

RECEIVED  
COURT OF APPEALS  
DIVISION ONE

DEC 15 2008

82613-7

No. \_\_\_\_\_  
COA No. 25844-1-III

IN THE SUPREME COURT OF WASHINGTON

---

---

**FILED**  
JAN 16 2009  
CLERK OF SUPREME COURT  
STATE OF WASHINGTON  
*ax*

STATE OF WASHINGTON,  
Respondent

v.

CHRISTOPER JONES,  
Petitioner

**FILED**  
DEC 22 2008  
COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

---

---

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

The Honorable Cameron Mitchell, Judge

---

---

PETITION FOR REVIEW

---

---

ERIC BROMAN  
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC  
1908 E. Madison  
Seattle, WA 98122  
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>IDENTITY OF PETITIONER</u> .....	1
B. <u>COURT OF APPEALS DECISION</u> .....	1
C. <u>ISSUES PRESENTED FOR REVIEW</u> .....	1
D. <u>STATEMENT OF THE CASE</u> .....	2
E. <u>ARGUMENT WHY REVIEW SHOULD BE ACCEPTED</u> ....	4
1. REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS AND TRIAL COURT DENIED JONES HIS RIGHT TO PRESENT EVIDENCE IN HIS DEFENSE. A TRIAL COURT CANNOT SUBSTITUTE ITS VIEW OF THE ACCUSED'S CREDIBILITY FOR THE JURY'S TO DENY AN ACCUSE THE RIGHT TO TESTIFY.....	4
a. <u>The Court's Affirmance of the ER 404(b) Ruling Denied Jones' Right to a Jury Trial and Presents a Significant Constitutional Question of Substantial Public Interest.</u> ....	7
b. <u>The Rape Shield Ruling Raises Important Constitutional and Statutory Questions</u> .....	8
2. THE PROSECUTOR'S MISCONDUCT OFFERS THIS COURT THE CHANCE TO ADOPT WELL-REASONED LAW PROHIBITING COMMENT ON THE RIGHT TO REFUSE CONSENT TO A WARRANTLESS SEARCH .....	10

**TABLE OF CONTENTS (cont'd)**

	Page
a. <u>The Improper Comment on Jones' Privacy Rights Present the Opportunity to Adopt Settled Law Prohibiting this Unfair and Unconstitutional Tactic</u> .....	12
b. <u>The Prosecutor's Comments on the Exercise of Fifth Amendment Rights Were Clear Error</u> .....	15
c. <u>The Errors Were Prejudicial</u> .....	15
F. <u>CONCLUSION</u> .....	19

## TABLE OF AUTHORITIES

Page

### WASHINGTON CASES

<u>State v. Burke</u> , 163 Wn.2d 204, 181 P.3d 1 (2008) .....	12, 13, 15, 17, 19
<u>State v. Cheatham</u> , 150 Wn.2d 626, 81 P.3d 830 (2003) .....	6
<u>State v. Darden</u> , 145 Wn.2d 612, 41 P.3d 1189 (2002).....	6
<u>State v. Easter</u> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....	11, 12, 17, 19
<u>State v. Ferrier</u> , 136 Wn.2d 103, 960 P.2d 927 (1998) .....	12
<u>State v. Hudlow</u> , 99 Wn.2d 1, 659 P.2d 514 (1983).....	6, 8, 9
<u>State v. Keene</u> , 86 Wn. App. 589, 938 P.2d 839 (1997) .....	11
<u>State v. Lough</u> , 125 Wn.2d 847, 889 P.2d 487 (1995) .....	7
<u>State v. Morse</u> , 156 Wn.2d 1, 123 P.3d 832 (2005) .....	13
<u>State v. Reed</u> , 101 Wn. App. 704, 6 P.3d 43 (2000) .....	6
<u>State v. Surge</u> , 160 Wn.2d 65, 70-71, 156 P.3d 208 (2007) .....	13

FEDERAL CASES

Chambers v. Mississippi,  
410 U.S. 284, 35 L. Ed. 2d 297,  
93 S. Ct. 1038 (1973) ..... 6

Crane v. Kentucky,  
476 U.S. 683, 106 S. Ct. 2142,  
90 L. Ed. 2d 636 (1986) ..... 6

Doyle v. Ohio,  
426 U.S. 610, 96 S. Ct. 2240,  
49 L. Ed. 2d 91 (1976) ..... 12, 14

Gasho v. United States,  
39 F.3d 1420 (9th Cir. 1994),  
cert. denied, 515 U.S. 1144 (1995) ..... 14

Griffin v. California,  
380 U.S. 609, 85 S. Ct. 1229,  
14 L. Ed. 2d 106 (1965) ..... 12, 14

United States v. Prescott,  
581 F.2d 1343 (9th Cir. 1978) ..... 13-15

Washington v. Texas,  
388 U.S. 14, 18 L. Ed. 2d 1019,  
87 S. Ct. 1920 (1967) ..... 6

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>OTHER JURISDICTIONS</u>	
<u>Commonwealth v. Tillery</u> , 417 Pa. Super. 26, 611 A.2d 1245, <u>review denied</u> , 616 A.2d 984 (1992) .....	40
<u>Elson v. State</u> , 659 P.2d 1195 (Alaska 1983).....	40
<u>Garcia v. State</u> , 103 N.M. 713, 712 P.2d 1375 (N.M. 1986) .....	40
<u>Gomez v. State</u> , 572 So.2d 952 (Fla. App. 1990) .....	40
<u>People v. Stephens</u> , 133 Mich. App. 294, 349 N.W.2d 162 (Mich. App. 1984).....	40
<u>Reeves v. State</u> , 969 S.W.2d 471 (Tex. Ct. App. 1998), <u>cert. denied</u> , 526 U.S. 1068 (1999) .....	40
<u>Simmons v. State</u> , 308 S.C. 481, 419 S.E.2d 225 (1992).....	40

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHERS</u>	
Const. art. 1, § 7.....	12
Const. art. 1, § 9.....	12
Const. art. 1, § 22.....	6
ER 404(b) .....	3, 5, 17
RAP 13.4(b) .....	19
RAP 13.4(b)(1).....	10
RAP 13.4(b)(3).....	8, 10
RAP 13.4(b)(4).....	8, 10
RAP 13.6.....	19
RCW 9A.44.020(3) .....	8, 9
U.S. Const. amend. 4.....	11, 13
U.S. Const. amend. 5.....	11, 12
U.S. Const. amend. 6.....	6
U.S. Const. amend. 14.....	6, 12

A. IDENTITY OF PETITIONER

Petitioner Christopher Jones, the appellant below, asks this Court to review the following Court of Appeals decision.

