Supreme Court No. _____
COA No. 39470-1-III

THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

CAMERON OWNBEY,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Under RAP 13.4, Cameron Ownbey asks this Court to review the opinion of the Court of Appeals filed in his case on October 22. (Appendix 1-29).

B. ISSUES PRESENTED FOR REVIEW

1. An accused person has a constitutional right to confront the witnesses against him and to present relevant evidence in his defense. The prosecution told the jury the relationship between Mr. Ownbey and Ms. Flipper was purely platonic and they never ever talked about sex, flirted, or engaged in any sexual conduct . Mr. Ownbey tried to introduce certain evidence to show the relationship was becoming increasingly sexual, they almost had sex in Las Vegas, and they talked and planned to have sex when Ms. Flipper visited Mr. Ownbey in Leavenworth. With this evidence, Mr. Ownbey sought to prove they agreed to have sex before

Ms. Flipper came to Leavenworth, and they engaged in consensual acts of intimacy on the night in question, before Ms. Flipper changed her mind and decided against having sex and he respected her wishes. But the court prohibited Mr. Ownbey from presenting a full picture of their sexual relationship, sex talk, flirtation, and intimate acts on the night of the alleged attempted rape and assaults. Did the court's ruling violate Mr. Ownbey's right to present his defense and his right to confront witnesses in his defense?

2. The open-the-door doctrine contemplates that when a party raises an irrelevant subject of inquiry on direct or cross-examination, the opposing party may address the same subject in cross-examination or redirect examination. When Mr. Ownbey sought to present his own version of events through cross-examining the key witness, the key witness claimed a

lack of memory. The prosecution insisted Mr. Ownbey could not impeach the witness with her statements to police and argued doing so opened the door for an expert witness to tell the jury that trauma affected her memory. Did the trial court err in allowing inadmissible expert opinion under a misapplication of the open-the-door doctrine?

3. A statute fixing a sentence violates the Fourteenth Amendment and article I, section 3 and is void for vagueness when it does not give fair notice of the conduct it punishes or is so standardless as to invite arbitrary enforcement. The sexual motivation enhancement and the position of trust aggravator both permit arbitrary application, require speculation, and fail to provide fair notice of when a crime crosses the line from lawful conduct to an aggravating circumstance. Do Mr. Ownbey's sentence enhancement

and aggravating circumstance violate due process for unconstitutional vagueness?

This Court should grant review under RAP 13.4(b)(1) because the Court of Appeals' decision misapplied rules of evidence, precluded Mr. Ownbey from presenting a complete defense and violated the constitutional prohibition against vagueness.

C. STATEMENT OF THE CASE

Mr. Ownbey refers this Court to his statement of the case in his opening brief. Br. of Appellant at 1026.

To briefly recap, Mr. Ownbey's case turned on cross-examining and impeaching his accuser, Natalie Flipper. He offered evidence to show that their relationship had become increasingly sexual, she had agreed to have sex with Mr. Ownbey and another couple just two months before her accusation, and they had discussed having sex and discussed their sexual

fantasies on the months leading to Ms. Flipper's visit to Leavenworth. 8/17/22 RP 536-38.

On direct examination and on cross-examination, Ms. Flipper claimed when they met online she was interested in a romantic relationship with Mr. Ownbey; but after they met in person, it became a purely platonic, business relationship. 8/17/22 RP 484. At no time after that did they talk about having sex or having a romantic relationship. *Id*. at 483, 486, 505-06, 520,525.

In response, Mr. Ownbey sought to present a theory of defense that their relationship had turned sexual in the months leading up to Ms. Flipper coming to visit Mr. Ownbey at his home in Leavenworth. He tried to elicit evidence that they frequently talked about sex, aphrodisiacs, bondage-type sex, and they agreed to have sex. *Id*. at 505-06, 526, 554, 642. And

on the night in question, they were engaged in consensual foreplay until Ms. Flipper said she did not want to have sex and Mr. Ownbey respected her wishes and stopped. *See* 3/16/20 RP 119-20; 9/10/20 RP 11.

The defense questioned Ms. Flipper about whether they discussed having a sexual encounter in Vegas. 2RP 543. At first, she claimed she did not understand the question. 2RP 542. Then she said: "I never had a conversation with him that we were going to have any sort of sexual encounter." 2RP 542. After she was allowed to review her prior statements, she vaguely admitted they could have discussed the "possibility of sexuality" in Vegas, but it was not a "sexual encounter" discussion. 2RP 543.

When Ms. Flipper was asked directly whether she and Mr. Ownbey discussed having sex during her trip to Leavenworth she said they had not. 2RP 506. Even

after reviewing her own statements stating "I won't rule that out that sex was a possibility," she now questioned the accuracy of the transcript: "That's not my words" .. "No, I did not say that." 2RP 545. Ms Flipper told the jury, "I actually said, I can't imagine anything I have ever said to him, especially in person, when we were in Leavenworth that would have made him believe he can get into bed with me." 2RP 545.

Eventually Ms. Flipper vaguely said there could have been some sexual talk but only when they would get serious as a couple. 2RP 547. Eventually, Ms Flipper agreed that she and Mr. Ownbey discussed using an aphrodisiac but said it was many years ago. 2RP 554.

Despite Ms. Flippers denials and changing story, the court prohibited Mr. Ownbey from cross-examining or impeaching Ms. Flipper with evidence from her

defense interview where she said she had agreed to have sex with Mr. Ownbey and another couple in Las Vegas. She could not be impeached with evidence that they had discussed bondage-type sex or discussed using the aphrodisiac leading up to her visiting him at his home in Leavenworth. 8/17/22 RP 536-38.

The jury found Mr. Ownbey not guilty of attempted rape but found him guilty of assault by administering a noxious substance and assault by strangulation. 9/19/22 RP 843, 845. Mr. Ownbey's sentence was substantially increased based on the special verdicts that he committed the assaults with a sexual motivation and abused his position of trust. *Id.* at 844.

Except for legal financial obligations, the Court of Appeals affirmed the judgment and sentence.

D. ARGUMENT

1. This Court should grant review because the Court of Appeals unfairly restricted Mr. Ownbey's right to confront his accuser and to present a complete defense.

a. The trial court erred by precluding substantive evidence of Ms. Flipper's prior sexual activity with Mr. Ownbey.

A criminal defendant possesses constitutional rights both to present testimony in his or her defense and to confront and cross-examine witnesses. U.S. Const. Amend. VI; Wash. Const. Art. I, § 22; *State v. Weaville*, 162 Wn. App. 801, 818–20, 256 P.3d 426, 435–36 (2011) (*citing State v. Hudlow*, 99 Wn.2d 1, 9, 14-15, 659 P.2d 514 (1983)).

The trial court violated Mr. Ownbey's right to present a defense and the right to confront his accuser by preventing him from introducing substantive evidence and impeachment evidence under both the

rape shield statute and ER 613. 8/17/22 RP 531; 534-35, 561-62.

On the stand, Ms. Flipper insisted that they never pursued or discussed pursuing a romantic relationship—no sex talk, no flirting, no exchanging sexual texts with Mr. Ownbey. *Id*. at 483, 505, 520, 525. But when cross examination exposed her prior statements to the contrary, the prosecution claimed Ms. Flipper's prior inconsistent statements to police were "protected" under the rape shield statute. 8/17/22 RP 531; 534-35.

The ruling of the trial court precluded Mr. Ownbey from presenting specific evidence to show their relationship became increasingly erotic and culminated into consensual intimate acts. Mr. Ownbey could not delve into an "all-encompassing" examination of either their past sexual activity or the circumstances

comprising his claim of consent. *Weaville,* 162 Wn. App. at 820. The court prevented Mr. Ownbey from demonstrating to the jury that they discussed having bondage-type sex, that she agreed to act on their sexual fantasies of bondage-type sex, and agreed to using the aphrodisiac to enhance their sexual experience. 8/17/22 RP 536-38.

b. The rulings denied Mr. Ownbey vital impeachment evidence.

