NO. 38176-5-III

COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION THREE

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

STATE OF WASHINGTON,

Respondent,

v.

DARRYL POND,

Appellant.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

ON APPEAL FROM THE SUPERIOR COURT OF THE

STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Charnelle Bjelkengren, Timothy Fennessy & Annette Plese, Judges

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

BRIEF OF APPELLANT

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

CHRISTOPHER H. GIBSON

Attorney for Appellant

NIELSEN KOCH & GRANNIS, PLLC

The Denny Building

2200 Sixth Avenue, Suite 1250

Seattle, Washington 98121

**TABLE OF CONTENTS**

Page

*INTRODUCTION* [1](#_Toc94020157)

[A. ASSIGNMENTS OF ERROR 3](#_Toc94020158)

Issues Pertaining to Assignments of Error [3](#_Toc94020159)

[B. STATEMENT OF THE CASE 5](#_Toc94020160)

[1. Procedural Facts 5](#_Toc94020161)

[2. Substantive Facts 6](#_Toc94020162)

[C. ARGUMENT 34](#_Toc94020164)

[THE EXCLUSION OF EVIDENCE SUPPORTING  
A CONCLUSION A.B. MADE UP THE ACCUSATION TO AVOID PUNISHMENT VIOLATED POND’S RIGHT TO PRESENT A DEFENSE. 34](#_Toc94020165)

[a. Purpose of the rape shield statute and the scope  
of its limitations. 36](#_Toc94020166)

[b. The evidence was admissible because it was  
relevant to Pond’s defense and no compelling  
interest outweighed Pond’s need for this evidence. 39](#_Toc94020167)

[d. The error was prejudicial 52](#_Toc94020168)

[D. CONCLUSION 54](#_Toc94020169)

**TABLE OF AUTHORITIES**

Page

washington cases

Fenimore v. Donald M. Drake Constr. Co.

87 Wn.2d 85, 549 P.2d 483 (1976) 41

Lamborn v. Phillips Pac. Chem. Co.

89 Wn.2d 701, 575 P.2d 215 (1978) 45

State v. Bedada

13 Wn. App. 2d 185, 463 P.3d 125 (2020) 48, 49

State v. Burke

163 Wn.2d 204, 181 P.3d 1 (2008) 52

State v. Carver

37 Wn. App. 122, 678 P.2d 842 (1984) 47

State v. Cayetano-Jaimes

190 Wn. App. 286, 359 P.3d 919 (2015) 39

State v. Chambers

197 Wn. App. 96, 387 P.3d 1108 (2016)

review denied, 188 Wn.2d 1010, 394 P.3d 1004 (2017) 52

State v. Darden

145 Wn.2d 612, 41 P.3d 1189 (2002) 41, 42, 50, 51

State v. Harris

97 Wn. App. 865, 989 P.2d 553 (1999)

review denied, 140 Wn.2d 1017 (2000) 45

**TABLE OF AUTHORITIES (CONT'D)**

Page

State v. Horton

116 Wn. App. 909, 68 P.3d 1145 (2003) 46

State v. Hudlow

99 Wn.2d 1, 659 P.2d 514 (1983) 37, 38, 40, 41, 42, 46

State v. Jones

168 Wn.2d 713, 230 P.3d 576 (2010) 16, 37, 40, 41, 42, 43, 52

State v. Lee

188 Wn.2d 473, 396 P.3d 316 (2017) 40

State v. McDaniel

83 Wn. App. 179, 920 P.2d 1218 (1996)

review denied, 131 Wn.2d 1011, 932 P.2d 1255 (1997) 52

State v. Perez-Valdez

172 Wn.2d 808, 265 P.3d 853 (2011) 41

State v. Peterson

2 Wn. App. 464, 469 P.2d 980 (1970) 51

State v. Peterson

35 Wn. App. 481, 667 P.2d 645 (1983) 38

State v. Quismundo

164 Wn.2d 499, 192 P.3d 342 (2008) 43

State v. Reed

101 Wn. App. 704, 6 P.3d 43 (2000) 42

**TABLE OF AUTHORITIES (CONT'D)**

Page

State v. Roberts

25 Wn. App. 830, 611 P.2d 1297 (1980) 51

State v. Sheets

128 Wn. App. 149, 115 P.3d 1004 (2005) 38, 46, 49

federal cases

Chambers v. Mississippi

410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) 39

Crane v. Kentucky

476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) 39

Davis v. Alaska

415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) 40, 50

Delaware v. Van Arsdall

475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) 53

Olden v. Kentucky

488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988) 17, 50

Pennsylvania v. Ritchie

480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) 39

**TABLE OF AUTHORITIES (CONT'D)**

Page

rules, statutes and other authorities

5A Wash. Prac., Evidence Law and Practice § 413.1

Purpose and History of Rule (6th ed.) 49

ER 403 45

ER 413 49

RCW 9A.44.020 27, 36, 37

U.S. Const. amend. VI 2, 3, 12, 25, 39, 40

U.S. Const. amend. XIV 39

Wash. Const. art. I, § 3 39

Wash. Const. art. I, § 22 2, 3, 39, 40

*Introduction*

In June 2018, after being sent to a counselor for possessing a cell phone she was not supposed have that she got from a boyfriend she was not supposed to be dating, then 12-year-old A.B. accused her step-grandfather, Darryl Pond, of attempting to molest her the previous summer.

In January 2019, A.B.’s best friend, then 11-year-old S.L., accused Pond of molesting her one time when she spent the night at his house with A.B. in 2017. She made the accusation after being asked if she knew why A.B.’s grandmother and step-grandfather (Pond) were getting divorced and being encouraged to “be there” for A.B. during these difficult times.

