP 114). During that time period, H.A.H. tried to break off from her relationship with the appellant about ten times. (01-20-2004 RP 198). The appellant would hit and threaten her so that she would not end the relationship. (01-20-2004 RP 117, 134, 239).

H.A.H. testified that she did not have consensual intercourse with the appellant after December 2002. (01-20-2004 RP 119). She testified regarding incidents where the appellant came to her home uninvited. The first incident took place in February of 2003. (01-20-2004 RP 122). H.A.H. was sleeping in her bedroom when she heard the appellant outside on the deck. (01-20-2004 RP 124). H.A.H. told her dad that someone was

outside on her deck. Her father grabbed his pistol from the dresser and went into the living room and looked outside to see if anybody was there. (01-20-2004 RP 125). The police were called, but nobody was found outside. (01-20-2004 RP 126).

The next incident occurred again in February of 2003. (01-20-2004 RP 127). H.A.H. was downstairs on her computer when the appellant started banging on the glass of the sliding door. (01-20-2004 RP 127). He was also yelling at H.A.H. to open the door. (01-20-2004 RP 127-28). Fearing that the appellant was going to break the sliding glass door, she let him in. (01-20-2004 RP 128-29).

H.A.H. then told the appellant that she no longer wanted a relationship with him, to which he responded by hitting her on the jaw. (01-20-2004 RP 129). She then told him to leave and he responded by saying that he was not going to leave. (01-20-2004 RP 130). By that point in time, H.A.H. was crying really hard, and she backed away from the appellant because he was very mad. (01-20-2004 RP 130). The appellant backed H.A.H. into a corner, grabbed her and pushed her to the ground. (01-20-2004 RP 130).

The appellant then got down on his knees and started choking H.A.H. (01-20-2004 RP 132). The appellant continued to strangle H.A.H.

until she lost consciousness. (01-20-2004 RP 133). When she regained consciousness, she found that the appellant was undoing her pants. H.A.H. told him to stop, to which the appellant got mad and yelled at her. (01-20-2004 RP 134). He said that it didn't matter what her mother said that she did not have a choice, that she had to go out with him. (01-20-2004 RP 134).

The appellant then forced her to have intercourse. (01-20-2004 RP 136). As the appellant had his penis inside of H.A.H., she continued to tell him to stop, however, the appellant continued. (01-20-2004 RP 136). He kept his hand on her throat and kept her from moving by having all of his weight on her. (01-20-2004 RP 136-37). The appellant did not have a condom on during this time. (01-20-2004 RP 138). Fearing that she could become pregnant, at the last minute H.A.H. was able to move just enough so that the appellant's penis came out of her before he ejaculated. (01-20-2004 RP 137-38). His ejaculate went onto the carpet. (01-20-2004 RP 138).

During the time of the intercourse, H.A.H. had a tampon inside of her since it was her menstruation period. This caused a great deal of pain and discomfort to her. (01-20-2004 RP 139). When H.A.H.'s mother returned home the appellant heard the garage door open, he left the

residence. (01-20-2004 RP 140). H.A.H. did not report the incident to her mother or father because the appellant had threatened to kill them if she did. (01-20-2004 RP 142).

The second incident of forced sexual intercourse took place in late February of 2003. (01-20-2004 RP 142). Again she heard the appellant banging on the glass doors demanding to be let in. (01-20-2004 RP 143). H.A.H. told him to leave but he refused. (01-20-2004 RP 144-45). She let the appellant in, and he punched her in the jaw. (01-20-2004 RP 145). The appellant then took her by the arms and forced her upstairs into her bedroom. (01-20-2004 RP 146, 149). Once there, the appellant pushed H.A.H. onto the bed and choked her until she lost consciousness. (01-20-2004 RP 152). She testified that the appellant took off her clothes and forced her to have intercourse. (01-20-2004 RP 153).

After having had intercourse with H.A.H., the appellant left the room. (01-20-2004 RP 154). H.A.H. put her clothes back on. (01-20-2004 RP 159). The appellant returned with her father's gun then pointed the gun, a revolver, to H.A.H.'s head and started pulling the trigger. (01-20-2004 RP 154-55, 156). The appellant pulled the trigger several times. This really scared H.A.H. (01-20-2004 RP 157). The appellant then took H.A.H. into her parent's bedroom. (01-20-2004 RP 157).