In addition to improperly curtailing Mr. Ownbey's right to present substantive evidence, the trial court's ER 613 rulings improperly prevented Mr. Ownbey from impeaching this key witness.

"Evidence offered to impeach is relevant only if (1) it tends to cast doubt on the credibility of the person being impeached, and (2) the credibility of the person being impeached is a fact of consequence to the action."

State v. Allen S., 98 Wn. App. 452, 459–60, 989 P.2d 1222 (1999).

"A prior inconsistent statement is a comparison of something the witness said out of court with a statement the witness made on the stand." *State v. Spenser*, 111 Wn. App. 401, 409, 45 P.3d 209 (2002). "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." ER 613(b). Before an impeaching party can introduce extrinsic evidence of a prior inconsistent statement, that party must either call the statement to the witness's attention while the witness is on the stand or arrange for the witness to remain in attendance to be given the opportunity to

explain or deny. *State v. Horton*, 116 Wn. App. 909, 915, 68 P.3d 1145 (2003). If the witness responds to foundation questions by admitting making the prior inconsistent statement, then extrinsic evidence of the statement is inadmissible. *State v. Dixon*, 159 Wn.2d 65, 76, 147 P.3d 991 (2006).

Here, Mr. Ownbey properly sought to impeach Ms. Flipper, who was resolute they never discussed sexual fantasies, or aphrodisiacs, and never discussed the possibility of having sex ; contrary to her recorded account to police. Mr Ownbey tried to establish on cross-examination they almost had sex in Las Vegas, or that she agreed they should have sex and use the aphrodisiac on the night in question. But the trial court excluded all of this relevant impeachment, preventing an effective cross-examination. The trial court violated Mr. Ownbey's constitutional rights to

confront the witness against him and to present a defense.

The State took full advantage by bolstering Ms. Flipper's credibility in closing by telling the jury she "gave you so much detail and was on the witness stand "for hours" and contrasted it with the paucity of Mr. Ownbey's few minutes account to police. 8/19/22 RP 832. And that they should believe her based on Ms. Johnson's expert witness' testimony. *Id*. at 830.

Although the jury acquitted Mr. Ownbey of attempted rape, it found him guilty of several counts of assault with a sexual motivation. Mr. Ownbey stands convicted of assault with a sexual motivation, could be incarcerated for the rest of his life, and has to register as a sexual offender if he is released.

Given this violation of Mr. Ownbey's constitutional right to present a complete defense, the

Court should grant review on this issue of substantial public interest. RAP 13.4(b)(3), (4).

2. Review is appropriate because the Court of Appeals misapplied ER 702 and the open the door doctrine to allow inadmissible expert witness testimony as rehabilition for an untruthful key witness.

At trial, the State moved to admit the testimony of Jessica Johnson, the executive director of Safety, Advocacy, Growth, and Empower, a sexual violence crisis center, as an expert witness, to educate the jury on why a victim of sexual assault might not immediately leave the area where they were assaulted. 7/8/20 RP 75. Mr. Ownbey objected that Ms. Johnson had not been qualified as an expert and her general testimony about sexual assault had no relevance to any issues at trial. *Id*. at 75-76. The trial court reserved its ruling on this issue. *Id*. at 75-76.

When Ms. Flipper appeared to flounder during cross-examination, prosecution argued that this line of cross-examination opened the door for Jessica Johnson to testify as memory expert witness because Mr. Ownbey challenged the "victim's" recollection of a traumatic event. 8/17/22 RP 565. The prosecution argued Ms. Johnson would explain to the jury how trauma affects a victim's memory of what happened. 8/17/22 RP 565. Mr. Ownbey objected that such expert testimony was inadmissible under ER 702 because Ms. Johnson was not qualified as an expert in the field of memory, brain science, or psychology; her testimony was a transparent attempt to unfairly rehabilitate the complaining witness in a tight credibility contest. 8/16/22 RP 74; *Id*. at 567. Over objection, the trial court permitted Ms. Johnson's testimony. *Id*.

Ms. Johnson told the jury that sexual assault accusers generally should be believed so they do not feel triggered or uncomfortable. *Id*. at 690. She also told the jury that less than five percent of alleged victims file false reports of sexual assault when it did not happen. *Id*. at 694.

The Court of Appeals incorrectly held that Ms. Johnson had specialized knowledge of how sexual assault victims react, based on her experience and training, when they are assaulted and of how a traumatic event, such as a sexual assault, affects their memory. Slip Op. at 17. Therefore, Ms. Johnson did not need to be an expert on brain science, psychology, or psychiatry to provide this testimony. *Id*.

a. The Court of Appeals misapplied ER 702.

Under ER 702, scientific testimony is admissible where (1) the witness qualifies as an expert, (2) the

expert's opinion is based on a theory generally accepted in the relevant scientific community, and (3) the testimony is helpful to the trier of fact. ER 702; *State v. Cheatam*, 150 Wn.2d 626, 645, 81 P.3d 830 (2003).

The witness the State endorsed, Ms. Johnson, is not an expert under ER 702. The trial court did not rule Ms. Johnson was qualified as an expert and did not consider whether the proposed testimony would would assist the jury to decide a central issue in this case. 8/18/22 RP 688. In short, Ms. Johnson's testimony was inadmissible, it was highly prejudicial, and it improperly told the jury whom to believe in the credibility contest.

b. *The Court of Appeal's reasoning is flawed because the inadmissible expert opinion bolstered the alleged victim's credibility and thus invaded the province of the jury.*

The Court of Appeals is mistaken that Ms. Johnson was qualified as an expert under ER 702 and

that the trial court did not abuse its discretion in allowing her to testify. Slip. Op. 19. As already discussed Ms. Johnson's opinion was inadmissible. Worse still, it invaded the province of the jury. Generally, opinion testimony may be admitted even if it addresses an ultimate issue to be decided by the trier of fact. ER 704. But lay and expert witnesses may not testify as to the guilt of the defendants, either directly or by inference. *State v. Olmedo*, 112 Wn. App. 525, 530–31, 49 P.3d 960, 963 (2002). Such an improper opinion undermines a jury's independent determination of the facts, and may invade the defendant's constitutional right to a trial by jury. *Id.*

No witness may state an opinion about an alleged victim's credibility because such testimony "invades the province of the jury to weigh the evidence and decide the credibility of the witness." *State v. Jones*, 71

Wn. App. 798, 812, 863 P.2d 85 (1993)(internal citation ommitted).

For this reason, this Court has held that there are some areas that are clearly inappropriate for opinion testimony in criminal trials. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Among these are opinions, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses. *Montgomery*, 163 Wn.2d at 591.

Here, the trial court permitted the State to call an "expert witness" to tell the jury to believe Ms. Flipper because less than five percent of alleged victims make false allegations of sexual violence. 8/17/22 RP 690-94.

Ms. Johnson's opinion weighed in on Ms. Flipper's credibility in a trial about whether or not she

engaged in consensual intimate acts with Mr. Ownbey. *Olmedo*, 112 Wn. App. at 530–31.

This Court should accept review because the Court of Appeals misconstrued ER 702 and allowed Mr. Ownbey's conviction to rest on impermissible expert testimony that was really an opinion about who the jury should believe.

c. The Court of Appeals misapplied the open the door doctrine and allowed rehabilitation of an untruthful witness with misleading statistics about false reporting.

The Court of Appeals held that Mr. Ownbey "opened the door" to the above inadmissible evidence. This is incorrect. Cross-examination of this evasive witness exposed her lies. This did not open the door to inadmissible expert testimony. Slip. Op. at 18. The Court of Appeals botches this doctrine to Mr. Ownbey's detriment.