B. COURT OF APPEALS DECISION

Jones seeks review of Division Three's decision in State v. Jones, No. 25844-1-III (November 13, 2008), attached as appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. The trial court prevented Jones from testifying about the defense theory of the case by determining it did not believe Jones' testimonial offer of proof. The Court of Appeals affirmed this result, citing no applicable authority.

a. Did the trial court and Court of Appeals violate Jones' constitutional right to testify and present evidence in his defense?

b. Should this Court grant review to provide guidance on the important constitutional question whether a trial court may prevent an accused from testifying based on a finding that it disbelieved the accused's testimony?

c. The "rape shield" statute precludes the defense from offering evidence of a complaining witness' past sexual conduct to attack credibility. It does not preclude evidence of contemporaneous sexual conduct with multiple partners as part of a drug, alcohol, and sex party. Did the trial court and Court of Appeals improperly rewrite

the rape shield statute to preclude Jones from offering contemporaneous sexual contact with multiple partners, which supported the defense theory of consent?

2. When presenting evidence and closing argument, the prosecutor repeatedly commented on Jones' exercise of his right to refuse consent to a warrantless search and his right to remain silent. Although other courts have condemned prosecutorial comment on refusals to consent to warrantless searches, this Court has not yet addressed the issue.

a. Should this Court grant review to provide guidance on this important constitutional question?

b. Where the first jury rejected the state's initial charge and did not return a verdict on the lesser, where the state emphasized its unconstitutional comments on multiple occasions in the second trial, and where this Court has at least twice required reversal following similar constitutional errors, does the Court of Appeals' unsupported harmless error finding warrant this Court's review?

D. STATEMENT OF THE CASE<sup>1</sup>

This case was tried a second time after the jury rejected the state's initial charge. This appeal arises from the second trial.

The Benton County prosecutor charged Jones with first degree rape. The first jury acquitted Jones of that charge but could not agree on the lesser included of second degree rape. At the second trial, the defense again theorized the 17-year-old complaining witness (Kashauna Dixon) consented to intercourse and sought to offer evidence supporting that defense.

The offered evidence would have shown Dixon was using cocaine and alcohol at the time of the alleged event. Dixon and another woman consented to a "party" with Jones and two other men. The women danced and engaged in sexual intercourse for money.

On the state's motion and over defense objection, the trial court excluded this evidence under the "rape shield" statute and ER 404(b). The trial court's ER 404(b) ruling essentially found the state's evidence more credible than Jones' proposed testimony. The court

---

<sup>1</sup> Citations to the record are set forth in full in the Brief of Appellant, at 5-18.

excluded the evidence on that basis. Slip op. at 13-14; see argument 1, infra.

During the second trial the prosecutor also committed several types of misconduct by unconstitutionally commenting on Jones' exercise of his Fourth and Fifth Amendment rights. BOA at 35-41. To avoid repetition, facts relating to those two claims are set forth in argument 2, infra.

Jones seeks review of the Court of Appeals' affirmance his conviction despite these prejudicial trial errors.

Jones also challenged the exceptional sentence, arguing the instructions for the aggravating factor suffered numerous errors. BOA at 42-59. The Court of Appeals held the special verdict form unconstitutionally commented on the evidence and the error was not harmless. The Court of Appeals remanded for resentencing and did not address Jones' remaining sentencing claims. Slip op. at 18-20.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS AND TRIAL COURT DENIED JONES HIS RIGHT TO PRESENT EVIDENCE IN HIS DEFENSE. A TRIAL COURT CANNOT SUBSTITUTE ITS VIEW OF THE ACCUSED'S CREDIBILITY FOR THE JURY'S TO DENY AN ACCUSE THE RIGHT TO TESTIFY.

Jones sought to present evidence, including his own testimony, that Dixon was using cocaine and alcohol on the night of the events.

According to the offer, there were three men and two women at an all night party. Dixon and the other woman danced and engaged in sexual intercourse for money with the three men. 2RP 196-97, 202-03, 211-15.

The trial court excluded the sexual contact evidence, finding it barred by the "rape shield" statute. 2RP 199, 246. The defense objected, arguing the ruling violated Jones' right to present evidence and to confront the state's witnesses. 2RP 200.

The state then sought to exclude the alcohol and cocaine evidence under ER 404(b). The court held a brief evidentiary hearing where Dixon denied consuming drugs, alcohol, or partying with others. The investigating detective said Jones did not mention drugs and alcohol during an interview at the jail. 2RP 204-08.

Jones' testimony at the in limine hearing differed substantially. He said Dixon and her brother went with him to a truck stop in Pasco where they met two Hispanic males and procured some cocaine. The group returned to the house and consumed the cocaine. Two more cocaine purchases were made and Dixon continued to consume cocaine. She also drank beer. The party continued until 8:00 in the morning. 2RP 111-15.

The trial court excluded the "party" evidence, finding Jones' testimony less credible than Dixon's. 2RP 222-23. On appeal, Jones

raised numerous constitutional and evidentiary claims challenging these rulings. BOA at 18-34. Jones seeks review of those claims.

In the Court of Appeals, Jones showed why the trial court's ruling denied his constitutional rights to confront witnesses and to present evidence in his defense. BOA at 18-26; U.S. Const. amend. 6, 14; Const. art. 1, § 22; citing, inter alia, State v. Cheatam, 150 Wn.2d 626, 648, 81 P.3d 830 (2003) (citing Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)). The right to present a defense is a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973); Washington v. Texas, 388 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967).

This Court's decisions in State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983) and State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002) recognize the constitution permits the accused to present even minimally relevant evidence unless the state can demonstrate a compelling interest for excluding it. Darden, 145 Wn.2d at 612. This is not an ER 403 balancing test. Once defense evidence is shown to be even minimally relevant, the burden shifts to the State to show a compelling interest in excluding it. If the state cannot do so, the evidence must be admitted. Hudlow, 99 Wn.2d at 15-16; see also, State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000) ("Evidence

relevant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest.").

- a. The Court's Affirmance of the ER 404(b) Ruling Denied Jones' Right to a Jury Trial and Presents a Significant Constitutional Question of Substantial Public Interest.

The trial court excluded the offered evidence of Dixon's cocaine and alcohol use by finding it did not believe Jones' offered testimony. As Jones' brief shows, however, the jury should determine witness credibility, not the judge. BOA at 31-34. Because of space limitations, Jones must incorporate that argument here.

The Court of Appeals did not address Jones' authority, but instead cited an ER 404(b) case for the proposition that a trial court may exclude misconduct evidence if the proponent does not convince the court the misconduct actually occurred. Slip op. at 13-14 (citing State v. Lough, 125 Wn.2d 847, 852, 864, 889 P.2d 487 (1995)).