After forcing H.A.H. into her parent's bedroom, he pushed her onto the bed. He again pointed the revolver at H.A.H. (01-20-2004 RP 157). The appellant told H.A.H. that there was one bullet in the gun, but he didn't know where it was in the cylinder. (01-20-2004 RP 159). He then asked her whether she was going to go out with him. (01-20-2004 RP 159). While pointing the revolver at H.A.H., the appellant pulled the trigger. The gun fired and the bullet went through the mattress and into the wall. (01-20-2004 RP 159-60). The appellant laughed and said that the next time he wasn't going to miss. (01-20-2004 RP 160). The appellant then cleaned up the mess from the bullet going through the mattress and he tried to cover the hole in the wall. (01-20-2004 RP 162).

After this incident, H.A.H. sent the appellant an email, which stated "I don't deserve to have to deal with all your bullshit; I bet you wish you had shot me, don't you? I'd rather be killed than tortured like this anyway." (SE 67; 01-22-2004 RP 295).

The third incident of forced sexual intercourse occurred around late March or early April, 2003. (01-20-2004 RP 165). The appellant came to the H.A.H.'s house uninvited and was pounding on the glass doors, demanding be let in. (01-20-2004 RP 165-66). She let him inside. Once inside the appellant used his hands to squeeze the lower part of

H.A.H.'s back, which caused her to fall to the ground. (01-20-2004 RP 166-67). He also got on the ground and was yelling at her, asking her why she didn't love him, why she would go out with him. Then he started to choke her. (01-20-2004 RP 167).

The appellant then pushed her into a guest room, and onto the bed. He yelled at her asking why she wouldn't go out with him. (01-20-2004 RP 169). He choked her again until she lost consciousness. (01-20-2004 RP 170). When H.A.H. regained consciousness, the appellant was undoing her clothes and yelling at her. (01-20-2004 RP 170). H.A.H. did not want to have sex with the appellant, but he forced his penis inside of her. (01-20-2004 RP 172). He did not stop until he was finished. (01-20-2004 RP 172).

The appellant left the room and went upstairs, locking H.A.H. in the basement. H.A.H. then got up, crying, and got dressed. (01-20-2004 RP 173). The appellant returned to the basement and asked H.A.H. if she had picked up the telephone. She told him that she had not. (01-20-2004 RP 174). She then went upstairs to see what he may have done while she was locked in the basement. (01-20-2004 RP 174). When she returned to the basement, he was gone. (01-20-2004 RP 174).

During the month of February, H.A.H. went to school guidance counselor Delynn Elliott and asked that her class schedule be changed. (01-22-2004 RP 403, 405). H.A.H. would not give a reason for the change in schedule when asked by Ms. Elliot, but she seemed desperate to make the schedule change. (01-22-2004 RP 406). Ms. Elliott allowed H.A.H. to change several classes and her lunch period. (01-22-2004 RP 410-11).

Heidi Bunker, H.A.H.'s biology teacher noticed a change in H.A.H.'s classroom behavior after she started dating the appellant, who was also in the same class. (01-22-2004 RP 425, 427). In February, Ms. Bunker observed the appellant and H.A.H. together. The appellant had been suspended and Ms. Bunker had seen him on the school campus. (01-22-2004 RP 429). Ms. Bunker observed that H.A.H. was uncomfortable around the appellant, so she took her concerns to the vice principal, Mr. Smith. (01-22-2004 RP 429). They called H.A.H. to the vice principal's office and spoke with her. H.A.H. indicated that she was no longer dating the appellant and that she didn't want to date him any longer. (01-22-2004 RP 430). H.A.H. stressed that it was better for them to be friends than not. See repeated over and over that she had to be friends with him, but she wouldn't tell them why. (01-22-2004 RP 430-31).