Pond denied both allegations and the only evidence in support them was the testimony of A.B. and S.L. A jury convicted Pond of the charge involving A.B., but could not reach a unanimous verdict on the charge involving S.L.

To defend against A.B.’s accusation, Pond sought to introduce evidence about the cell phone she possessed and the boy she was dating, both of which were strictly forbidden by her parents, as well as the disposition of the phone after it was discovered, to show she had a motive to fabricate the claim, which was to lessen the punishment for her misbehavior. The trial court excluded this evidence except to the extent A.B. had a cell phone she was not supposed to have that she got from a boy at school. The trial court excluded voluminous text messages between A.B. and her boyfriend that tended to indicate their relationship was physical, excluded evidence A.B. was ordered to attend counseling after the cell phone and older boyfriend were discovered and excluded evidence that A.B.’s mother misled the defense as to the disposition of the phone once it was discovered. This brief explains how the trial court’s refusal to admit this evidence deprived Pond of his Sixth Amendment and Wash. Const. art. 1, § 22 rights to present a defense.

A. ASSIGNMENTS OF ERROR

The trial court deprived Pond’s Sixth Amendment and Wash. Const. art. 1, § 22 rights to present a defense by excluding:

1. evidence of text messages between A.B. and her boyfriend found on the phone she possesses in violation of her parents’ rules;

2. evidence about the relationship between A.B. and her boyfriend, also in violation of her parents’ rules, except to the extent she got the phone from a boy at school;

3. evidence that A.B. was ordered into counsel as a result of her rule violations; and

4. evidence that A.B.’s mother misled the defense about the disposition of the phone once it was discovered.

Issues Pertaining to Assignments of Error

Did the trial court deprive Pond of his Sixth Amendment and Wash. Const. art. 1, § 22 rights to present a defense by excluding:

1. test messages between A.B. and her boyfriend which showed they were intimately involved despite strict parental rules against dating before the age of 16 and where this evidence would have supported the defense theory that A.B. had a motive to make up the allegation against Pond?;

2. evidence about the duration and level of intimacy between A.B. and her boyfriend where this evidence would have supported the defense theory that A.B. had a motive to make up the allegation against Pond?;

3. evidence that A.B. was ordered to attend counseling after discovery her misbehavior with the boy and the phone and that she made the accusation against Pond at the first counseling session?; and

4. evidence that A.B.’s mother misled the defense as to the disposition phone after it was discovered by claiming she did not know where it was when it was in fact in her sock drawer the whole time?

B. STATEMENT OF THE CASE

1. Procedural Facts

By second amended information the Spokane County Prosecutor charged Appellant Darryl Pond with first degree child molestation and attempted first degree child molestation. CP 22-23. The prosecutor alleged that in 2017 Pond molested S.L., a close friend of his step granddaughter, A.B., when she was 9 years old and spending the night at his house along with A.B. The prosecutor also alleged Pond attempted to molest A.B. in 2017. CP 1-4.

A trial was held April 12-19, 2021, before the Honorable Judge Annette Plese. 3RP; 4RP.[[1]](#footnote-1) A jury convicted Pond of attempting to molest A.B. but could not reach a verdict on the other charge CP 154-55; 5RP 367-69.

Pond was sentenced to an indeterminate sentenced of at least 40 months. CP 201-17; 5RP 417. Pond appeals. CP 197-98.

2. Substantive Facts

On January 28, 2021, before the case was assigned to a specific judge for trial (2RP 81), Judge Fennessy held a hearing on the parties’ motions in limine. 2RP 4-93. At the hearing defense counsel stated Pond was asserting a “general denial” defense. 2RP 43-44.

Defense counsel also explained the defense theory of the case as to A.B.’s claim was that she made it up to avoid punishment for breaking her parents’ strict rules. 2RP 69-72. Specifically, counsel explained that when A.B. was 10 or 11 years old she began dating a 14 year old boy despite her parents’ rule that she was not allowed to date at all. 2RP 69-70. A.B. accepted a cell phone from the boy, despite her parents’ rule against her having a cell phone. 2RP 70. Defense counsel also noted the parents used a camera in the home to check on their children and described A.B.’s home as “a tightly controlled environment, Your Honor, a very strict raising.” 2RP 70. Counsel went on to explain:

Imagine the fallout when it is discovered, and it is discovered while [A.B.] is at another girl's house, that she's texting on a cellphone. And we're not talking about a couple texts or ten texts. I think in the duration, whether it was a month or two, it was well over 1,000 text messages that I went through. And some of these text messages have some explicit nature to them. And now Defense isn't necessarily trying to get into the explicit text messages themselves, but merely that [the boy] provided her with a cellphone, but the cellphone was a secret that she and [the boy] had outside the presence of her parents.

When her parents found out, that is when they had a school meeting, . . ., and that [the boy] was in front of the vice principal, [A.B.’s] two parents, and he said [A.B.] was present, and got to see the fallout and what they felt about [the boy], as well as what they felt about her having that cellphone, about how they felt about her having that cellphone in secret, about that relationship.

Upon seeing that fallout, she goes into counselling, Your Honor. And upon that counselling, that's when the allegation is made. But it clearly lays out logical inference where the jury's going to have a [sic] questions, right? We're in general denial. So, obviously, our position is that [A.B.] and [S.L.] are not telling the truth.