The open-the-door doctrine permits a court to admit evidence on a topic that would normally be excluded for reasons of policy or undue prejudice when raised by the party who would ordinarily benefit from exclusion. *State v. Rushworth*, 12 Wn. App. 2d 466, 473, 458 P.3d 1192 (2020). It recognizes that a party can waive protection from a forbidden topic by broaching the subject. *Id*. Should this happen, the opposing party is entitled to respond. *Id.* Thus "when a party opens up a subject of inquiry on direct or cross-examination, [the party] contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced." *Id*; *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

Highlighting a witness's faulty memory is not grounds for admitting a memory expert. 8/18/22 RP 566. Mr. Ownbey did not discuss inadmissible evidence or inquire about a forbidden topic. The open the door rule was also inapplicable because this "rule applies only when the opposing party has first introduced inadmissible evidence." *Patterson v. Kennewick Pub. Hosp. Dist. No. 1*, 57 Wn. App. 739, 744, 790 P.2d 195 (1990).

The Court should accept review to correct this misapplication of doctrine. See Slip Op. 17-19.

3. Review is appropriate because the enhancements and aggravators are unconstitutionally vague as applied.

Mr. Ownbey argued the aggravating circumstances and enhancements on which the court relied to impose an exceptional sentence are unconstitutionally vague. Br. of Appellant at 84. This

is so because the enhancement and the aggravator are so standardless and governed only by the personal predilections of jurors such that they are unconstitutionally vague. *Id.* at 81-82.

The definition of sexual motivation does not provide fair notice of the line between permissible pre-coitus foreplay and sexual motivation. *Id.* Most people have a sexual motivation when they engage in pre-coitus foreplay. The sexual motivation aggravator also asks jurors to determine the line between permissible and wrongful sexual motivation. *Id*. This inquiry—combined with the amorphous concept of "sexual motivation" —is inherently speculative. *Id*. The arbitrariness became self-evident in this case because the jury acquitted Mr. Ownbey of attempted rape but entered a special verdict of sexual motivation.

Additionally, the position of trust aggravator is unconstitutionally vague. The statute does not define what a "position of trust" is, nor does it explain how one uses that position to "facilitate" the offense. Br. of Appellant at 82 (*citing* RCW 9.94A.535(n)).

The Court of Appeals misconstrued Mr. Ownbey's argument and conclusorily declared that he has not demonstrated any unconstitutional vagueness. Slip Op. at 25-26.

a. The Court of Appeals, without any legal analysis, declared that Mr. Ownbey's vagueness challenge fails.

Without any analysis, the Court of Appeals rejected the vagueness challenge and held that "[a] defendant is properly on notice that if they use a position of trust to facilitate a crime against a victim, they are subject to a higher penalty." Slip. Op. at 26.

The Court of Appeals misconstrued Mr. Ownbey's argument contention that if a statute does not contain every single possible relationship that may give rise to a position of trust then it is unconstitutional. Slip Op. at 26.

This Court should take review and reverse the enhancement and aggravating circumstance as void for vagueness.

b. The void for vagueness doctrine applies to statutes that define the scope of punishment.

The state and federal constitutions prohibit the deprivation of life, liberty, or property without due process. Const. art. I, § 3; U.S. Const. amend. XIV. The State violates this guarantee by taking away "someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless

that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015). A statute violates the vagueness doctrine where it fails to "establish minimal guidelines to govern law enforcement." *Smith v. Goguen*, 415 U.S. 566, 574, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974).

The vagueness doctrine applies to both statutes defining elements of crimes and statutes fixing sentences. *Johnson*, 576 U.S. at 596. The Washington Supreme Court's decision to the contrary in *State v. Baldwin*, 150 Wn.2d 448, 78 P.3d 1005 (2003), is based on pre-*Blakely* decisions and is no longer good law.

In *Baldwin*, the court held the vagueness doctrine exempts challenges to aggravating factors. 150 Wn.2d at 459. The court based this conclusion on the reasoning that aggravating factors do not "vary the statutory maximum and minimum penalties assigned

to illegal conduct by the legislature" and that the guidelines "do not set penalties." *Id.*

The Washington Supreme Court has not yet squarely overruled *Baldwin*. However, it has recognized that any fact that increases the permissible range of punishment, including aggravating circumstances, are elements for constitutional purposes. *Allen*, 192 Wn.2d at 542-43. And it has assumed without deciding the vagueness doctrine applies to aggravating factors. *State v. Murray*, 190 Wn.2d 727, 732 n.1, 736-38, 416 P.3d 1225 (2018); *State v. Duncalf*, 177 Wn.2d 289, 296, 300 P.3d 352 (2013). Because aggravating circumstances increase the permissible range of punishment, they are elements of the base offense, and constitutional protections, including the vagueness doctrine, apply.

This Court's decisions following *Baldwin* are based on a misunderstanding of the essential difference between discretionary and mandatory sentencing guidelines. In *DeVore* and *Brush*, this Court rejected vagueness challenges to aggravating circumstances based on the mistaken premise that aggravators do not increase the permissible range of punishment. *State v. DeVore*, 2 Wn. App. 2d 651, 665, 413 P.3d 58 (2018); *State v. Brush*, 5 Wn. App. 2d 40, 61-62, 425 P.3d 545 (2018). These cases rely on *Beckles v. United States*, in which the U.S. Supreme Court rejected a vagueness challenge to enhancements under the federal sentencing guidelines. 580 U.S. 256, 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017).

However, *Beckles* interpreted the federal sentencing guidelines, which are now advisory and not mandatory. 580 U.S. at 265. Because the federal

guidelines "merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range," they do not "fix the permissible range of sentences." *Id.* at 262-63. Therefore, the *Beckles* court concluded the vagueness doctrine does not apply. *Id.* at 265.

Washington's guidelines, conversely, are mandatory. They create a mandatory sentence range based on the seriousness level of the crime of conviction and the offender score. RCW 9.94A.505; RCW 9.94A.510; RCW 9.94A.515; RCW 9.94A.520. Unlike the federal system, a court may only depart from the guidelines where the jury unanimously finds additional facts beyond a reasonable doubt, except when the departure is based only on a prior conviction. The court's reliance on *Beckles* in *DeVore* and *Brush* is "misguided." *State v. Santos*, 36069-5-III, 2020 WL

2079271, at *18 (2020) (Pennell, C.J., dissenting) (unpub)[1]. Moreover, *Beckles* reiterated the vagueness doctrine applies to "laws that define criminal offenses and laws that fix the permissible sentences for criminal offenses." 580 U.S. at 262.

The Opinion incorrectly holds Mr. Ownbey cannot bring a vagueness challenge. Slip Op. 26. In fact, the due process vagueness doctrine applies to aggravating circumstances under RCW 9.94A.535(3) and sentence enhancements under RCW 9.94A.533.

c. Both the enhancement and the aggravating factor are unconstitutionally vague.

A statute is vague if it "fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or if it does not provide

[1] cited Cited as nonbinding authority for persuasive value pursuant to GR 14.1.

standards sufficiently specific to prevent arbitrary enforcement." *Duncalf*, 177 Wn.2d at 296-97 (internal citations and quotation marks omitted). If a person of reasonable understanding cannot guess at the meaning of the statute and whether their conduct is at risk, the statute is vague. *Id*. at 297; *Maynard v. Cartwright*, 486 U.S. 356, 361, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988). Where jurors are free to find an aggravator based on their own "personal predilections," the aggravator is vague. *Goguen*, 415 U.S. at 575; U.S. Const. amend. XIV.

Here, the enhancement and the aggravator are so standardless and governed only by the personal predilections of jurors such that they are unconstitutionally vague.

Johnson supports this conclusion. In that case, the court applied the vagueness doctrine to the federal

Armed Career Criminal Act's residual clause. *Johnson*, 576 U.S. at 593. When applicable, the provision increased a sentence beyond the statutory maximum if the defendant had three or more convictions for a "violent felony." *Id.* Under the residual clause, "violent felony" included a crime that "involves conduct that presents a serious potential risk of physical injury to another." *Id.* at 594.