In March of 2003, H.A.H. transferred to Eisenhower High School in Yakima so that she could avoid the appellant. (01-20-2004 RP 175-76; 01-23-2004 RP 537). On April 11, 2003, Selah Police Officer Antonio Valencia responded to the residence at 407 Hillcrest Drive, Selah, Washington, in reference to a burglary. (01-16-2004 RP 12). Officer Valencia contacted Mrs. Walkenhauer, H.A.H.'s mother, at the residence. (01-16-2004 RP 12). He spoke to H.A.H. in the afternoon at the police station. (01-16-2004 RP 15). While interviewing her regarding the burglary investigation, she disclosed the prior incidents of rape and abuse. (01-16-2004 RP 15-16, 46-47; 01-20-2004 RP 175).

### III. ARGUMENT

#### A. THE ADULT TRIAL COURT HAD PERSONAL JURISDICTION OF THE APPELLANT WHEN IT SENTENCED HIM AS AN ADULT.

##### 1. Standard of Review.

Issues involving statutory interpretations are questions of law, and are reviewed de novo. *State v. Schultz*, 146 Wn.2d 540, 544, 48 P.3d 301 (2002).

##### 2. Argument.

The appellant mistakenly assumes that the outcome of a prosecution dictates court jurisdiction. As the appellant acknowledges in

his brief, he was 16 years of age at the time of both of the charged crimes and the filing of the information. (CP 94-97; 84-87). Because count 3 involved a charge of first degree assault, it is classified as a “serious violent offense” according to RCW 9.94A.030, and RCW 13.04.030 provides for adult criminal court jurisdiction under those circumstances. Specifically, RCW 13.04.030 provides:

(1) Except as provided in this section, the juvenile courts in this state shall have exclusive original jurisdiction over all proceedings:

.....

- (e) Relating to juveniles alleged or found to have committed offenses, traffic or civil infractions, or violations as provided in RCW 13.04.020 through 13.40.230, unless:
  - (v) The juvenile is sixteen or seventeen years old and the alleged offense is:
    - (A) A serious violent offense as defined in RCW 9.94A.030;

The appellant argues that the jury verdict affected the jurisdiction of the adult court. The appellant is mistaken in his analysis. When the plain language of a statute is clear on its face, the appellate court will not engage in rules of statutory interpretation. The appellate court will interpret statutory language in context of the entire statute and its purpose, and avoid strained interpretations. *City of Seattle v. Clark-Munoz*, 152

Wn.2d 39, 43-44, 93 P.3d 141 (2004). Where possible, the appellate court will interpret a statute as constitutional. *Public Utility Dist. No. 1 v. Dep't of Ecology*, 146 Wn.2d 778, 834-35, 51 P.3d 744 (2002).

RCW 13.040.030 is clear on its face and unambiguous. As the appellant points out, some jurisdictions have adopted statutes that provide procedures upon acquittal of all automatic-transfer charges. RCW 13.040.030 however, is silent on this issue. But its wording indicates that it is the nature of the charge which justifies adult court jurisdiction. RCW 13.04.030(e)(v)(A) uses the word "alleged" which indicates that the Legislature intended the charge, not the final outcome, to dictate the proper court jurisdiction. The Legislature's silence regarding alternative procedures upon acquittal of all automatic-transfer charges also indicates that the outcome of the prosecution has no effect on jurisdiction.

Colorado courts have adopted the same interpretation of "alleged," reasoning the words "charged" and "alleged" demonstrate that "the [Colorado Legislature] intended the indictment, and not the subsequent conviction, to trigger the allocation of juvenile and district court jurisdiction." Further, "jurisdiction is not lost simply because the juvenile defendant is convicted of a lesser offense." *People v. Davenport*, 43 Colo. App. 41, 602 P.2d 871, 872 (Colo. App. 1979) (citing *Gray v. State*, 6

Md.App. 677, 253 A.2d 395 (1969)); *People v. Hughes*, 946 P.2d 509 (Colo. App. 1997) (overruled on other grounds).