[And] specifically about [A.B.], the jury's going to have a question, as I'm sure the Court does. I'm sure [the prosecutor] has talked about. Why would she lie? Why would she lie? Well, she lied because she got in trouble for a cellphone and because these are just right in time, this happened -- she got caught with a cellphone June of 2018. The last text message is like June 8th, Your Honor. She gets caught. She goes into counseling June 18 of 2018 -- I'm sorry, June of 2018. She makes the accusation June of 2018. This all happens so closely in time, Your Honor, that logically it makes sense that this was her tactic. This is the theory of the Defense.

THE COURT: I still don't hear the theory. I hear the chronology.

[DEFENSE COUNSEL]: So the theory of the Defense is that [A.B.] made up this allegation in an attempt to get out of trouble with the cellphone, her secret illicit relationship with [the boy] who is also transgender.

RP 70-72.

Counsel also noted that the content of the text message found on A.B.’s secret phone were more explicit than he would have expected for middle school-age children. 2RP 72. Counsel noted one of the messages to the boy said, “do to me what you did behind the school.” Another, sent on the phone by S.L. to the boy read, “You should fuck [A.B.].” 2RP 75.

After Judge Fennessy expressed reluctance at accepting the defense theory, opining that it was not corroborated by some tangible advantage or reward for A.B. by making a false allegation (2RP 73-74, 76), defense counsel noted that after she claimed sexual abuse by Pond, she was no longer grounded for disobeying her parents’ rules, so there was a benefit to A.B. by falsely accusing Pond. 2RP 78.

Judge Fennessy declined to rule on whether the defense could pursue its theory of the case, noting he had not yet been assigned to try the case. 2RP 81. Nonetheless, Judge Fennessy offered the following opinion:

All right. Here's my decision. I just don't -- I guess, I don't -- I'm going to reserve . . .. But I'm going to reserve with the caution, [Defense Counsel], nothing that I've heard at this point gives me any reason to follow the conclusion.

I understand if there was something more that the Court would have something to go on, but based on your representations thus far, it's not until after all of this occurs that some softening, if you will, of the supervision occurs. And so it's not something that was motivating [A.B.]. What was going on was life was happening, and [A.B.] was reacting to life.

So I'm not excluding the testimony, but I'm not indicating that they're going to be permitted to say what you've offered them for. I don't understand the connection that you're trying to draw. I do not intend to permit random facts unless there's some relevance. I do not see a relevance presently on my understanding of the facts to the idea, I don't know why there's a camera in the home. I don't know if these are two parents that work who wanted to have some information about their child's arrival at home, who had an experience where one of the children called using a cellphone from somebody else's phone.

I could imagine any of a thousand circumstances that would reasonably have a parent have a camera so they can actually see their child come into the home. It's much more sophisticated, but, in my day, it was not at all unusual to text with your child and say take a picture of where you are and send to me so you could see where they were.

The sophistication of children and the battel [sic] for parents to try to keep up is known to me. And so I don't automatically jump to the idea that this was an oppressive regime. Ten years old and not being able to date is not, in my view of the world, oppressive. In fact, ten years old and not being able to have a cellphone is not, in my view of the world, oppressive.

So without more, I don't understand the analogy that's being made. I'm reserving out of deference to the Defense that you might be able to provide me some additional support. But I don't get it at this point. And I'm tending to very strongly agree with the State.

2RP 79-81.

Those motions in limine reserved for trial by Judge Fennessy were later addressed by Judge Plese at the beginning of trial. Defense counsel began by reiterating the defense position:

Your Honor, we brought the motion for additional briefing based on -- initially motions in limine were heard in this case before Judge Fennessy in January of this year. And at that time, based off the argument of defense, he said he would need more before he could find that the relationship between [A.B.] and [the boy] would be relevant; that the cell phone that the two secreted and shared messages on would be relevant. And this isn't something that the defense is necessarily seeking to put on the record; but it is a fact that [the boy] is a transgendered boy, which could potentially come out at some point of testimony. But, your Honor, defense sought to introduce the testimony and evidence under the Sixth Amendment right essentially to present a defense and that Mr. Pond would have the right to offer testimony and witnesses to present the defense's version of the facts. And that's a fundamental element of due process. And the case law that tells us that is Washington versus Texas. I have a cite if the Court would like it. It's 388 U.S. 14 (1967).

But, your Honor, the defense's argument is essentially that these two girls are not telling the truth. And the testimony of these two girls is the only evidence that the state has. And if we were allowed to present the testimony and evidence, we believe that a rational juror could easily understand the bias and motive-to-lie argument in that a preteen is caught engaged in a deceitful and secretive behavior -- I'm sorry, deceitful and secretive behavior in having a physical relationship with an older boy by her parents, and so she fabricates a story to get herself out of trouble.

And this is a common-sense argument, your Honor. People and children both lie to get out of trouble. An expert's not needed to testify as to this, because the court will instruct the jury that it's within their purview to determine the credibility of the witnesses. And again, I think the umbrella that the court needs to consider this in is that the testimony of the two girls is the only evidence that the state has to support their charges. And so their veracity is of the utmost importance. And in and around the time of the first disclosure, that's the disclosure by . . . [A.B.] [A.B.], both girls were engaged in deceitful and secretive behavior. I think I submitted, your Honor, an affidavit or as an offer of proof as to what the -- the testimony would be that would be related to that. And that would be that [A.B.] was in sixth grade at the time; her family had strict rules in their house about dating; she wasn't supposed to be dating until she was 16 years old; and that she didn't have a cell phone, she wasn't allowed to have a cell phone. But instead, your Honor, [A.B.] is dating an eighth grader who her parents don't know about.