The court held two features of the provision made it vague. *Id.* at 597. First, it required a person to ascertain what the "ordinary" version of the offense involved. *Id.* This assessment was inherently speculative, and the clause offered no guidance on how one could identify the "ordinary" version of the offense. *Id.* Second, the residual clause did not define what level of risk made a crime qualify as a violent felony. *Id.* at 598. "By combining indeterminacy about how to

measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.*

Similarly here, the sexual motivation enhancement permits arbitrary application and does not provide fair notice of what conduct will expose a person to an enhanced sentence.

This court has stated that "[t]he sexual motivation statute is directed at the action or conduct of committing a crime because of the defendant's desire for sexual gratification." *State v. Halstien*, 122 Wn.2d 109, 123, 857 P.2d 270 (1993). The statute punishes the defendant for acting on sexual thoughts in a criminal manner. *Id.*; *State v. Halgren*, 137 Wash. 2d 340, 348, 971 P.2d 512, 515 (1999).

But this definition of sexual motivation does not provide fair notice of the line between permissible pre-coitus foreplay and sexual motivation. Most people have a sexual motivation when they engage in pre-coitus foreplay.

Like the violent felony clause in *Johnson*, the sexual motivation enhancement also asks jurors to determine the line between permissible and wrongful sexual motivation. This inquiry – combined with the amorphous concept of "sexual motivation" – is inherently speculative. It grants the jury an "inordinate amount of discretion" and makes juror determinations unpredictable and arbitrary. *State v. Myles*, 127 Wn.2d 807, 812, 903 P.2d 979 (1995). This aggravator is vague.

Additionally, the position of trust aggravator is unconstitutionally vague. The statute does not define

what a "position of trust" is, nor does it explain how one uses that position to "facilitate" the offense. RCW 9.94A.535(n). Cases and the pattern instructions offer limited guidance on assessing a position of trust, suggesting consideration of the length and nature of the relationship and any circumstance, including age, rendering the victim vulnerable. WPIC 300.23; *State v. Serrano*, 95 Wn. App. 700, 713,977 P.2d 47 (1999). But exactly how much of a relationship must exist remains undefined.

Every relationship that places the perpetrator "in close proximity to his victim at a time when no one else [is] in the home" is not enough to satisfy position of trust because that could be true of many "tenuous, transient relationship[s]." *State v. Stuhr*, 58 Wn. App. 660, 663, 794 P.2d 1297 (1990). The jurors are also left to speculate when a perpetrator's actions use a position

of trust to facilitate the offense using "guesswork and intuition." *Johnson*, 576 U.S. at 600. This aggravator is also vague.

This Court should accept review to hold that the aggravating factors and enhancements are void for vagueness and remand for resentencing within the standard range. *Stubbs*, 170 Wn.2d at 131.

E. CONCLUSION

Mr. Ownbey respectfully requests this Court accept review of the Court of Appeals' opinion and grant Mr. Ownbey a new trial or strike the unconstitutional enhancements. RAP 13.4(b)(1), (3) and (4).

This brief complies with RAP 18.7 and contains 4,892 words.

DATED this 11th day of November 2024.

Respectfully submitted,

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APPENDICES

FILED
OCTOBER 22, 2024
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
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. CAMERON SCOTT OWNBEY, Appellant.	)))))))))	No. 39470-1-III UNPUBLISHED OPINION

COONEY, J. — Cameron Ownbey was charged with one count of attempted rape in the second degree and three counts of assault in the second degree stemming from an incident in which N.F.[1] alleged that, after she consumed alcohol and went to bed, she

[1] To protect the privacy interests of N.F., we use her initials throughout this opinion. Gen. Order of Division III, *In re the Matter of Victims*, (Wash. Ct. App. September 22, 2023),https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp &ordnumber=2023_3&div=III.

awoke to Mr. Ownbey spooning her while holding a substance to her face. The charges were tried to a jury.

Following trial and a postconviction motion by the defense, Mr. Ownbey was sentenced on one count of assault in the second degree with sexual motivation. Mr. Ownbey appeals, arguing: (1) the trial court misapplied the rape shield statute, (2) the trial court erred in allowing Jessica Johnson to testify as an expert in order to rehabilitate N.F., (3) the special verdicts returned by the jury are not supported by sufficient evidence or are unconstitutionally vague, and (4) the DNA collection fee and Victim Penalty Assessment (VPA) should be struck.

We affirm Mr. Ownbey's conviction and sentence but remand for the limited purpose of striking the VPA and DNA collection fee.

BACKGROUND

In 2017, N.F. met Mr. Ownbey through a Craigslist ad he posted in which he stated he wanted "to impregnate somebody." Rep. of Proc. (RP) at 482-83.[2] After meeting in person, N.F. decided against a romantic relationship with Mr. Ownbey, but the two remained friends. As their friendship progressed, the two began a business relationship. Mr. Ownbey was involved in "outdoor marketing," and the two would go to

[2] Unless otherwise noted, RP refers to the Verbatim Report of Proceedings beginning on July 8, 2020.

"expos and meet different clients." RP at 484-85. In 2019, N.F. accompanied Mr. Ownbey to Las Vegas, Nevada, to attend a gun show.

In 2020, Mr. Ownbey invited N.F. to stay with him in Leavenworth, Washington. Mr. Ownbey sent N.F. a link to their accommodations. The link showed that there were two bedrooms but upon her arrival, N.F. discovered that one of the bedrooms was occupied, and she and Mr. Ownbey would be sharing a room and bed. The first night N.F. and Mr. Ownbey shared a bed was uneventful.

The next morning, N.F. and Mr. Ownbey drank champagne and wine spritzers while discussing business strategies. Although N.F. needed to return to her home in Moscow, Idaho, she felt it would be unsafe to drive. She opted to go to sleep "because [she] was intoxicated" and "to metabolize the alcohol." RP at 496-97. N.F. went to bed alone, attired in pajamas over her bra and underwear. At some point, N.F. awoke and realized she was no longer wearing clothes, and Mr. Ownbey was naked, "spooning [her], from behind," and holding a substance in a small yellow vial to her face that smelled like "paint thinner" or a "strong permanent marker." RP at 498. N.F. panicked and tried to get away, only to have Mr. Ownbey place her in "a choke hold." RP at 507. Once N.F. broke free, she locked herself in the bathroom and called the local sexual assault crisis line. She then called the police. It was later discovered that the substance Mr. Ownbey was holding to N.F.'s face was amyl nitrate, also referred to as "rush." RP at 610, 616.

Mr. Ownbey was charged with attempted rape in the second degree and three counts of assault in the second degree. Count 3, assault in the second degree, alleged Mr. Ownbey "did administer to and/or cause to be taken by N.A.F. a poison and a destructive or noxious substance." Clerk's Papers (CP) at 179.

At trial, N.F. testified consistent with the above. N.F. further testified she and Mr. Ownbey never discussed having a sexual relationship, using an aphrodisiac, or starting a dating relationship. N.F. was subject to cross-examination regarding these statements:

> Q. Do you recall telling Detective Grant that, quote, "I'm sure that I've sent him pictures, at one point in time, when I was trying to pursue something." Do you remember saying anything like that?
> A. Yes. I am sure.
> Q. And do you remember telling Detective Grant that you haven't always been appropriate in those conversations?
> A. Inappropriate is different than having sexual conversations. Are you talking about sexting or are you talking about sexual bantering?
> Q. Both.
> A. We've never sexted.
> Q. Just sexual banter?
> A. Yes.
> Q. Okay. Do you remember Detective Grant asking you, "Have you ever talked about any kind of bondage-type stuff, with Mr. Ownbey?" And your response was, "I don't know. I'm really an open person. So, yeah." Do you remember anything like that?
> A. Yes. I remember answering his questions.

RP at 525-26.