This interpretation is consistent with one of the purposes behind the Juvenile Justice Act, which is to “[p]rovide for a clear policy . . . to determine the jurisdictional limitations of the courts.” RCW 13.03.010(2)(j); *State v. Cirkovich*, 41 Wn. App. 275, 279, 703 P.2d 1075 (1985) (noting that “one of the express purposes of the Act as stated in RCW 13.40.010(2)(j) is to provide clear policy as to jurisdiction”). If the Legislature intended the outcome of the prosecution to dictate jurisdiction, then adult court jurisdiction would be provisional throughout the prosecution. This does not harmonize with the Legislature’s intent to clearly delineate jurisdictional boundaries. Further, the appellant’s argument does not mesh with one of objectives of adopting the automatic-transfer provision, that of the fiscal impact of violence. Laws of 1994, 1<sup>st</sup> Sp. Sess., ch. 7, § 101, at 2197-98.

Thus, RCW 13.04.030 is clear on its face. Jurisdiction attaches when certain enumerated offenses are charged. The outcome of the prosecution has no affect on jurisdiction. The plain language of the statute, coupled with the Legislature’s objectives, must prevail.

B. THE AUTOMATIC DECLINE PROVISIONS OF RCW 13.03.030 DO NOT VIOLATE THE APPELLANT'S EQUAL PROTECTION RIGHTS.

1. Standard of Review.

The rational relationship test applies to issues involving the challenged statute since juveniles are neither a suspect class nor a semi-suspect class. Under that test, the legislative classification will not fail unless it rests on grounds “wholly irrelevant to achievement of legitimate state objectives.” *In re Boot*, 130 Wn. 2d 553, 572-573, 925 P.2d 964 (1996).

2. Argument.

The appellant argues that he is being treated differently from other “similarly situated” 16 and 17-year old offenders in his same class. Specifically that he is treated differently than someone convicted and sentenced for the same crime in juvenile court. (App. Br. pg. 26). Statutes are presumed to be constitutional. *State v. Hennings*, 129 Wn.2d 512, 524, 919 P.2d 580 (1996). A party challenging the constitutionality of a statute has the heavy burden of proving its unconstitutionality beyond a reasonable doubt. *Id.* at 524; *State v. Ward*, 123 Wn.2d 488, 496, 869 P.2d 1962 (1994). The appellant in this case has the burden of proving the unconstitutionality of RCW 13.04.030(e)(v).

Equal protection does not ensure complete equality among individuals or classes. Rather, it ensures equal application of the laws to persons “similarly situated.” *State v. Simmons*, 152 Wn.2d 450, 98 P.3d 789, 793 (2004). A juvenile person does not have a constitutional right to be tried in juvenile court. *In re Pers. Rest. Pet. of Dalluge*, 152 Wn.2d 772, 784, 100 P.3d 279 (2004).

Our Supreme Court has held that initially sending two 16- or 17-year-old defendants to different courts based on the nature of the charges against them is constitutional. *In re Boot*, 130 Wn.2d at 572, 574. The two juveniles were no longer “similarly situated” once they are sent on different paths, one in adult court and the other in juvenile. Likewise, the appellant has failed to make a distinction that he was similarly situated with juvenile counterparts.

Furthermore, the appellant fails to recognize one significant point, that at the beginning of trial the appellant was on trial for the crime of first degree assault with a firearm as an adult. (CP 86). That fact alone differentiates the two situations so that they are not “similarly situated.” See *State v. Morales*, 240 Conn. 727, 742-43 694 A.2d 758 (1997) (concurring opinion-the appropriate time to examine whether two parties

are “similarly situated” for equal protection analysis is at the beginning of the process when the classification is made).

The appellant cites a concurring opinion of Justice Alexander in *In re Boot*, supra, to support his position that he is being treated differently. As the appellant’s brief points out, Justice Alexander acknowledged that there may be a rational basis for charging one of the hypothetical offenders in adult court. Other courts have examined this situation and have found a rational basis for such a distinction.

In *State v. Morales*, supra, the court found that the Connecticut legislature provides a variety of benefits to juvenile defendants, before and after a trial. That the Connecticut legislature had “chosen to bestow or withhold those benefits as a whole, rather than on a piecemeal basis.” *Id.* at 740. Further, that the Connecticut legislature could have decided that, “in the best interests of our open public court system, any defendant tried as an adult and exposed to the public for trial should be sentenced as an adult, regardless of the crimes of which he or she ultimately is convicted.” *Id.* at 740. The court surmised that the legislative reasoning for not “conferring post verdict benefits, such as more lenient sentencing and erasure of records, on a defendant who, in open court, had been tried as an adult and convicted of a serious crime would damage society’s perception

of the fair administration of justice.” Id. at 740. The *Morales* court found that that was a rational basis “to preclude a defendant from seeking the postverdict benefits of juvenile statutes once validly transferred . . .” Id. at 741.