She -- and, your Honor, I don't think that I brought the text messages. But it's not even just a few text messages. It's 1500 text messages between May 29th and June 3rd when the phone is confiscated, so it's a significant amount of text messages. And these text messages contain things like "I love you," you know, "Tell your parents that you're going to a track meet so we can meet up instead," and, you know, "I liked what you did to me behind the school," you know, it -- "last week," or -- I'm sorry; again, I don't have them with me. But, I mean, it was obviously a very significant relationship for the two even if it was, you know, with a sixth grader and an eight [sic] grader and for a short period of time.

But our witnesses, [the boy] would testify that he knew that [A.B.] wasn't supposed to have the phone; she had it anyway; she took steps to conceal the phone and make sure that her parents didn't know that she had it. And [the boy] is then confronted at school by the parents. The parents are upset that this eighth grade boy gave their sixth grade daughter a phone. And they take the phone; they yell at him; I think that they -- or he indicates that the parents tell the school that they need to keep them far apart from each other.

But so this was a big deal. They went to the school to confront [the boy] and to make sure that the school got involved in making sure that the two students didn't continue to have contact. But then [A.B.’s] own statements to the defense in an interview are that she then goes to counseling because of this relationship. So it's her first day of counseling on June 13th. The text messages, again, that were extracted from the phone are between May 29th and June 3rd. And on June 13th she goes to her first counseling session, and in this first counseling session she discloses abuse by Mr. Pond. So but for -- presumably anyway, but for this relationship with a boy, she wouldn't have been in counseling; we don't know if she would have made the disclosure.

So the state had indicated to the judge, Fennessy previously, that it intended to ask [A.B.] about when she made the first disclosure, intending to elicit that she made the disclosure in counseling. But the state can't bring it up and then tell us that we can't argue it or talk about it, "Why were you in counseling?" because it's relevant, right? And again, it's a common-sense argument that people lie to get out of trouble.

But so again, to make -- to make the timeline hopefully as clear as I can, at the time -- we don't know when in the spring [A.B.] and [the boy] started their relationship. But it was for some period of time, which, because they couldn't communicate outside of school, [the boy] gives [A.B.] the cell phone and then they text nonstop. And the texts show, again, the lies and the deception that [A.B.] is going through to keep the phone unknown to her parents, right? It also shows that she's breaking the house rules for a variety of other reasons. But, you know, she's texting at one o'clock in the morning, two o'clock in the morning with [the boy]. And then, your Honor, you know, she's purposefully not using Snapchat because she can't connect the phone to her home's wireless because then her parents would know she has the device, right? So she's taking lots of extra steps to engage in this secretive behavior. So I would imagine, your Honor, that, you know, this was a really significant violation. And I think we can see that because the parents put her into counseling because of it and on June 13th she makes a disclosure.

But so the testimony that we're seeking and the evidence just in the form of the text messages -- and again, your Honor, I haven't submitted those as -- as a part of the court file, because the Court hasn't made a ruling on them. I'm hesitant to put them into any sort of public record given kind of their confidential nature or the sensitive material contained within it. But if -- if we're not allowed to talk about these things, Mr. Pond is denied his right to question the credibility of the witnesses.

The other thing, your Honor, is that in this defense interview with the mother, Amber Broden, she -- when asked about this event between [A.B.] and [the boy], she downplays it. She says, "Oh, I think [A.B.] had a crush in sixth grade." We say, "Do you know what happened to the cell phone?" And she said, "I threw it away." She said, "I looked at it and it's just some simple stuff like 'Hey, how are you?'" And then immediately after that interview with Amber Broden, we interview [A.B.] And she's -- she says, again, that's the reason why she went to counseling; it's because of that relationship; that the cell phone was in her -- her mom's sock drawer; that she knew exactly where it was, it was in her mom's sock drawer. And she also said -- or I'm sorry, she didn't say it, but the text messages, once extracted, show that they're certainly not just "Hey, how are you?"

But so if we're denied the ability to talk about the cell phone, then we don't get to talk about Amber Broden's credibility and her truthfulness in talking to defense counsel about this case. And again, your Honor, this is a case where it's going to come down entirely to the credibility of both the girls and Amber Broden and the rest of the family. And so we had submitted briefing, your Honor, that I think makes it really clear in that State v. Jones, which was a 2010 case, in that case it was a -- a prosecution for rape and the defendant intended to seek evidence of a sex party that occurred on the night of the alleged rape. And the trial court denied the defendant's right to -- to testify as to his own version of the facts and denied the request to cross-examine the -- the victim about it. And the conviction was ultimately overturned for denial of Mr. Jones' right to –

THE COURT: I read that case. But that was a consent case, so -- wasn't that a consent issue?

[DEFENSE COUNSEL]: It is a consent case --

THE COURT: Okay.

[DEFENSE COUNSEL]: -- mm-hm. But it is somewhat factually analogous.

We cited to other cases as well, your Honor. There's Olden v. Kentucky where they say that there was error because they weren't allowed to cross-examine the wife about her extramarital affair. And in that case, I think that they ultimately said -- again, it said, similar to our case, people lie to get out of trouble and we should -- the defense should have been allowed to talk about that.

State v. Orn -- and that was a more recent case, your Honor; I think that's just last month -- the defense cited that. And it -- it found that their right to present evidence of a witness's bias is essential to the fundamental constitutional right of a criminal defendant to present a complete defense. And that includes the right to confront and cross-examine adverse witnesses.