N.F. was also cross-examined regarding her memory of the incident:

> Q. And you indicated that you were wearing—you said a bra and panties, and pajama bottoms and a sweatshirt?
>
> A. Pajama bottoms and tank top. And, when I went out, I would put a—a sweatshirt on, because it was cold.
>
> Q. So you don't remember removing your clothes, before you went to bed, or during—you were sleeping in bed?
>
> A. I did not remove my clothes.
>
> Q. Are you sure about that?
>
> A. I am sure.
>
> Q. Because you were—strike that. Isn't it true, ma'am, that you don't even remember going to bed?
>
> A. I know it was hard at the—at one moment, to remember. But I do remember getting into bed by myself, at that point.
>
> Q. Do you remember telling Detective Grant—and I'll refer you to Page 6 of 23, of his interview, where you indicate, "I don't remember. I don't remember lying down. I don't remember if he lied down with me, or if he came to bed later. Like, that part, I just don't have a lot of recollection of that."
>
> Do you remember saying that to Mr.—Detective Grant?
>
> A. I do remember saying that to him, after I was in the hospital, and dealing with the affects of what I was drugged with. And my memory did come back.
>
> Q. But you did say that.
>
> A. I did say that, to—

RP at 550-51.

Defense counsel sought to question N.F. about an alleged sexual discussion she and Mr. Ownbey had while in Las Vegas. The defense also wanted to question N.F. about a "sexual encounter with another couple" in Las Vegas. RP at 532. The State objected, citing RCW 9A.44.020. The State argued that defense counsel was attempting to question N.F. about her past sexual behavior with others and that evidence of that nature was inadmissible under the rape shield statute. The State argued that defense

counsel could "ask her if she had previously had a discussion with him about—in Las Vegas, about having a sexual relationship. But the details of it is protected." RP at 532. Ultimately, the court allowed "the question of whether or not, during this Vegas trip, [N.F.] discussed having a sexual relationship with Mr. Ownbey. And that's as far as I'm willing to go." RP at 534.

Defense counsel then inquired of N.F.:

> Q. . . . Ms. [F], directing your attention back to your stay at Las Vegas, with Mr. Ownbey. Did you, at that time, down in Las Vegas, ever have a discussion with Mr. Ownbey about having a sexual encounter, that involved Mr. Ownbey?
>
> A. I don't understand.
>
> Q. Okay.
>
> . . . .
>
> Q. . . . Ms. [F], with my last question in mind, I'd like you to review your response to prior counsel, contained on Page 22, Lines 10 through 18, and Lines 21 through 25.
>
> . . . .
>
> A. Okay.
>
> Q. After reviewing that, I want to repeat my questions. Did you have a discussion with Mr. Ownbey—talk with him—about having a sexual encounter that involved Mr. Ownbey?
>
> [THE STATE]: Objection. The framing is not the framing the Court ordered.
>
> THE COURT: Okay. I'm going to overrule the objection. And, if you can, answer the question.
>
> A. It seems there might have been a discussion that could have the possibility of sexuality in—in nature, but that was not a sexual encounter discussion, if—if that's what you're asking.

RP at 541-43.

Brian Capron, a forensic scientist with the Washington State Patrol Toxicology Laboratory, testified regarding the effects of amyl nitrate. Mr. Capron testified that amyl nitrate is "a central nervous system depressant," can "relax the anal sphincter" and "prolong and intensify orgasm[s]." RP at 611, 616-17. He also testified it is "generally used in sexual situations, to enhance sexual pleasure." RP at 611. Mr. Capron stated, "we know that that can be very dangerous. It can be fatal, as well" if too much amyl nitrate was inhaled. RP at 613.

The State also sought the testimony of Jessica Johnson, the executive director of a domestic and sexual violence crisis center in Chelan and Douglas counties known as SAGE.[3] It was anticipated Ms. Johnson would testify as an expert witness on "a victim's recollection of a traumatic event." RP at 565. The State argued the defense had opened the door for Ms. Johnson to testify by questioning N.F.'s memory of the incident. Mr. Ownbey objected to Ms. Johnson testifying as an expert because he did not think it was appropriate to "call an expert to rehabilitate [N.F.]" or that Ms. Johnson "would qualify as a memory expert." RP at 566. The court allowed Ms. Johnson to testify.

Ms. Johnson's testimony was that victims of traumatic events often remember sensory details of what happened and that it may take some time after the traumatic event

[3] SAGE stands for Safety, Advocacy, Growth, Empower.

for a victim to be able to make rational decisions again. She also testified that victims often have a "fight, flight, or freeze response" to traumatic events. RP at 691.

During cross-examination, defense counsel asked Ms. Johnson, "Do you have any experience in dealing with people who make false reports of domestic violence?" RP at 694. Ms. Johnson responded, "Yes. There are some, but it's very few." RP at 694. On redirect, the State asked Ms. Johnson, absent an objection from the defense, if she recalled "the average rate of false reporting." RP at 694. Ms. Johnson replied, "Less than five percent." RP at 694.

Mr. Ownbey did not testify at trial but his general defense was that N.F. did not accurately remember the events of the day, and that he never attempted to rape or assault her. Instead, his defense was that the events were "consensual." RP at 823.

Two interviews of Mr. Ownbey were admitted into evidence. Exs. 12, 13. During the first interview, when law enforcement personnel arrived on scene in response to N.F.'s call, Mr. Ownbey stated he and N.F. had been doing "rush" together and having "intimate relations" when N.F. "started getting rough." Ex. 12, 01:43-02:28, 06:07-06:09. Mr. Ownbey stated N.F. "was fucking nuts." Ex. 12, 02:15-02:17.

In a second interview with law enforcement, Mr. Ownbey stated, "One hundred percent, everything that we were engaged in was consensual." Ex. 13, 26:42-26:48. Immediately after this statement, he said, "I did not have sex with her." Ex. 13, 26:48-26:50. When asked about the status of his relationship with N.F., Mr. Ownbey described

it as a "friendship." Ex. 13, 08:25-08:29. When describing the incident, he said that, "we're in bed, and we're like, we're being intimate together and then she's—all of a sudden she's like 'Stop!' and I'm like 'Okay!'" Ex. 13, 13:01-13:11. Mr. Ownbey said the two were "doing rush together" and that he "had a couple bottles" of it. Ex. 13, 29:27-30:40.

At the conclusion of trial, Mr. Ownbey was acquitted of attempted rape in the second degree (count 1). The jury found Mr. Ownbey guilty of two counts of assault in the second degree (counts 2 and 3), and guilty of the lesser included offense of fourth degree assault (count 4). Count 3 alleged Mr. Ownbey used a noxious substance to commit the assault, that the crime was committed with sexual motivation, and that Mr. Ownbey used "his [ ] position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense." CP at 179.

On Mr. Ownbey's motion, the trial court "vacate[d] the convictions in counts 2 + 4" (second degree assault and fourth degree assault, respectively). CP at 244. On count 3, the court sentenced Mr. Ownbey to nine months, the high end of the standard range, plus 24 months for the sexual motivation enhancement, and an additional 27 months as an exceptional sentence for the position of trust aggravator. The VPA and DNA collection fee were also imposed.

Mr. Ownbey timely appeals.

ANALYSIS

WHETHER THE TRIAL COURT MISAPPLIED THE RAPE SHIELD STATUTE

Mr. Ownbey argues that the court misapplied the rape shield statute and excluded relevant, admissible, and highly probative evidence. He argues that his Sixth Amendment rights to confrontation and to present a defense were violated as a result. We disagree.

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). "The right to confront and cross-examine adverse witnesses is [also] guaranteed by both the federal and state constitutions." *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citing *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)). We review a Sixth Amendment violation claim de novo. *State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009).

Evidence that a defendant seeks to introduce at trial, however, "must be of at least minimal relevance." *Darden*, 145 Wn.2d at 622. A defendant only has a right to present relevant evidence. *State v. Gregory*, 158 Wn.2d 759, 786 n.6, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014). "[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Darden*, 145 Wn.2d at 622. Our

Supreme Court has noted that, for evidence of high probative value, "no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and [Wa.] Const. art. 1, § 22." *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983).