Lough was a case where the state sought to admit Lough's prior misconduct under the "common scheme or plan" exception. This Court held the evidence admissible. Lough, 125 Wn.2d at 861.

Lough, of course, neither addressed nor approved a trial court's exclusion of important defense evidence. Lough did not hold a trial court may find an accused is not credible under an evidence rule and thereby deny his constitutional right to testify in his own defense.

According to the Court of Appeals, however, “that is exactly what ER 404(b) permits.” Slip op. at 14 (citing no authority).

For the reasons stated in his brief, Jones respectfully argues the Court of Appeals has misidentified the controlling rule in reaching this remarkable conclusion. If that is to be the rule, however, then some authority other than Lough should support it. This Court should grant review to settle this important constitutional question and issue of substantial public importance. RAP 13.4(b)(3), (4).

b. The Rape Shield Ruling Raises Important Constitutional and Statutory Questions.

The trial court similarly relied on the rape shield statute to preclude Jones from testifying that Dixon engaged in contemporaneous sexual intercourse with himself and the other men. Jones cited authority from other jurisdictions showing why courts had distinguished between past and present behavior when construing similar rape shield statutes and rules. BOA at 28-29 (citing numerous cases).<sup>2</sup>

The Court of Appeals, however, analyzed none of the cited authority. Instead, the court conducted its own dissection of Hudlow to support its conclusion “that previous consent to sexual behavior

---

<sup>2</sup> The statute bars evidence of “past sexual behavior” to attack credibility. RCW 9A.44.020(3).

with a different man was not relevant to the question of whether the victim had consented to the present sexual contact with the defendant.” Slip op at 11-12 (emphasis added). According to the Court, “[t]he underlying premise – that consent with one person makes it more likely there was consent to sexual contact with another person – simply is not dependent upon temporal factors. The premise is logically invalid regardless of the length of time between the two incidents.” Slip op at 12 (citing Hudlow, 99 Wn.2d at 10.)

Again, the cited authority does not support the Court of Appeals’ conclusion. Hudlow did not address the exclusion of evidence of consensual sexual contact with multiple individuals. The Court of Appeals’ decision also removes the word “past” from RCW 9A.44.020(3).

Ultimately, if the state or the trial court did not believe Jones’ testimony, the state’s remedy was to cross-examine him, impeach him, or present its own countervailing evidence. But as this Court held in Hudlow and has reaffirmed numerous times since, the state cannot lawfully exclude probative defense evidence without a compelling interest.

The Court of Appeals decision therefore conflicts with Hudlow and its progeny. The case raises a significant constitutional question

and a question of substantial public interest under the rape shield statute. This Court should grant review. RAP 13.4(b)(1), (3), (4).

2. THE PROSECUTOR'S MISCONDUCT OFFERS THIS COURT THE CHANCE TO ADOPT WELL-REASONED LAW PROHIBITING COMMENT ON THE RIGHT TO REFUSE CONSENT TO A WARRANTLESS SEARCH.

Jones' appeal raises two separate but related claims of prosecutorial misconduct. One arises from the prosecutor's improper comments on Jones' refusal to consent to a warrantless search of his person. The other arises from the prosecutor's improper comments on Jones' right to silence.

During the second trial the prosecutor elicited testimony from the Richland police detective that Jones did not attempt to contact the police after the accusation surfaced. 2RP 251-52. In closing, the prosecutor emphasized Jones' alleged failure to contact the police, arguing Jones did not behave the way an innocent man would behave. 2RP 329-30.

The prosecutor also asked the detective numerous questions relating to the detective's efforts to secure a DNA sample from Jones. The prosecutor first offered testimony to show it is easy to take DNA with a cheek swab. The prosecutor then asked the detective whether Jones would allow the swab, and the detective said no. The prosecutor then pointed out "[a] judge of the Benton County Superior

Court granted you a search warrant to actually force the defendant to give you the swab, is that right?”, to which the detective answered “yes.” 2RP 265. In closing, the prosecutor again commented on Jones’ exercise of his Fourth Amendment rights, equating Jones’ exercise of his rights with the actions of a guilty man. 2RP 334.

On appeal, Jones argued the prosecutor’s tactics denied him a fair trial by unconstitutionally commenting on his constitutional rights. BOA at 35-41. Citing settled authority, Jones argued the comments on his alleged failure to contact police violated his Fifth Amendment right to remain silent. BOA at 35-37 (citing State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996) and State v. Keene, 86 Wn. App. 589, 592, 938 P.2d 839 (1997)).

Jones also argued the prosecutorial tactics unconstitutionally commented on his Fourth Amendment right to refuse to consent to a warrantless search. BOA at 38-41. The state’s brief in the Court of Appeals wholly failed to respond to this argument.

The Court of Appeals declined to analyze these issues or cite authority, and instead assumed these instances of misconduct were error. Slip op. at 17. Also without citing relevant authority, the court then found the errors harmless. Slip op. at 17.

- a. The Improper Comments on Jones' Privacy Rights Present the Opportunity to Adopt Settled Law Prohibiting this Unfair and Unconstitutional Tactic.

The state and federal constitutions guarantee an accused the right to remain silent. U.S. Const. amend. 5; Const. art. 1, § 9. The state and federal constitutions also guarantee Washington residents the right to be free from warrantless and unreasonable searches absent authority of law. U.S. Const. amend. 4; Const. art. 1, § 7.

This Court and the United States Supreme Court have condemned prosecutorial comments on an accused's prearrest and postarrest exercise of the right to remain silent. State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008). As this Court made clear in Burke, the state's substantive use of prearrest silence violates the Fifth Amendment,<sup>3</sup> and the state's substantive use of post-Miranda silence violates the Fourteenth Amendment.<sup>4</sup>

The basic premise for these decisions is simple: where the constitution protects individual rights, a person should not be punished for exercising those rights. The state may not insinuate an

---

<sup>3</sup> Burke, 163 Wn.2d at 211-17, (citing, inter alia Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) and State v. Easter, 130 Wn.2d 228, 231-35, 922 P.2d 1285 (1996)).

<sup>4</sup> Burke, 163 Wn.2d at 211-17 (citing, inter alia, Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)).

accused is guilty based on the exercise of constitutional rights.