Your Honor, there's no physical evidence, or at least there's no physical evidence that the state's told us that they intend to introduce. And it's in -- in that regard, again, the credibility and the veracity of all of these witnesses. And again, I think too, not only do we need the opportunity to say . . . Amber Broden, wasn't truthful to defense counsel about a couple of different things in the defense interview. And, your Honor, I think the actions of [A.B.] in the weeks leading up to the disclosure on June 13th show that she was engaged in deceitful, untruthful behaviors. And I think that the jury needs to hear that. I think we have -- we have that in the hard evidence in the form of these text messages.

And I don't think, your Honor, that I necessarily need to introduce individual text messages. But I need to be able to talk about those and what she was doing. And if she says something different, then I need to be able to use those to at least refresh her recollection, because this is not a handful of text messages. You know, this is -- I think there was 100 pages of 1500 total text messages. I mean, it's significant.

4RP 209-17.

In response, the prosecutor argued that the evidence the defense sought to admit at trial was at most minimally relevant yet more prejudicial than probative and therefore should be excluded. 4RP 220-23. Thereafter Judge Plese expressed doubt about the defense theory of the case and the admissibility of the evidence it sought to introduce in support:

So you can ask about credibility, "Has your daughter ever been untruthful? Has your daughter ever lied to you? Has she been in trouble for that?" those type of general questions. But to go off on "Well, she lied about the cell phone and she's meeting with this transgender person," that is a red herring and not admissible. So that's where the court views it as yes, if there's been past instances where the witness has been untruthful to her parents, yes. If she's going to sit here and say her daughter's never lied to her and never been deceitful or dishonest, that might be one thing. But it does come down to credibility, but I don't -- I don't tie it in together that she lied to get out of trouble, that she made these allegations up. That's where I'm having trouble and see it as a red herring that you're trying to say, "Well, two weeks later she made that allegation just so she could get out of going to counseling." There's no connection. That's also what Judge Fennessy was having an issue with, that there's no connection. And going through those, you have -- your defense, according to this, is a general denial. So then we go to what's the legal theory, how is it offered, and what's the reason and the relevance for admissibility and what's the nexus? And the court is not seeing that as a nexus.

4RP 224-25.

The issue was revisited the following day. 5RP 14-35. Defense counsel began by more thoroughly fleshing out why evidence that A.B. was surreptitiously dating an older boy who gave her a cell phone so they could communicate without her parents’ knowledge was relevant to Pond’s defense and to the credibility of A.B. and her mother as to the accusation against him:

At the end of the day yesterday, this Court indicated that it struggled to find a nexus between [A,B.’s] relation with [the boy] and the charges before the Court today. The Court's suggested that the disclosure was too attenuated in time from the relationship, and, therefore, there was no nexus.

Black's online law dictionary defines nexus as a point of causal intersection, a link, a relation or connection, and to make sure that I've clearly put this timeline on the record before this Court, it was in late spring of 2018 that [A.B.] begins having a secret relationship with an eighth grader. She is not allowed to date. Her older brother, [A.], knows and dislikes [the boy].

And during the course of this relationship, [A.B.] is given a cell phone by [the boy] for the two to communicate. [A.B.] is careful to hide the relationship and the phone from her parents.

The two exchange 1,500 text messages between May 29th and June 3rd. The 29th is a Tuesday, and the 3rd is a Sunday. These messages contain highly personal content, and the messages are sent throughout the day and into the early mornings.

The messages stop on June 3rd presumably because the phone is discovered by [A.B.’s] parents.

Interviews reveal that [A.B.’s] parents were told by a friend's mother that at an overnight, [A.B.] had a phone. 6/3 is a Sunday.

[The boy] will testify that some time after the parents discover the phone, again, so after June 3rd, the parents go to North Pines Middle School and confront the school and the administration about [the boy] and his relationship with their daughter and the fact that he gave their daughter a cell phone.

[The boy] will testify that he was called down to the principal's office, and that the parents yelled at him. During this event, [A.B.] was sitting in the hallway.

June 13th is a Wednesday, and that is [A.B.’s] first day of counseling. This is only ten days after the phone is discovered and even fewer days after the confrontation at school. The State suggests that [A.B.] will testify that she didn't get into much trouble for this incident, and that it wasn't that big of a deal, but, Your Honor, it obviously was.

The parents went to school, confronted the boy, yelled at him and demanded the administration keep them separate, and the counseling that starts on June 13th is because of the relationship, and it is on day one of counseling on the very first form that [A.B.] fills out she discloses attempted sexual assault to a stranger that she's never met, but the relationship is the reason she is in counseling. If she would not have gone to counseling, we may very well not be here before the Court today, and

that is the nexus.

To believe that there is no causal link is erroneous, and, again, the State has put on the record their intention to ask [A.B.] about counseling and the trial here is an opportunity for the jury to hear both sides. It's a fact finding, not just the State's.

Darryl Pond's defense, which he is entitled to under the constitution, is that [A.B.] is not telling the truth, and she had a motive to fabricate a story to get herself out of trouble at home.

Her disclosure on June 13th changes the narrative. Now she's a victim of abuse instead of a liar and a rule breaker. The parents' interview indicates that she didn't get into much trouble at home because she didn't. After the disclosure.

The other piece that I think the Court needs to be aware of is that the State has charged a very broad timeframe for the alleged abuse by Mr. Pond. It's over a year, and so it's not that [A.B.] suffered the abuse from Darryl Pond potentially within this timeframe of the incident with the boy.

The State's timeframe goes all the way back into 2017, Your Honor. So the counseling is clearly specifically related to the relationship with the boy and the secret cell phone.