RCW 9A.44.020, Washington's rape shield statute, reads in relevant part:

> (1) In order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated.
>
> (2) Evidence of the victim's past sexual behavior including but not limited to the victim's marital history; divorce history; general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards; or, unless it is related to the alleged offense, social media account, including any text, image, video, or picture, which depict sexual content, sexual history, nudity or partial nudity, intimate sexual activity, communications about sexual activity, communications about sex, sexual fantasies, and other information that appeals to a prurient interest 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.
>
> (3) In any prosecution for the crime of rape, trafficking pursuant to RCW 9A.40.100, or any of the offenses in chapter 9.68A RCW, or for an attempt to commit, or an assault with an intent to commit any such crime evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior; divorce history; general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards; or, unless it is related to the alleged offense, social media account, including any text, image, video, or picture, which depict sexual content, sexual history, nudity or partial nudity, intimate sexual activity, communications about sexual activity, communications about sex, sexual fantasies, and other information that appeals to a prurient interest is not admissible if offered to attack the credibility of the victim and is admissible

> on the issue of consent, except where prohibited in the underlying criminal offense. . . .

The rape shield statute was created to end the archaic common law rule that "a woman's promiscuity somehow had an effect on her character and ability to relate the truth." *Hudlow*, 99 Wn.2d at 8. In *Hudlow*, our Supreme Court made a distinction between evidence of the general promiscuity of a rape victim and evidence that, if excluded, would deprive a defendant of the ability to testify to their version of events. *Id.* at 16-18.

Further, in *State v. Jones*, the Supreme Court reiterated that the rape shield statute "states unequivocally that evidence of the victim's '*past* sexual behavior' is 'inadmissible to prove the victim's consent.'" 168 Wn.2d 713, 722, 230 P.3d 576 (2010) (emphasis added) (citing RCW 9A.44.020). "The statute was not designed to prevent defendants from testifying as to their version of events but was instead created to erase the misogynistic and antiquated notion that a woman's past sexual behavior somehow affected her credibility." *Id.* at 723 (citing *Hudlow*, 99 Wn.2d at 8-9).

Mr. Ownbey, by his own admission, sought to introduce evidence of his and N.F.'s "interactions *before and leading up to* the night in question." Br. of Appellant at 31 (emphasis added). Specifically, Mr. Ownbey sought to introduce evidence that he and N.F. almost had sex during a trip to Las Vegas and that the two later agreed to "act on their BDSM fantasies." Br. of Appellant at 31. Because this is undisputedly evidence of

N.F.'s past "communications about sexual activity, communications about sex, sexual fantasies, and other information that appeals to a prurient interest," it falls squarely into the purview of the rape shield statute. RCW 9A.44.020.

In order for this evidence to be admissible, or conversely, for Mr. Ownbey to show that the court's decision to exclude the evidence violated his constitutional rights, Mr. Ownbey must first demonstrate that it is relevant.

In *Jones*, our Supreme Court noted that the rape shield statute does not state that a victim's "past sexual behavior is never relevant . . . Evidence of past sexual conduct, such as meeting men in bars before consenting to sex or other distinctive sexual patterns, could be relevant if it demonstrates 'enough similarity between the past consensual sexual activity and defendant's claim of consent.'" 168 Wn.2d at 723 (quoting *State v. Geer*, 13 Wn. App. 71, 73-74, 533 P.2d 389 (1975)). In *Hudlow*, the Supreme Court ruled that if such evidence is only minimally relevant, "the evidence may be excluded if the State's interest in applying the rape shield law is compelling in nature." 99 Wn.2d at 16.

Before the trial court, the State argued that Mr. Ownbey "could ask [N.F.] if she had previously had a discussion with him about—in Las Vegas, about having a sexual relationship. But the details of it is protected." RP at 534. The court ultimately "allow[ed] the question of whether or not, during this Vegas trip, [N.F.] discussed having a sexual relationship with Mr. Ownbey." RP at 532. Mr. Ownbey was also permitted to impeach N.F.'s credibility by asking her about sexual conversations she had with

Mr. Ownbey in the past. However, Mr. Ownbey was not permitted to ask whether N.F. had a sexual encounter with others while in Las Vegas.

RCW 9A.44.020(2) states that 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." This provision of the statute is inapplicable here because N.F. and Mr. Ownbey undisputedly did not have a sexual relationship prior to their time in Leavenworth.

Here, Mr. Ownbey seems to argue that his proffered evidence is relevant because it tended to undermine N.F.'s credibility. N.F. testified that there was never any discussion of starting a sexual relationship between she and Mr. Ownbey. However, the evidence Mr. Ownbey sought to introduce, specifically evidence of an alleged sexual encounter with "another couple" in Las Vegas, does not contradict N.F.'s testimony about her discussions with Mr. Ownbey and is therefore inadmissible. RP at 532. Whether N.F. had a sexual encounter with another couple while she and Mr. Ownbey were in Las Vegas is the type of evidence RCW 9A.22.020 mandates is inadmissible as it is evidence of "the victim's past sexual behavior," which is "inadmissible on the issue of credibility." RCW 9A.44.020(2). Further, Mr. Ownbey has not demonstrated that this evidence was relevant for any reason, including to impeach N.F.'s credibility. Whether N.F. had a sexual relationship with another couple while on a trip to Las Vegas is

immaterial to her credibility. Because the evidence was not relevant, Mr. Ownbey's constitutional rights were not violated when the court declined to admit it.

As for Mr. Ownbey's argument that he and N.F. "agreed they would act on their BDSM fantasies," this claimed evidence is not in the record, and Mr. Ownbey does not provide a citation for it. Br. of Appellant at 31. Because we cannot ascertain from the record what Mr. Ownbey is referring to, we cannot review any alleged error in not admitting it. *See State v. Mannhalt*, 33 Wn. App. 696, 704, 658 P.2d 15 (1983) ("The portion of the record certified to this court does not contain any of the motions or proceedings relevant to these matters. Therefore, we cannot consider the alleged errors.").

The court did not misapply the rape shield statute, and Mr. Ownbey's constitutional rights were not violated.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING MS. JOHNSON'S TESTIMONY

Mr. Ownbey argues the trial court erred in allowing Ms. Johnson to testify as an expert in order to rehabilitate N.F. Mr. Ownbey contends that the trial court's ruling violated ER 702 because Ms. Johnson was not an expert on brain science, psychology, or psychiatry. The State responds that Ms. Johnson was qualified under ER 702 to testify and that Mr. Ownbey opened the door, allowing Ms. Johnson to testify as to false reporting statistics. We agree with the State.

ER 702 provides:

> **TESTIMONY BY EXPERTS**
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

"In the case of scientific testimony, the expert (1) must qualify as an expert, (2) the expert's opinion must be based upon a theory generally accepted in the relevant scientific community, and (3) the testimony must be helpful to the trier of fact." *State v. Cheatam*, 150 Wn.2d 626, 645, 81 P.3d 830 (2003). Whether or not to admit expert testimony under ER 702 is within the trial court's discretion. *Id.*

Mr. Ownbey's first argument is that Ms. Johnson is not an expert under ER 702. Before the trial court, Mr. Ownbey objected to Ms. Johnson testifying as an expert because he did not think it was appropriate to "call an expert to rehabilitate [N.F.]" and because he did not think she "would qualify as a memory expert." RP at 566. The State argued Ms. Johnson should be allowed to testify about N.F.'s "recollection of a traumatic event, from an initial interview, versus two-plus years later" and because Mr. Ownbey had "opened the door" by discussing and calling into question N.F.'s memory of what happened. RP at 565-66.

Ms. Johnson was allowed to testify as an expert with regard to issues of sexual assault and sexual violence. Ms. Johnson testified that she worked for SAGE, the domestic violence and sexual violence crisis center for Douglas and Chelan counties.

She testified she has a Bachelor's Degree from Central Washington University and over 600 hours of training in domestic violence, sexual assault, crime victims, child abuse, and neglect. She also stated she had testified as an expert witness on issues related to sexual assault and sexual violence in the past and that she was trained on the impact of a traumatic event on an individual, including their memory.