Burke, 163 Wn.2d at 211-17. –

This Court has made it clear we may refuse to consent to a warrantless search of our persons and property. State v. Morse, 156 Wn.2d 1, 13, 123 P.3d 832 (2005) (citing State v. Ferrier, 136 Wn.2d 103, 116, 960 P.2d 927 (1998)). This Court also has made it clear that the Washington Constitution provides broader protection of our privacy rights than does the Fourth Amendment. State v. Surge, 160 Wn.2d 65, 70-71, 156 P.3d 208 (2007) (citing cases). This right to refuse consent includes the preconviction right to privacy in our bodily fluids. Schmerber v. California, 384 U.S. 757, 770, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966); cf., Surge, 160 Wn.2d at 211-13 (after conviction, a felon's right to privacy in his identity may be lessened).

This Court has not yet had the opportunity, however, to clarify that a prosecutor is prohibited from insinuating a person is guilty because the person refused consent to a warrantless search. This case now presents that opportunity.

As shown in Jones' brief, other courts from numerous jurisdictions have addressed this question in persuasively reasoned opinions. In a leading case, United States v. Prescott, 581 F.2d 1343, 1350 (9th Cir. 1978) the court held it was prejudicial error to admit evidence showing Prescott refused permission for a warrantless

search of her apartment. The court explained a person cannot be penalized for asserting the Fourth Amendment right to refuse consent:

The Amendment gives him a constitutional right to refuse to consent to entry and search. His asserting it cannot be a crime. . . . *Nor can it be evidence of a crime.*

581 F.2d at 1351 (emphasis added). Prescott emphasized it is well established a person may not be penalized for exercising the Fifth Amendment right to silence. 581 F.2d at 1351-52 (citing Griffin and Doyle). The court reasoned the same principle applies under the Fourth Amendment:

Just as a criminal suspect may validly invoke his Fifth Amendment privilege in an effort to shield himself from criminal liability, so one may withhold consent to a warrantless search, even though one's purpose be to conceal evidence of wrongdoing.

...

The rule that we announce . . . seeks to protect the exercise of a constitutional right, here the right not to consent to a warrantless entry.

581 F.2d at 1351; accord, Gasho v. U.S., 39 F.3d 1420, 1431-32 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995).<sup>5</sup>

---

<sup>5</sup> As shown in Jones' brief, numerous jurisdictions follow this settled rule. BOA at 40 (citing Elson v. State, 659 P.2d 1195, 1197-99 (Alaska 1983); Gomez v. State, 572 So.2d 952, 953 (Fla. App. 1990); People v. Stephens, 133 Mich. App. 294, 349 N.W.2d 162, 163-64 (Mich. App. 1984); Garcia v. State, 103 N.M. 713, 712 P.2d 1375, 1376 (N.M. 1986); Commonwealth v. Tillery, 417 Pa. Super. 26, 611

These persuasively reasoned decisions set forth a clear and workable rule that prevents the state from unconstitutionally inferring guilt from the exercise of the constitutional right to be free from warrantless searches. This Court should grant review, because this case presents the important opportunity to analyze and adopt that rule in Washington.<sup>6</sup> RAP 13.4(b)(3), (4).

b. The Prosecutor's Comments on the Exercise of Fifth Amendment Rights Were Clear Error.

Jones' brief also challenged the error from the state's evidence and prosecutor's closing that commented on Jones' alleged failure to contact the Richland police. BOA at 35-37. The Court of Appeals properly assumed this misconduct was error. Slip op. at 17; cf., Burke, 163 Wn.2d at 211-17.

c. The Errors Were Prejudicial.

The Court of Appeals reached its conclusion the evidence was "overwhelming" based on four alleged facts. (1) After the incident, Jones left the area and went to Texas, (2) Jones initially denied the

---

A.2d 1245, 1249-50, review denied, 616 A.2d 984 (1992); Simmons v. State, 308 S.C. 481, 419 S.E.2d 225 (1992); Reeves v. State, 969 S.W.2d 471, 493-95 (Tex. Ct. App. 1998), cert. denied, 526 U.S. 1068 (1999).

<sup>6</sup> Counsel's research has revealed only unpublished Washington decisions addressing this issue, citing Prescott.

sexual contact, (3) Dixon identified Jones as the assailant and described an act of rape, and (4) DNA testing confirmed that the male DNA recovered from Dixon belonged to Jones. Slip op. at 17. These facts, however, are consistent with and do not exclude the consent defense.

As shown in Jones' brief, the state faced a difficult case on retrial. The first jury had rejected the state's theory and could not agree on the lesser charge.

In order to obtain a conviction, the State had to convince the jury Dixon was credible beyond a reasonable doubt. Inconsistencies in her statements could have sewn seeds of doubt in a rational juror's mind. Dixon testified she was dragged by Jones from the bedroom to the kitchen on her knees, but she did not make this assertion to Officer Glasgow who took her statement just hours after the incident. Dixon testified she threw a mask against the wall, breaking it. In her statement to Glasgow she claimed she threw a glass, breaking it as well. When Glasgow searched the house that same day, he observed neither a broken mask nor broken glass. These inconsistencies spoke directly to the material issue of consent. Doubt that Dixon was dragged from the bedroom to the kitchen and doubt she smashed the mask and water glass in anger would necessarily undermine her assertion that Jones forced her to have sexual intercourse.

As shown above, the prosecutor took maximum advantage from Jones' refusal to provide a DNA sample without a warrant. During the detective's testimony and in closing the prosecutor took multiple opportunities to make the prejudicial comments. 2RP 264-65, 334.

A rational juror could have doubted Dixon's account in light of inconsistencies, noted above, in her statements and between her statements and Officer Glasgow's observations of the interior of her house. The state's improper comments on Jones' exercise of his constitutional rights were designed to distract the jury from these weaknesses in the state's case. The state did not satisfy its burden to show the errors were harmless beyond a reasonable doubt.

As in Easter, the prosecutor made the improper comments a theme of his closing argument. That error was not harmless. Easter, 130 Wn.2d at 242. In Burke, the prosecutor emphasized Burke's silence on several occasions. That error was prejudicial. Burke, 160 Wn.2d at 221-23.

When applied, Burke and Easter lead to the same conclusion. In commenting on Jones' right to remain silent, the prosecutor argued:

And what did the defendant do after this took place? What did he do? Did he clear-- did he clear up any misunderstanding? No. Did he find Detective Shepherd and say, "Boy, big misunderstanding here. We need to clear this up?" No.

...

[W]hen Detective Shepherd first learned that Center, Texas, had the defendant, did the defendant come right back then? No. He didn't come right back up and say, "Let's clear this up." He didn't call Detective Shepherd and go, "Holy cow, I've got a warrant out for rape for me. I better get to the bottom of this."

2RP 329-30.