. . .

Again, it's our intention to introduce this evidence because we believe that a reasonable jury or a juror could believe that [A.B.] made a false accusation against Darryl Pond to get herself out of trouble.

The testimony that we're seeking to introduce is both highly probative and relevant and if barred would violate Mr. Pond's constitutional rights.

5RP 14-18.

The prosecutor agreed with the timeline and factual scenario set forth by defense counsel. 5RP 20. The prosecutor argued, however, that what the defense sought to introduce at trial was not relevant to the charges and therefore inadmissible. 5RP 22. To the extent the court found some minimal relevance to the evidence offered by the defense, the prosecutor argued it should:

limit any cross examination to asking [A.B.] if she was given a phone in middle school by a boy, ask [A.B.] if she kept the phone secret and didn't tell her parents about it, ask [A.B.] if her parents found out about the phone and took it away from her.

Your Honor, I think that that is sufficient to allow the defense to argue their theory of the case that there was some prior dishonesty involved with [A.B.] hiding the phone, and then they can argue their case that, well, because of this prior dishonesty of hiding the phone from your parents, then they can argue that she made up the allegations against Darryl Pond, but any other inquiry I think beyond that scope would be improper into the collateral matters, Your Honor, that are inadmissible under [ER] 401 and 403 and 608.

5RP 23.

The prosecutor also argued the defense should be precluded from questioning A.B.’s mother about the messages found on the phone and about the fact the phone was in her sock drawer instead of being thrown away as she had initially claimed, arguing these were all collateral matters. 5RP 23-24.

In reply, defense counsel noted that the evidence it sought to introduce went not just to credibility, but also to A.B.’s motive to lie. 5RP 25-26.

Judge Plese, like Judge Fennessy, failed to understand the theory of the case set forth by defense counsel:

When you talk about a nexus, if the mom said you're getting in trouble. You're grounded. You're doing this, and the girl says this is what happened to me with grandpa, and now all of a sudden, she's now the victim, that might be different, but the timeline in this is she meets a boy. She has some kind of a relationship going, gives her a phone on May 29th, and she has it through June 3rd. I don't find 1,500 texts between children unusual. So I text that much myself, so I can't imagine and having a kid who texts ten times more, I don't find that unusual, but the fact that they found the phone on June 3rd, she confronts -- the parents confront the boy at the school, yell at him for giving their daughter a phone all that on June 4th or the next week, and she doesn't get in too much trouble, but she goes to a counseling session.

So you're trying to say that while she's standing there getting punished, she makes this revelation. She doesn't make the revelation for ten days, and then she's in talking to a counselor and she makes this revelation. The Court still has trouble with the nexus. It's not the nexus that you would like, and it's not the defendant's right, Sixth Amendment right, to just present anything he wants, but at this point with that as far as the rape shield law, having a relationship with some other boy, that is absolutely not necessary in this case.

At this point, I do think her credibility is an issue, and you can argue credibility. Her parents said she can't have a phone. She didn't tell her parents about the phone. She lied about having the phone. She had a phone, it got taken away from her. Those go to credibility, and that's relevant, her credibility, but as far as a nexus where she lied to get out of trouble, the Court has trouble tying that together.

I'm going to let you ask the mother about the credibility, was she to have a cell phone? No. Did she have one that you found out about? Yes, that kind of thing, but as far as going into depth about, and absolutely don't see any relevance to throwing in that this boy is an LBGQ boy and that relationship.

So at this point, none of that's going to come in because I think that is highly prejudicial and is a red herring. The fact that she didn't tell her parents about a phone, lied about having the phone, got it taken care of, got it taken away, those things, but as far as the text messages to the boy, all of that, those are going to be out.

It does go to credibility. I'll let you ask about the credibility, but the timeline of even the ten days, if she was going to use it to get out of trouble, she should have told her mom right then and there. So then we wouldn't be here because there would be a nexus.

5RP 29-31.

At the request of defense counsel, the trial court clarified its ruling. 5RP 119-30. The court would allow the defense to elicit from A.B. that she got the cell phone from “a friend at school,” but not that the boy was transgendered or that their relationship was physical, concluding that the fact of the physical relationship was excluded under the Rape Shield statute.[[2]](#footnote-2) 5RP 119-20. The court also clarified that the defense would not be allowed to elicit testimony about the confrontation of the boy at school by A.B.’s parents because it was not relevant. 5RP 120. Nor could it delve into the content of the messages found on the phone. 5RP 127. The court also ruled the defense could elicit that A.B. lived in a strict household, but not that it was a “religious” home. 5RP 130. After the prosecution agreed not to elicit testimony that A.B. first made the accusation against Pond in counseling, the defense agreed not to explore that set of facts before the jury. 5RP 124-25. The court entered a written ruling memorializing its decisions. CP 122-32.

The following day the defense moved for reconsideration of the trial court’s rulings excluding much of the proffered defense evidence. CP 68-121; 5RP 172-74. The motion was denied. 5RP 175-76.

Thereafter, one of the investigating officers testified that Pond’s date of birth is January 25, 1957. 5RP 183. A.B. was the next prosecution witness.

According to A.B., she was born June 21, 2006 and was currently 14 years old and in 9th grade. 5RP 184-85. She explained she would often spend the night at her grandmother’s house in Spokane Valley. 5RP 186-87. Pond was usually there. 5RP 187. The home had two bedrooms on the same floor; one for Pond and A.B.’s grandmother and one she and her brother shared when they visited. 5RP 187-88. The room she shared with her brother had bunkbeds and a twin bed. 5RP 188. A.B. recalled S.L. going to her grandmother’s house “[l]ike one [sic] or twice,” and that she had spent the night there with her before, but “[n]ot often.” 5RP 189. A.B. would sleep on the twin bed and S.L. would sleep on the bunkbed when they spent the night there together. Id.