Mr. Ownbey's first argument, that Ms. Johnson was not qualified as an expert on brain science, psychology, or psychiatry so should not have been allowed to testify, fails. Ms. Johnson had specialized knowledge of how sexual assault victims react, based on her experience and training, when they are assaulted and of how a traumatic event, such as a sexual assault, affects their memory. Ms. Johnson did not need to be an expert on brain science, psychology, or psychiatry to provide this testimony. The court did not err when it allowed her testify under ER 702.

Mr. Ownbey next argues that even if Ms. Johnson was qualified under ER 702, the defense did not open the door for the prosecution to rehabilitate N.F.'s testimony with statistics on false reporting. Specifically, Mr. Ownbey takes issue with Ms. Johnson's testimony, absent an objection from the defense, that less than five percent of victims make false reports.

"A party may assign evidentiary error on appeal only on a specific ground made at trial." *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (citing *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985)). We will not consider issues raised for the

first time on appeal. RAP 2.5. Mr. Ownbey did not object to Ms. Johnson's testimony on the rate of false reporting. Any alleged error is therefore unpreserved.

Notwithstanding the procedural infirmity, it was Mr. Ownbey who opened the door to the State's question. On cross-examination, defense counsel asked whether Ms. Johnson had experience with people who make false reports, which led to the question by the State on redirect that Mr. Ownbey now complains of.

To the extent Mr. Ownbey argues he did not open the door to allow Ms. Johnson to testify, we disagree. "[C]orroborating testimony intended to rehabilitate a witness is not admissible unless the witness's credibility has been attacked by the opposing party." *State v. Petrich*, 101 Wn.2d 566, 574, 683 P.2d 173 (1984) *abrogated on other grounds by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988). In some cases, the credibility of a witness may inevitably be a central issue. *Id.* at 575. "An attack on the credibility of these witnesses, however slight, may justify corroborating evidence." *Id.*

Here, N.F.'s credibility was a central issue. Mr. Ownbey's defense was that the incident was consensual while N.F. alleged she did not consent. Further, defense counsel challenged N.F.'s memory of the events leading up the incident:

> Q. *So you don't remember* removing your clothes, before you went to bed, or during—you were sleeping in bed?
> A. I did not remove my clothes.
> Q. Are you sure about that?
> A. I am sure.
> Q. Because you were—strike that. *Isn't it true, ma'am, that you don't even remember going to bed?*

> A. I know it was hard at the—at one moment, to remember. But I do remember getting into bed by myself, at that point.
>
> Q. Do you remember telling Detective Grant—and I'll refer you to Page 6 of 23, of his interview, where you indicate, "I don't remember. I don't remember lying down. I don't remember if he lied down with me, or if he came to bed later. Like, that part, I just don't have a lot of recollection of that."
>
> *Do you remember saying that to Mr.—Detective Grant?*
>
> A. I do remember saying that to him, after I was in the hospital, and dealing with the affects of what I was drugged with. And my memory did come back.

RP at 550-51 (emphasis added).

Because N.F.'s credibility and recollection of the events was an essential issue, and because Mr. Ownbey attacked her memory of the events, the State was entitled to call Ms. Johnson to testify about how a traumatic event might affect a victim's memory in order to rehabilitate N.F.

Ms. Johnson was qualified as an expert under ER 702, and the court did not abuse its discretion in allowing her to testify.

WHETHER THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE SEXUAL MOTIVATION AGGRAVATOR AND POSITION OF TRUST ENHANCEMENT

Mr. Ownbey argues there was insufficient evidence to support the position of trust aggravator. Therefore, he contends there was insufficient evidence to support an exceptional sentence. Similarly, Mr. Ownbey asserts there was insufficient evidence to support the sexual motivation enhancement. We disagree with both arguments.

"A jury's finding by special interrogatory is reviewed under the sufficiency of the evidence standard." *State v. Stubbs*, 170 Wn.2d 117, 123, 240 P.3d 143 (2010). The sufficiency of the evidence is a question of law this court reviews de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). In a sufficiency of the evidence challenge, "we review the evidence in the light most favorable to the State" to determine whether any rational trier of fact could have found the aggravating factor beyond a reasonable doubt. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). "A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn from it." *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). "[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

RCW 9.94A.535(3)(n) states:

> Aggravating Circumstances - Considered by a Jury - Imposed by the Court
>
> Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.
>
> . . . .
>
> (n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

When analyzing the position of trust aggravator, "[t]he inquiry is whether the defendant was in a position of trust, and further whether this position of trust was used to facilitate the commission of the offense. Whether the defendant is in a position of trust depends on

the length of the relationship with the victim." *State v. Bedker*, 74 Wn. App. 87, 95, 871 P.2d 673 (1994). "A relationship *extending over a longer period of time*, or one within the same household, would indicate a more significant trust relationship, such that the offender's abuse of that relationship would be a more substantial reason for imposing an exceptional sentence." *State v. Grewe*, 117 Wn.2d 211, 219, 813 P.2d 1238 (1991) (citing *State v. Fisher*, 108 Wn.2d 419, 427, 739 P.2d 683 (1987) (emphasis added)).

Mr. Ownbey argues that he was not in a position of trust with N.F. because they were both adults. But this is not dispositive. *See State v. Davis*, 47 Wn. App. 91, 734 P.2d 500 (1987) (affirming the exceptional sentence where the defendant, an adult who was painting the victim's house, used his position of trust to gain entry immediately before assaulting the adult victim).

Here, N.F. testified she had known Mr. Ownbey for years, since 2017. Additionally, N.F. testified that she and Mr. Ownbey had taken trips together, gone hiking together, worked together, and communicated often. Given N.F.'s testimony about the duration and nature of her relationship with Mr. Ownbey, a rational trier of fact could have found that Mr. Ownbey occupied a position of trust with N.F.

The jury also could have found that Mr. Ownbey used that position of trust to facilitate the crime. N.F. testified that Mr. Ownbey had sent her a link to the residence that showed it had two bedrooms when he invited her to Leavenworth. However, upon arrival, N.F. discovered that one of the two bedrooms was occupied, and she and

Mr. Ownbey would actually be sharing a room and a bed. She testified that she felt "safe" and "wasn't concerned" about sharing a bed with Mr. Ownbey when the two went to bed on the first night. RP at 494.

A rational trier of fact could have found that Mr. Ownbey used his position of trust to make N.F. feel comfortable enough to share a bed with him and that he subsequently used that position of trust to assault N.F. the next day. Consequently, there was sufficient evidence to support the position of trust aggravator.

Mr. Ownbey argues because there was insufficient evidence to support the position of trust aggravator, there was insufficient evidence to support the exceptional sentence. Because the aggravator is supported by sufficient evidence, Mr. Ownbey's exceptional sentence argument fails.

Mr. Ownbey next claims there was insufficient evidence to support the sexual motivation enhancement.

RCW 9.94A.835 states:

> **Special allegation—Sexual motivation—Procedures.**
>
> (1) The prosecuting attorney shall file a special allegation of sexual motivation in every criminal case, felony, gross misdemeanor, or misdemeanor, other than sex offenses as defined in RCW 9.94A.030 when sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding of sexual motivation by a reasonable and objective fact finder.
>
> (2) In a criminal case wherein there has been a special allegation the state shall prove beyond a reasonable doubt that the accused committed the crime with a sexual motivation. The court shall make a finding of fact of

> whether or not a sexual motivation was present at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not the defendant committed the crime with a sexual motivation. This finding shall not be applied to sex offenses as defined in RCW 9.94A.030.
>
> (3) The prosecuting attorney shall not withdraw the special allegation of sexual motivation without approval of the court through an order of dismissal of the special allegation. The court shall not dismiss this special allegation unless it finds that such an order is necessary to correct an error in the initial charging decision or unless there are evidentiary problems which make proving the special allegation doubtful.