The prosecutor similarly emphasized the refusal to consent to the DNA search, initially setting the stage with Shepherd's description of the benign procedure for collecting DNA, a swab of the inner cheek with a "Q-tip type" device for "about five seconds". 2RP 264. After Shepherd testified Jones "would not allow me to take the swab at that time", 2RP 264-65, the prosecutor said:

Q. A judge of the Benton County Superior Court granted you a search warrant to actually force the defendant to give you the swab; is that right?

A. Yes.

2RP 265. In case any jurors missed the point, the prosecutor followed up:

Q. All right. Again, this is all in the context of the conversation you had with the defendant where he claims he had done nothing wrong, correct?

A. Yes.

2RP 265. The prosecutor emphasized the issue in closing argument:

Why did he say no at that point, ladies and gentlemen?  
You know, you don't have to be real smart to know why.

Because he knew. The DNA wasn't gonna lie. . . . he said, "No. You're not gettin' my DNA." Detective Shepherd said, "Yeah, I am," and he did. He got a court order. Nothing voluntary from this man.

2RP 334.

Because these errors were prejudicial individually and cumulatively, the Court of Appeals erred in finding them harmless. Because the decision conflicts with this Court's decision in Burke and Easter, this Court should grant review. RAP 13.4(b)(1).

F. CONCLUSION

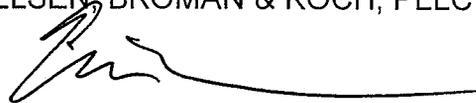
For the reasons set forth above, this Court should grant review.

RAP 13.4(b), 13.6.

DATED this 15 day of December, 2008.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



---

ERIC BROMAN, WSBA 18487

Office ID No. 91051

Attorneys for Petitioner

# APPENDIX A

RECEIVED  
NOV 17 2008  
Nielsen, Broman & Koch, PLLC.

FILED

NOV 13 2008

In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 25844-1-III
	)	
Respondent,	)	
	)	
v.	)	Division Three
	)	
CHRISTOPHER LAWRENCE JONES,	)	
	)	
Appellant.	)	UNPUBLISHED OPINION

KORSMO, J.—The second jury to hear the case against Christopher Jones convicted him of the second degree rape of his niece, K.D. The trial court imposed an exceptional minimum term sentence based on a jury finding that Mr. Jones abused a position of trust to commit the offense. This appeal raises a variety of claims relating to the trial court’s application of the rape-shield statute, exclusion of testimony about an alleged party, testimony and argument concerning defendant’s failure to cooperate with police, and alleged sentencing error. Concluding that the trial court did not abuse its discretion in the rulings *in limine*, and that defendant was not harmed by the other alleged errors, we affirm the conviction. The court’s instruction defining the aggravating factor

constituted a comment on the evidence. Therefore, we reverse the sentence and remand for resentencing.

### FACTS

Mr. Jones was originally charged with first degree rape. The matter proceeded to jury trial on a defense of general denial. Neither K.D. nor her uncle testified at that proceeding. The jury found Mr. Jones not guilty of first degree rape, but could not agree on the lesser degree offense of second degree rape. The case was rescheduled for trial and was ultimately heard before a different judge. The charge was amended to reflect one count of second degree rape by forcible compulsion. The prosecutor also alleged that the defendant abused a position of trust in the commission of the offense.

On the eve of the second trial, Mr. Jones indicated an interest in raising a consent defense. Invoking the rape-shield statute, the prosecutor moved *in limine* to prohibit defense counsel from stating in opening statement that K.D. had engaged in sexual conduct with anyone other than the defendant. Defense counsel contended that K.D. had engaged in consensual intercourse with the defendant and two other men that night and that he had a "good faith basis to explore the incidents." The trial court inquired: "You mean relations or acts involving other individuals other than the defendant?" Defense counsel answered "Yes." The trial court asked the parties to provide authority and not address the matter in opening statement.

No written materials were submitted. Instead, defense counsel orally asked the court to “consider reconsidering its ruling saying that we cannot go into the facts surrounding the events of the prior evening and early morning.” It was not “purely” offered “to attack the credibility of the victim and make her look bad. It’s there to show that the events, as described by my client, more likely took place than not.” Counsel then explained that he desired to cross examine the victim about an alleged party, claiming that Mr. Jones and K.D. had gone to a truck stop, found another young woman and two men to join them, and that the five had returned to the house where they drank, used cocaine, and mutually engaged in sexual activity. Counsel also alleged that both women received money for dancing and sexual intercourse. The party lasted from about 11:00 p.m. until 7:30 or 8:00 a.m. Because Mr. Jones would testify about this information, counsel requested to question K.D. about it.

The prosecutor argued that the rape-shield statute precluded testimony or argument that just because a woman had sex with other men, then she must have consented to have sex with the defendant. The trial court agreed with defense counsel’s assessment that he had discretion to admit the evidence, but found that offering the evidence to attack the credibility of the victim and prove consent was barred by the rape-shield statute, so “[t]he defense is precluded from providing evidence in that regard.” In

response to counsel's inquiry, the court indicated that Mr. Jones could not testify to that evidence either.

The prosecutor clarified that cross-examination on "surrounding issues, not including sex," would be prohibited, and requested an ER 404(b) hearing on the topic if counsel wished to get into evidence about alcohol and drug consumption. Defense counsel argued in response that while he would "not be able to ask her about sexual intercourse or dancing with those people," he should be able to go into the other facts of the evening because "I think those go directly to consent." The court offered to conduct a hearing about what other facts counsel wished to elicit now that the court had excluded "any sexual conduct or sexual accounts." Defense counsel responded that he wanted to show that the victim used alcohol and cocaine, explaining "that goes directly towards . . . the victim's ability to recall, to clearly recollect the events and to consent."

The court then conducted an evidentiary hearing. K.D. testified that she and her uncle never went to a truck stop and that there was no party. There were no people in the house when her uncle attacked her that afternoon. A detective testified that Mr. Jones had never claimed that there had been a party or that others were present on June 28. Mr. Jones told the detective that he had been using drugs, but did not report anyone else doing so. Mr. Jones took the stand and contended that he, K.D., and K.D.'s brother had gone to a truck stop, where they picked up two Hispanic males named Kiki and Roger. The

group then returned to the Richland house and consumed cocaine (except for K.D.'s brother) and alcohol. In the morning, Mr. Jones and one of the Hispanic males left to buy more cocaine from "Clyde." Mr. Jones did not know how to contact Clyde, Kiki, or Roger. He also declined to call K.D.'s brother to the stand.

The trial court excluded the evidence, finding that the defense had not established the events by a preponderance of the evidence. Pointing to the absence of corroboration, even though it was available, and the failure of the defendant to disclose to the detective, the trial judge concluded he was not convinced that the conduct occurred.