In *Price v. State*, 683 So. 2d 44, (Ala.Crim. App. 1996), the court recognized, in an equal protection challenge to their automatic transfer statute, that there was a rational basis relating to a legitimate governmental interest for treating juveniles differently, that of “retribution for serious crimes in addition to having the deterrent effect that facing an adult trial would have on juveniles, it does not violate the appellant’s equal protection rights.” Id. at 45. Although this was an attack on the initial transfer of the appellant there, it highlights a significant rationale for implementing such an automatic transfer scheme, that of deterring juvenile crime. A juvenile who is facing the prospect of adult prosecution may very well be deterred from committing any crime.

Additionally, our Supreme Court in *In re Boot*, infra., in an equal protection challenge our state’s automatic transfer statute, that the legislative objective in adopting the Act was to “increase the severity and certainty of punishment for youth and adults who commit violent acts.” *In re Boot*, 130 Wn.2d at 574. The court acknowledged that the “1994

Legislature attempted in the Act to address the prevalence of violence in our society, particularly the violent tendencies of certain young people.” *In re Boot*, 130 Wn.2d at 575. Thus, the deterrent effect upon young people to keep them from committing violent crime is sufficient justification to differentiate between those tried in juvenile court and those tried in adult court, such as the appellant; and to sentence them as adults even if they are convicted of lesser crimes or “nonenumerated” offenses.

C. THE AUTOMATIC DECLINE PROVISIONS OF RCW 13.03.030 DO NOT VIOLATE THE APPELLANT’S DUE PROCESS RIGHTS.

1. Standard of Review.

A party challenging the constitutionality of a statute has the heavy burden of proving its unconstitutionality beyond a reasonable doubt. *State v. Ward*, 123 Wn.2d 488, 496, 869 P.2d 1962 (1994).

2. Argument.

The appellant argues that because the legislature failed to expressly provide for situations where a person a convicted of a lesser offense that is a nonenumerated crime, that deprived him of due process because he was not given the same opportunity for a hearing before he was convicted and sentenced in adult court for nonenumerated crimes.

“To successfully raise a claim that the state has denied a person procedural due process, the claimant must establish the loss of a protectable property or liberty interest. *Ingraham v. Wright*, 430 U.S. 651, 672, 51 L. Ed. 2d 711, 97 S. Ct. 1401 (1977). . . . Although the imposition of the adult criminal sentence in the case at bar will deprive Behl of his liberty, this deprivation occurred only after he received a trial that provided him with the utmost procedural due process protections. See *In re Gault*, 387 U.S. 1, 29, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967) (noting that the adult criminal process provides safeguards pursuant to rights afforded by the constitution).” *State v. Behl*, 564 N.W.2d 560, \*18 (Minn. 1997).

Our Supreme Court has held that since juveniles do not have a constitutional right to be tried in juvenile court, and that the automatic transfer statute does not deprive them of any constitutionally protected right merely by conferring adult criminal court jurisdiction over them without a hearing. *In re Boot*, 130 Wn.2d at 571. When a defendant is charged with an automatic transfer offense, the adult court is vested with exclusive jurisdiction over all charges against the defendant. *State v. Salavea*, 151 Wn.2d 133, 141 n.3, 86 P.3d 125 (2004); *In re Boot*, 130 Wn.2d 553, 575, 925 P.2d 964 (1996).; *State v. Sharon*, 100 Wn.2d 230,

231, 668 P.2d 584 (1983). Because the appellant was properly tried in adult court under RCW 13:04.030(1)(e)(v), he was not entitled to a declination hearing under RCW 13.40.110. Therefore, he was not deprived of procedural due process.

Furthermore, since the appellant was not under juvenile court jurisdiction, he did not acquire a protectable interest in juvenile court disposition of his case. And since the automatic transfer to adult court precludes juvenile court jurisdiction, there is no loss of a protected right of interest. See *State v. Behl*, infra at 19-20. Thus he was not denied his due process rights.

D. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S PROFFERED EVIDENCE UNDER THE RAPE SHIELD LAW.

1. Standard of Review.

The appellate court reviews the trial court's evidentiary decisions under an abuse of discretion standard. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). Discretion is abused when it is exercised in a manifestly unreasonable way or based on untenable grounds or reasons. *State ex rel Carroll v. Junker*, 79 Wn.2d 26, 482 P.2d 775 (1971).

2. Argument.

The appellant argues that the trial court erred in not permitting him to present the email evidence regarding prior thoughts of past sexual thought involving violent sex. (App. Br. pg 37). He cites *State v. Carver*, 37 Wn. App. 122, 124, 678 P.2d 842 (1984) for the proposition that he should have been permitted to introduce that evidence. In *Carver*, the court held that the trial court improperly excluded evidence that two young victims of sexual abuse had been previously abused. 37 Wn. App. at 125. It reasoned that the evidence was "extremely relevant" and admissible because "[w]ithout the evidence the jury logically could draw the inference that [the girls] were conversant with such [sexual acts] only because defendant was guilty as charged." *Carver*, 37 Wn. App. at 124.

The court in *Carver* reasoned that "the evidence proffered in this case does not fit within the concepts and purposes of the rape shield statute. First, the evidence sought to be admitted here was prior sexual *abuse*, not *misconduct*, of a victim. Added to this is the fact that the victims were young girls who were incapable of consenting to such acts. Under these circumstances the evidence is not prejudicial to the victims nor does it tend to discourage prosecution. Merely because the evidence pertains to a sexual experience does not mean we must strain to fit it into the special confines of the rape shield statute. Rather, we must apply

general evidentiary principles of relevance, probative value and prejudice.”

Id. at 124.

Carver is unlike the case at hand. The defense sought to introduce the email messages as evidence of the victim’s consent to the violent sexual incidents. (01-12-2004 RP 53). The trial court conducted a hearing pursuant to RCW 9A.44.020(3)(c). (01-12-2004 RP 45-61). The court found that the proffered evidence was highly prejudicial and that it was not very probative. (01-12-2004 RP 60). Unlike the facts in *Carver* where the court reasoned that it was “extremely relevant” for the jury to know the complaining witnesses in *Carver* were knowledgeable regarding sexual acts because they had been previously abused, here it was determined to be highly prejudicial.

The purpose of the statute is to encourage rape victims to prosecute, and to eliminate prejudicial evidence of prior sexual conduct of a victim which often has little, if any, relevance on the issues for which it is usually offered, namely, credibility or consent. *Carver*, 37 Wn. App. at 124. Unlike *Carver*, the issue of consent is clearly the focal point here. And unlike *Carver*, the evidence proffered was less than prior specific acts. They were prior specific thoughts. As the trial court recognized that the email correspondence had little to do with whether someone would

actually do what they say they would do typing an email on a computer. (01-12-2004 RP 56). These thoughts should not be accorded the weight that the appellant seeks to give them.

The appellant's argument that the trial court erred in its probative weighing process is not persuasive. For to be admissible, evidence must first be relevant, that is it must make the existence of a fact of consequence to the case more likely or less likely than without the evidence. ER 401. In addition, to be admissible, the probative value must not be substantially outweighed by the risk of unfair prejudice under ER 403. *See State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983) (explaining that the admission of sexual history evidence could lead to "acquittals based on prejudice against the victims' past sex lives").

"It is within the trial judge's discretion to exclude relevant evidence if the probative value is outweighed by the danger that the facts offered would unduly arouse a jury's emotions of prejudice, hostility or sympathy." *State v. Henry*, 36 Wn. App. 530, 534, 676 P.2d 521 (1984). Here, the trial court properly applied the rape shield law and found that the prejudicial nature of the evidence proffered by the defense in the form of the email messages outweighed any probative value that it may have had.

IV. CONCLUSION

The Court should affirm the conviction for the reasons stated above.

Respectfully submitted this 7<sup>th</sup> day of March, 2005.

  
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