RCW 9.94A.030(48) defines "sexual motivation" as "one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification."

"The exclusion of sex offenses [in RCW 9.94A.835(2)] makes sense because the purpose of creating the sexual motivation aggravator was to enhance the punishment of an offender who was sexually motivated in committing a crime that did not necessarily include sexual motivation." *State v. Murray*, 190 Wn.2d 727, 734, 416 P.3d 1225 (2018). The State must prove, beyond a reasonable doubt, the defendant committed the crime for the purpose of sexual gratification. *State v. Vars*, 157 Wn. App. 482, 494, 237 P.3d 378 (2010). The State "must do so with evidence of identifiable conduct by the defendant while committing the offense." *Id.*

Here, Mr. Ownbey was convicted in count 3 of assault in the second degree. Count 3 alleged Mr. Ownbey used a "poison and a destructive noxious substance" to commit the assault. CP at 7. The noxious substance being amyl nitrate, also known as "rush." RP at 610, 616. Mr. Capron testified that amyl nitrate can "relax the anal

sphincter" and "prolong and intensify orgasm[s]." RP at 616-17. He also testified it is "generally used in sexual situations." RP at 611. N.F. testified that she awoke unclothed with Mr. Ownbey, also naked, spooning her while holding amyl nitrate under her nose. N.F. testified that when she tried to get away, Mr. Ownbey put "his arm, you know, elbow, in—my neck, and I couldn't—I couldn't—it was hard for me to breathe." RP at 508.

Given Mr. Capron and N.F.'s testimony, a reasonable trier of fact could have found that Mr. Ownbey committed the assaults with sexual motivation. A jury could have found that Mr. Ownbey, while laying naked with N.F., sought to use the amyl nitrate to make it easier to sexually assault N.F., and that the crime was therefore committed with sexual motivation.

Sufficient evidence supports the sexual motivation enhancement.

WHETHER THE POSITION OF TRUST AGGRAVATOR AND SEXUAL MOTIVATION ENHANCEMENT ARE UNCONSTITUTIONALLY VAGUE

Mr. Ownbey next argues that even if supported by substantial evidence, the position of trust aggravator and sexual motivation enhancement are unconstitutionally vague. We disagree.

Statutes are presumed to be constitutional, and the party challenging the validity of a statute has the heavy burden of proving it is unconstitutional beyond a reasonable doubt. *State v. Peters*, 17 Wn. App. 2d 522, 538, 486 P.3d 925 (2021). A statute is

unconstitutionally vague, and therefore void for vagueness if it "fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or if it does not provide standards sufficiently specific to prevent arbitrary enforcement." *State v. Eckblad*, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004). The test for a vagueness challenge is "whether a person of reasonable understanding is required to guess at the meaning of the statute." *State v. Duncalf*, 177 Wn.2d 289, 297, 300 P.3d 352 (2013).

In *State v. Baldwin*, our Supreme Court held that sentencing guideline statutes are exempt from a vagueness challenge. 150 Wn.2d 448, 458-59, 78 P.3d 1005 (2003). Mr. Ownbey argues this court should depart from *Baldwin* in light of the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). In *Blakely*, the Supreme Court held that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Blakely*, 542 U.S. at 301 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 525, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)).

However, our Supreme Court has not yet overruled *Baldwin*. *See, e.g.*, *Murray*, 190 Wn.2d at 732 n.1 ("[W]e do not reach the broader question of whether aggravators listed in RCW 9.94A.535 are subject to void for vagueness challenges generally.").

Mr. Ownbey argues that, in light of *Blakely*, enhancements and aggravators can be subject to a vagueness challenge. We need not analyze whether *Blakely* overruled

Baldwin because even if Mr. Ownbey could bring a vagueness challenge to the enhancement and aggravator, it would fail.

Mr. Ownbey argues the "position of trust aggravator is unconstitutionally vague" because it does not define what a position of trust is or explain how someone could use that position to facilitate an offense. Br. of Appellant at 82. Mr. Ownbey's argument is unpersuasive.

As discussed above, there is a two-part test and various factors to be considered when analyzing whether a defendant was in a position of trust with a victim. *Bedker*, 74 Wn. App. at 95; *Grewe*, 117 Wn.2d at 219. If there is a position of trust, the next inquiry is whether it was used to facilitate the crime.

Mr. Ownbey seems to posit that, because "exactly how much of a relationship must exist [to constitute a position of trust] remains undefined," the aggravator is vague. Br. of Appellant at 83. We disagree. Though it is a fact specific inquiry, a defendant is properly on notice that if they use a position of trust to facilitate a crime against a victim, they are subject to a higher penalty. Mr. Ownbey points to no authority that stands for the proposition that the statute must contain every single possible relationship that may give rise to a position of trust in order for it to be constitutional. Mr. Ownbey cannot meet his burden of demonstrating that the aggravator is unconstitutionally vague.

Mr. Ownbey argues that the sexual motivation enhancement is vague because it "does not provide fair notice of the line between permissible pre-coitus foreplay and sexual motivation." Br. of Appellant at 81.

Our Supreme Court has stated, "The sexual motivation statute is directed at the action or conduct of committing a crime because of the defendant's desire for sexual gratification." *State v. Halstien*, 122 Wn.2d 109, 123, 857 P.2d 270 (1993). The court further noted that, "[t]he statute does not punish a defendant for having sexual thoughts, but rather punishes the defendant for *acting* on those thoughts in a criminal manner." *Id.*

RCW 9.94A.835, the definition of "sexual motivation" contained in RCW 9.94A.030(48), and our Supreme Court have made sufficiently clear that crimes committed for a defendant's sexual gratification carry a higher penalty. Mr. Ownbey fails to demonstrate that the enhancement is unconstitutionally vague.

Assuming Mr. Ownbey can bring a vagueness challenge to the aggravator and enhancement, they are not unconstitutionally vague.

VICTIM PENALTY ASSESSMENT AND DNA COLLECTION FEE

Mr. Ownbey requests that we remand his case to have the trial court strike the VPA and DNA fee. The State concedes.

Former RCW 7.68.035(1)(a) (2018) required a VPA be imposed on any individual found guilty of a crime in superior court. In April 2023, the legislature passed Engrossed Substitute H.B. 1169 (H.B. 1169), 68th Leg., Reg. Sess. (Wash. 2023), that amended

RCW 7.68.035 to prohibit the imposition of the VPA on indigent defendants. RCW 7.68.035 (as amended); LAWS OF 2023, ch. 449, § 1. H.B. 1169 took effect on July 1, 2023. Amendments to statutes that impose costs upon convictions apply prospectively to cases pending on appeal. *See State v. Ramirez*, 191 Wn.2d 732, 748-49, 426 P.3d 714 (2018).

Similarly, pursuant to former RCW 43.43.7541 (2018), the trial court was required to impose a $100 DNA collection fee for every sentence imposed for the crimes specified in RCW 43.43.754. Effective July 1, 2023, the legislature amended RCW 43.43.7541 by eliminating language that made imposition of the DNA collection fee mandatory. *See* LAWS OF 2023, ch. 449, § 4.

Because Mr. Ownbey's case is pending on direct appeal, the amendments apply. Further, Mr. Ownbey was found to be indigent.[4]

CONCLUSION

We affirm Mr. Ownbey's conviction and sentence and remand for the limited purpose of striking the VPA and DNA collection fee.

[4] At sentencing, defense counsel stated Mr. Ownbey was indigent. The court stated it "believe[d] he is indigent" but that it wanted a financial declaration. RP at 884. It does not appear a financial declaration was filed. Mr. Ownbey's judgment and sentence states, "The defendant has the ability or likely future ability to pay the LFOs imposed herein. RCW 9.94A.753." CP at 247. It is unclear whether Mr. Ownbey was indigent at sentencing, but he was found indigent for purposes of this appeal.

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.

Cooney, J.

WE CONCUR:

Fearing, J.

Lawrence-Berrey, C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 39470-1-III**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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