According to A.B., Pond tried to molest her the “[s]ummer of going into 6th grade.” She claimed that sometime that summer when she spent the night and her grandmother left early for work, Pond came into her room and asked if she wanted to come with him into his bedroom. A.B. claimed she initially declined, but then agreed when Pond asked a second time. 5RP 190. At that point Pond allegedly picked her up out of bed and carried her into his bedroom and put her in bed, where she said she turned over to go back to sleep. 5RP 190-91. A.B. testified Pond then attempted to remove her pajama bottoms, but she was able to resist, and eventually told Pond she was going back to her room and did so and fell back to sleep. 5RP 191-94. A.B. claimed that later than morning Pond told her “not tell anyone and to keep it between us.” 5RP 195. A.B. admitted she never told anyone immediately after the alleged abuse. 5RP 196. A.B. claimed she never talked to S.L. about Pond’s attempt to molest her, but that she eventually disclosed to her mother. 5RP 197, 204.

A.B. also claimed that when she spent the night at Pond’s house, he would often get up in the middle of the night to use the bathroom and would stare at her in bed through the bedroom door for minute or two before going back to bed. 5RP 195-96.

On cross examination, A.B. agreed she and S.L. were like sisters, were very close and spent a lot of time together. 5RP 198. They would tell each other “[m]ostly everything.” 5RP 199.

A.B. admitted on cross examination that she had a cell phone in 6th grade that she was not allowed by her parents to have that she got from “[t]his kid from my school.” 5RP 199. She actively kept the phone secret from her parents, but S.L. knew about it. 5RP 199-200. A.B.’s parents eventually found out about the phone and that she had lied to keep it secret from them. 5RP 200.

S.L.’s grandmother, Pamela LaFontaine-Moran, testified after A.B. 5RP 208-18. LaFontaine-Moran called police in January 2019 after having a discussion with S.L. about the fact that A.B.’s grandmother and Pond were divorcing and why. 5RP 211-12. According to LaFontaine-Moran, S.L. “froze. She just stopped and just stopped talking, and then she came over and [put]her arms around me and started to bawl.” 5RP 212-13. S.L. told LaFontaine-Moran that she too had been “sexually abused by someone[.]” 5RP 213.

The next and final prosecution witness was S.L. 5RP 222-52. S.L. claimed that when she was in 4th grade and spending the night with A.B. at A.B.’s grandmother’s house, Pond woke her up and asked if she want to go with him to his computer and play some games, to which S.L. agreed. 5RP 228. S.L. claimed Pond had her sit on his lap as they played computer games, and eventually Pond started touching her vagina and breast under her clothes. 5RP 231-33. The touching stopped after S.L. said she resisted when Pond tried to pull her pants down. 5RP 234. As S.L. left to return to bed, Pond allegedly told her, “This is our secret.”

S.L. admitted she never told anyone immediately after the alleged abuse, but that she eventually told her grandmother, LaFontaine-Moran. According to S.L.:

Well, we were in the kitchen, and she was saying that we need to be there for [A.B.], and then she asked me if anything happened to me, and I told her no at first, but then I started crying, and she knew something happened.

5RP 237-38.

S.L. maintained at trial that she never discussed Pond’s alleged abuse with A.B. 5RP 250.

Pond was the last witness at trial. 5RP 259-92. Pond denied ever carrying A.B. into his bedroom, denied ever inviting S.L. to sit with him at his computer and denied ever touching either girl in a sexual manner. 5RP 260, 271, 276-77, 284. With regard to whether Pond was even capable of carrying a 12 year old girl from one bed to another, Pond replied: “I could have tried, but I don’t think I could have did it. . . [b]ecause I have a very bad low back, and you know, I just can’t carry things.” 5RP 276-77.

In closing argument, defense counsel argued:

You, also, heard the girls testify that they would do anything for each other, that they've kept secrets for each other. Specifically you, also, heard that [A.B.] was lying to her parents prior to her disclosure, and that [S.L.] was keeping that secret.

Still the girls continue to see each other and spend time together as a family after [A.B.] reports this supposed incident in June of 2018. Roughly seven months later, [S.L.] discloses her own abuse.

The State has suggested that these allegations must be true because the facts are similar, the stories are similar, and we suggest that their stories are similar because these girls are talking, because [S.L.] has heard A.B.’s] story.

5RP 342.

In rebuttal closing argument, the prosecutor turned to the defense claim that A.B. and S.L. made up the accusations against Pond:

The defense talked about how their theory is that [A.B.] and [S.L.] are making all this up. Does that make sense in light of all of the evidence that you heard?

There is this vague argument from the defense that because [A.B.] and [S.L.] are close and their families are close that there is some kind of conspiracy to fabricate sexual abuse allegations about Darryl Pond. While I'm not sure what the connection is between being close to your relatives and sexual abuse allegations, again, I ask you does this argument make sense?

The State submits to you that no, it doesn't, and this argument is, also, a distraction from the facts of this case.

5RP 353-54.

C. ARGUMENT

THE EXCLUSION OF EVIDENCE SUPPORTING A CONCLUSION A.B. MADE UP THE ACCUSATION TO AVOID PUNISHMENT VIOLATED POND’S RIGHT TO PRESENT A DEFENSE.