Officer Troy Glasgow of the Richland Police Department told the jury that he met K.D. at Kennewick General Hospital about 5:00 p.m. on June 28, 2005. She reported being raped by her uncle between 1:00 p.m. and 2:00 p.m. that day. He received a rape kit performed by a nurse. Subsequent analysis showed that the DNA recovered from the victim's body belonged to her uncle, Christopher Jones.

The initial charge of first degree rape was filed July 22, 2005, and an arrest warrant was obtained. Police in Center, Texas, made inquiry about the warrant on August 28, 2005. The warrant was later amended to indicate nationwide extradition and Center police arrested Mr. Jones on December 5. He arrived at the Benton County Jail on February 17, 2006. A detective testified that Mr. Jones spoke with him at the jail and denied having any sexual contact with K.D. The detective testified that Mr. Jones

refused to voluntarily provide a DNA sample. A search warrant was obtained and the sample taken pursuant to that authority.

K.D., age 18 at the time of trial in November 2006, testified that in May 2005, her uncle moved into the house where she and her brother were living. On June 28, she had been sleeping in her bed in the early afternoon when her uncle climbed on top of her, squeezed her neck while telling her to be quiet, and raped her. He then left and she had no idea where he was until police told her two months later that he was in Texas. K.D. eventually called her mother about the attack and was taken to the hospital.

Defense counsel vigorously cross-examined K.D. about whether she had consented to intercourse with her uncle, an allegation that K.D. repeatedly denied. At the end of cross-examination, defense counsel made a record that he would have liked to have questioned K.D. about drug use, meeting and bringing the others home, and engaging in sexual intercourse "with these individuals." The court confirmed its previous ruling that those topics were excluded under ER 404(b).

The defense called Officer Glasgow as its sole witness in order to highlight differences between K.D.'s report of the incident to him and her trial testimony. The defense then rested without Mr. Jones taking the stand. His counsel explained that Mr. Jones would have little to say in light of the exclusion of the party evidence.

During the instruction conference, the prosecutor moved *in limine* to preclude defense counsel from arguing consent since there had been no testimony that K.D. had consented to intercourse with her uncle. Objecting, defense counsel stated that there was no testimony about consent because the defendant had been precluded from testifying on the topic. The judge interrupted to point out that defendant had not been prohibited from testifying about that topic and had not been precluded from testifying.<sup>1</sup> The motion *in limine* was granted.

The special verdict on the alleged aggravating factor asked: “Did the defendant, Christopher Jones, use his position of trust as [K.D.’s] maternal uncle to facilitate the commission of the current offense?” The jury ultimately answered “Yes.”

During closing argument, the prosecutor noted that Mr. Jones did not take steps to clear up the situation when he learned of the warrant. Rather, the warrant had to be re-issued and the defendant apprehended. Defense counsel objected on the basis that there was no evidence in the record to support the argument. The court directed the jury to rely on its own memory.

Later in closing, the prosecutor noted that the defendant had been cooperative with the detective during his interview up to the point that the detective asked for a DNA

---

<sup>1</sup> Defense counsel did not ask the court to allow him to reopen the case to present testimony from his client.

sample. The prosecutor discussed the change in attitude, asking jurors why Mr. Jones declined to provide a sample. “You know, you don’t have to be real smart to know why. Because he knew. The DNA wasn’t gonna [sic] lie. The DNA couldn’t be manipulated . . . [the detective] got a court order. Nothing voluntary from this man.” There was no objection to this argument.

The jury convicted the defendant of second degree rape as charged and also found that he abused a position of trust in the commission of the crime. Sentencing was conducted two months later. The court used an offender score of six that included a burglary conviction from Nevada. There was no challenge to the offender score calculation and no attempt made to establish that the Nevada crime was the equivalent of a Washington offense. The standard range for second degree rape with an offender score of six is 146-194 months. The court imposed a maximum sentence of life in prison pursuant to RCW 9.94A.712 and imposed an exceptional minimum term of 242 months due to the aggravating factor. Mr. Jones then appealed to this court.

#### ANALYSIS

*Rape-Shield.* The initial argument in this appeal is a contention that the trial court erred in excluding evidence that K.D. had allegedly engaged in sexual activity with two other men from the truck stop. The trial court properly excluded the evidence under the rationale of the rape-shield statute. Alleging that the victim contemporaneously engaged

in sexual activity with others does not make Mr. Jones's own sexual contact with K.D. consensual.

RCW 9A.44.020(2) provides:

Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section, but when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.

Subsection (3) permits evidence of past sexual behavior to prove consent, but not to attack the credibility of the victim, on several conditions: A written motion is filed (accompanied by an affidavit) explaining the relevance of the information, the court holds a hearing and concludes the offer of proof is sufficient, and the court finds the evidence relevant, not unduly prejudicial, and exclusion would deny substantial justice to the accused. *See* RCW 9A.44.020(3).

This statute was authoritatively construed in *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983). The court noted that the purpose of the statute was to overturn the former common law rule that evidence of promiscuity or nonchastity was evidence of a woman's lack of credibility, but not so for a man. *Id.* at 8-9. Another fallacy of the common law rule was the belief that a woman who had consented to sexual activity with

another man in the past was more likely to currently consent to sexual activity with the defendant. *Id.* at 10. The court rejected the notion that past consent to sexual activity meant one was likely to have consented in the current case; such evidence did “not even meet the bare relevancy test of ER 401.” *Id.* Instead, the court suggested that past patterns of behavior might be relevant if similar to the behavior at issue in the present case. *Id.* at 10-12. Even in cases where past sexual behavior had some relevance to the case at bar, the trial judge has discretion to exclude the evidence if it presented a danger of prejudicing the truth-finding process. *Id.* at 12-14. However, the defendant’s constitutional right to present evidence could only be overcome by the showing of a “compelling state interest” in excluding relevant evidence. *Id.* at 14-16. The court concluded that the compelling interest test was satisfied with respect to evidence that had minimal relevance, but would not be met for evidence that was highly probative. *Id.* at 16. The court concluded that the trial court had not abused its discretion in excluding evidence that the victims had a reputation for promiscuity. *Id.* at 17-19.

Mr. Jones argues here that the rape-shield statute does not apply to his case because the alleged sexual activity with other men was contemporaneous with his own activity with K.D., rather than involving the type of *past* activity the rape-shield statute was intended to reach. No Washington case has defined the phrase “past sexual behavior” for purposes of the rape-shield statute. This court touched upon the issue

briefly in a case involving a double jeopardy challenge to a court's mistrial ruling. *State v. Sheets*, 128 Wn. App. 149, 115 P.3d 1004 (2005), *review denied*, 156 Wn.2d 1014 (2006). There, a trial judge had doubted whether a rape victim's flirtation with another man earlier in the evening constituted "past sexual behavior" for purposes of the rape-shield statute. *Id.* at 156-157. This court questioned whether the behavior even amounted to "sexual conduct" under the statute, but agreed that the rape-shield statute did not bar the testimony as it was highly probative evidence of intoxication (the primary issue in the case) and minimally prejudicial. *Id.* at 157-158.

This case, too, does not require us to decide what constitutes "past sexual behavior" under the statute. The *Hudlow* court noted that the balancing required by the rape-shield statute is essentially the same balancing test applied under ER 403. 99 Wn.2d at 12. ER 403 authorizes trial courts to exclude otherwise relevant evidence if the probative value of the evidence is significantly outweighed by the danger of unfair prejudice or other interference with the fact-finding function of the jury. *Carson v. Fine*, 123 Wn.2d 206, 222-223, 867 P.2d 610 (1994). Even if the rape-shield statute did not apply to the proffered evidence, we think the trial court's balancing of the probative value of that evidence versus its prejudicial effect also would require exclusion under ER 403.

The *Hudlow* court already determined that previous consent to sexual behavior with a different man was not relevant to the question of whether the victim had consented

to the present sexual contact with the defendant. 99 Wn.2d at 11. We believe that the fact that the earlier consent occurred near in time to the defendant's sexual contact with the victim does not change that equation. The fact that V consented to sexual contact with A ten minutes ago does not make it more likely that V therefore consented to contact with D now. The underlying premise—that consent with one person makes it more likely there was consent to sexual contact with another person—simply is not dependent upon temporal factors. The premise is logically invalid regardless of the length of time between the two incidents. *Hudlow*, 99 Wn.2d at 10. Rather, if there is probative value from a prior consent to sexual contact, it has to do with the nature of the sexual behavior in question rather than the fact that consent was given. *Id.* at 11. There was no argument or evidence along those lines presented in this case.

Evidence that is not relevant is not admissible. ER 402. Evidence that is relevant but unduly prejudicial is excluded by ER 403. Rulings under either rule, as with the rape-shield statute, are reviewed for abuse of discretion. *State v. Rivers*, 129 Wn.2d 697, 709, 921 P.2d 495 (1996); *Carson*, 123 Wn.2d at 226; *Hudlow*, 99 Wn.2d at 17-18. Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Given that *Hudlow* already has recognized that the evidence has little or no relevance in this context, we cannot say that the trial court abused its discretion when it excluded evidence that K.D. allegedly

engaged in sexual relations with two other males the same evening that defendant claims he had sexual relations with her.<sup>2</sup> There was no error in excluding this evidence.

*Party Evidence.* In a related argument, Mr. Jones contends that even if sexual contact with the two other males was excluded, he should have been allowed to admit evidence of drug and alcohol use involving the same people to show that the victim consented to sexual activity. The trial court considered the proffer and found that there was no such “party.” There was no abuse of discretion in that ruling either.

In order to admit evidence of “other bad acts” under ER 404(b), the proponent of the evidence must first convince a trial court by a preponderance of the evidence that the “misconduct” actually occurred. *State v. Lough*, 125 Wn.2d 847, 853, 864, 889 P.2d 487 (1995). A trial court may conduct a hearing to take testimony, but is not required to do so. *State v. Kilgore*, 147 Wn.2d 288, 294-295, 53 P.3d 974 (2002). If the court determines that the misconduct occurred, the court then must identify the purpose for which the evidence is offered, determine whether the evidence is relevant to prove an element of the offense, and weigh the probative value of the evidence against its prejudicial effect. *Lough*, 125 Wn.2d at 853. The court may then admit the evidence subject to a limiting instruction telling the jury the proper uses of the evidence. *Id.* at 864.

---

<sup>2</sup> The only male DNA recovered from the victim belonged to the defendant.

Appellant complains that the trial court lacked the ability to exclude his testimony merely by disbelieving it. However, that is exactly what ER 404(b) permits. The trial court does not look to see merely if there is *prima facie* evidence of the misconduct. Rather, the ER 404(b) standard requires a trial judge to determine what happened in order to rule upon the admissibility of evidence. This preliminary factual determination necessarily involves weighing evidence when there is a dispute.

Here, it is understandable that the trial court found that the “party” did not take place. Not only did K.D. deny it, but Mr. Jones’s statement to the police made no mention of a party or suggest any drug use other than his own. Appellant’s own testimony also was seriously at odds with his counsel’s offer of proof. Counsel claimed that K.D. and Mr. Jones went to the truck stop where they picked up two males and a female, and then claimed that the two women danced and engaged in sex for money. Instead, Mr. Jones testified that he, K.D., and K.D.’s brother went to the truck stop and returned only with two males. There was no allegation that another woman was present during the “party.” There was no testimony that money was exchanged for dancing or sexual activity. The trial court, understandably, did not find the evolving story to be credible, pointing out that there was no disclosure to the police of this evidence and that the defense was not going to call K.D.’s brother to corroborate the claims. Finding that

the defense story did not amount to a preponderance of the evidence, the court determined that no “party” occurred and excluded the evidence.

There is no constitutional right to present irrelevant evidence. *Hudlow*, 99 Wn.2d at 15. When the trial court determined that there was no party, the proposed evidence was irrelevant and properly excluded. ER 401, 402.

Mr. Jones argues that in addition to the consent issue, evidence of drug usage also was relevant to show the victim’s ability to recall events. The problem with the argument is that there was no evidence that the victim was ever impaired. Absent such evidence, the proposed drug and alcohol usage testimony was again irrelevant.

Intoxication or impairment from drug usage is a factual question that can be proved by lay testimony. *State v. Smissaert*, 41 Wn. App. 813, 815, 706 P.2d 647, review denied, 104 Wn.2d 1026 (1985). There must be a showing of drug or alcohol consumption and the effect of the consumption on the drinker. See, e.g., *State v. Dana*, 73 Wn.2d 533, 535, 439 P.2d 403 (1968); *State v. Zamora*, 6 Wn. App. 130, 132, 491 P.2d 1342 (1971), review denied, 80 Wn.2d 1006 (1972). Mr. Jones had lived with his niece for a month and had known her a substantially longer period of time. He presumably could have testified that from his observations the alcohol and cocaine influenced K.D. in a manner that impaired her ability to recall events properly. He did not do so. Similarly, counsel’s offer of proof did not suggest that the victim was

impaired in any manner.<sup>3</sup> Appellant seems to argue that drug usage is *per se* evidence of impairment. The decision he relies upon shows that is not the case. In *State v. Brown*, 48 Wn. App. 654, 739 P.2d 1199 (1987), the alleged victim of a rape had reportedly told a man that she was high on LSD at the time of the sexual assault. The trial court excluded both that statement and expert testimony that the drug could produce perception distortion. *Id.* at 657. This court reversed, ruling that both pieces of evidence were crucial to assessing the victim's ability to perceive events properly. *Id.* at 660-661. Tellingly, we noted that evidence of the "ingestion of LSD *and* its effect is crucial." *Id.* at 660 (emphasis added). This court did not suggest that usage of LSD was admissible on its own without a showing of its impact on the victim.

Similarly here, the fact that K.D. allegedly used cocaine is not relevant evidence without either some indication that she was actually affected by the drug or expert testimony about the probable impact of cocaine usage on her ability to perceive events. *Id.* Since there was no showing of either, there was no error in excluding the testimony.

*Other Claims.* Mr. Jones also challenges the verdict on two other bases. He contends his right to remain silent was violated when the prosecutor argued that he did not voluntarily return from Texas or contact the detective. He also contends that his

---

<sup>3</sup> In a rape prosecution, defense presentation of evidence that the victim was intoxicated is a double-edged sword since one of the means of proving rape is that the victim was incapable of consent due to incapacity. RCW 9A.44.050(1)(b).

rights were violated when a detective testified that Mr. Jones refused to consent to a DNA swab. Even if we assume that both of these events were error, we do not believe they harmed the defendant. Any error was harmless beyond a reasonable doubt.

Error of constitutional magnitude can be harmless if it is proven to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967). We believe that to be the case here. In light of the failure to present any evidence on the issue of consent, the defense theory of the case was that the State failed in its burden to prove the elements beyond a reasonable doubt. The State's evidence, however, was overwhelming. Defendant's denial of any sexual contact with the victim was admitted. The victim identified her uncle, Mr. Jones, as the assailant and described an act of rape for the jury. Testing confirmed that the male DNA recovered from the victim belonged to Mr. Jones, who abruptly left Richland after the incident and went to Texas. In light of this evidence, the erroneous admission of evidence and argument about the defendant's failure to cooperate with authorities was truly harmless beyond a reasonable doubt. No jury would have returned a different verdict if the errors had not occurred.

*Sentencing.* Appellant raises three sentencing related claims. He contends for several reasons that the jury was not properly instructed on the aggravating factor of abuse of trust. He also argues that the trial court erred by failing to enter findings of fact

in support of the exceptional sentence as required by RCW 9.94A.535, and did not consider whether his Nevada conviction was comparable to a Washington felony before counting it in the offender score. Agreeing with one of his arguments, we reverse the exceptional minimum sentence and remand for resentencing. Accordingly, we will not address his other sentencing-related claims.

It is an aggravating factor that “The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.” RCW 9.94A.535(3)(n). Well-settled case law confirms that this factor consists of two components: the offender occupied a position of trust and used that position to facilitate commission of the crime. *State v. Vermillion*, 66 Wn. App. 332, 347, 832 P.2d 95 (1992), *review denied*, 120 Wn.2d 1030 (1993); *State v. Bedker*, 74 Wn. App. 87, 95, 871 P.2d 673, *review denied*, 125 Wn.2d 1004 (1994).

Our constitution prohibits judges from commenting on the evidence before the jury. Wash. Const. art. IV, § 16 provides: “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” A jury instruction which removes a factual matter from the jury constitutes a comment on the evidence in violation of this section. *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). In *Becker*, a special verdict form asked the jury if the crime had been committed within 1,000 feet of a school, “to-wit: Youth Employment Education Program School.” *Id.* The

parties had contested at trial whether the Youth Employment Education Program constituted a school or not. *Id.* at 63. Because the form stated that the program was a school, the special verdict constituted a comment on the evidence. *Id.* at 65.

The same result follows here. The jury was required to find two things in order to return a special verdict on the aggravating factor. First, it had to find that Mr. Jones had in fact occupied a position of trust. Second, it had to find that he used that position to facilitate the commission of the crime. *Vermillion*, 66 Wn. App. at 347. The unfortunate wording of the special verdict form here told the jury that Mr. Jones did occupy a position of trust as an uncle and simply asked whether he used that position to commit the crime. The removal of the question whether the defendant occupied a position of trust is just as much a comment on that fact as was the status of the contested school in *Becker*. As in *Becker*, the error in the special verdict form constituted a comment on the evidence.

The prosecution contends that any error in this regard was harmless. We disagree. While there was evidence<sup>4</sup> from which the jury could find that defendant occupied a position of trust—he was an uncle and the only adult in a house with two minors—he had only lived in the residence for a month and the victim's mother still lived in the area. The

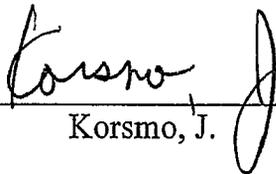
---

<sup>4</sup> We believe sufficient evidence was presented for the jury to find both that Mr. Jones occupied a position of trust and that he used the position to facilitate the crime. Compare *State v. Stevens*, 58 Wn. App. 478, 501, 794 P.2d 38, review denied, 115 Wn.2d 1025 (1990) (babysitter who committed child rape abused a position of trust). Accordingly, we reject his argument that the evidence was insufficient as a matter of law.

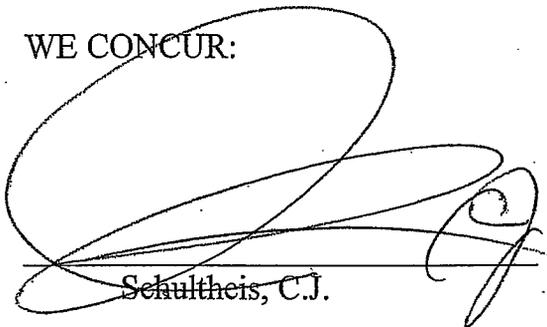
evidence was clearly in dispute and could have gone either way with the jury. Thus, we do not believe the error in the wording of the instruction was harmless. We therefore reverse the exceptional minimum sentence and remand the case for a new sentencing proceeding.

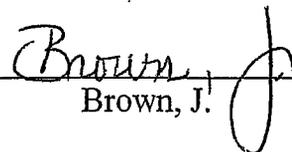
The conviction for second degree rape is affirmed. The exceptional minimum sentence is reversed. The case is remanded for a new sentencing proceeding.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
Korsmo, J.

WE CONCUR:

  
Schultheis, C.J.

  
Brown, J.