Pond denied the accusations against him and sought to show why they were made up. The defense wanted to introduce evidence that A.B. grew up in a strict household that forbid dating before the age of 16 and forbid having a cell phone, and that when she was found to have violated both those rules, she was grounded and forced into counseling. Pond’s defense theory was that A.B. made up the accusation against him so her parents would see her as a victim instead of an unruly child and not punish her for her misbehaviors. This evidence would have included the testimony of A.B. 8th grade boyfriend, some of the text messages exchanged between the boy and A.B., some of which indicated a sexual relationship between the two, and evidence that when A.B.’s parents discovered the boyfriend and cell phone, they became enraged at the boy in A.B.’s presence, indicating they were extremely upset with her. It also would have included evidence that A.B.’s mother misled the defense as to the disposition of A.B.’s cell phone once it was discovered. This evidence would have provided a reasonable basis for jurors to conclude A.B. made up the accusation against Pond.

The trial court refused to admit this evidence because it did not see how it was relevant to whether Pond molested A.B. The court also found the evidence that A.B. was dating an 8th grader was inadmissible under the Rape Shield statute. Because the evidence Pond sought to introduce was relevant and not excluded by the Rape Shield statute, this Court should conclude Pond was denied his right to present a defense and reverse and remand for a new trial.

a. Purpose of the rape shield statute and the scope of its limitations.

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.

The phrase "past sexual behavior" is not defined by statute and no Washington case has offered a definition. State v. Jones, 168 Wn.2d 713, 722, 230 P.3d 576 (2010). RCW 9A.44.020(3) reiterates that for certain offenses, including rape, "evidence of the victim's past sexual behavior . . . is not admissible if offered to attack the credibility of the victim" and "is admissible on the issue of consent" provided a certain procedure is followed. Read in isolation, subsections (2) and (3) appears to erect an absolute, categorical bar on using evidence of past sexual behavior on the issue of credibility. But that is not how the statute has been interpreted.

First, the statute permits the defense "to cross-examine and impeach the alleged victim's testimony on her past sexual behavior if the prosecution raises the issue of her past sexual behavior in its case in chief." State v. Hudlow, 99 Wn.2d 1, 9, 659 P.2d 514 (1983); see RCW 9A.44.020(4) ("Nothing in this section shall be construed to prohibit cross-examination of the victim on the issue of past sexual behavior when the prosecution presents evidence in its case in chief tending to prove the nature of the victim's past sexual behavior.").

Second, "the prohibition of sexual conduct evidence is directed at the use of such evidence for impeaching the victim's general credibility for truth and veracity." Hudlow, 99 Wn.2d at 8. "The purpose of the rape shield statute is to prevent prejudice arising from promiscuity and by suggesting a 'logical nexus between chastity and veracity.'" State v. Sheets, 128 Wn. App. 149, 155, 115 P.3d 1004 (2005) (quoting State v. Peterson, 35 Wn. App. 481, 485, 667 P.2d 645 (1983)). The statute was thus intended to protect against the evil of the old common law rule that "apparently recognized a woman's promiscuity somehow had an effect on her character and ability to relate the truth, whereas no such effect existed as to men." Hudlow, 99 Wn.2d at 8. The prohibition on using sexual behavior evidence to disprove the alleged victim's credibility is "directed at the misuse of prior sexual conduct evidence based on this antiquated and obviously illogical premise." Id. at 9.

b. The evidence was admissible because it was relevant to Pond’s defense and no compelling interest outweighed Pond’s need for this evidence.

The Sixth Amendment and due process require an accused be given a meaningful opportunity to present a complete defense. State v. Cayetano-Jaimes, 190 Wn. App. 286, 297, 359 P.3d 919 (2015); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. VI, XIV; Wash. Const. art. 1, § 3, 22. "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). Defendants have the right to present evidence that might influence the determination of guilt before a jury. Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

In conjunction with the right to present a defense, defendants have the constitutional right to confront the witnesses against them. Hudlow, 99 Wn.2d at 14-15; U.S. Const. amend. VI; Wash. Const. art. 1, § 22. Defense counsel exercises the right to confrontation through cross-examination of the State's witnesses, "the principle means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

Trial court limitations on the scope of cross-examination are reviewed for abuse of discretion. State v. Lee, 188 Wn.2d 473, 486, 396 P.3d 316 (2017). A claimed violation of the Sixth Amendment right to present a defense is reviewed de novo. Jones, 168 Wn.2d at 19.

Here, the trial court ruled evidence of A.B.’s secret affair with an older boy and the trouble it got her into was inadmissible because it was not relevant to whether Pond tried to molest her. This was error.

Analysis begins with the observation that the accused has the constitutional right to present relevant evidence in support of a defense. Id. "All facts tending to establish a theory of a party, or to qualify or disprove the testimony of his adversary, are relevant." State v. Perez-Valdez, 172 Wn.2d 808, 824-25, 265 P.3d 853 (2011) (quoting Fenimore v. Donald M. Drake Constr. Co., 87 Wn.2d 85, 89, 549 P.2d 483 (1976)). The State must demonstrate a compelling interest in keeping relevant evidence out. Jones, 168 Wn.2d at 723 (citing Hudlow, 99 Wn.2d at 16). "[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." Id. at 720 (quoting State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)).

"The State's interest in excluding prejudicial evidence must also 'be balanced against the defendant's need for the information sought,' and relevant information can be withheld only 'if the State's interest outweighs the defendant's need.'" Jones, 168 Wn.2d at 720 (quoting Darden, 145 Wn.2d at 622). "'[T]he integrity of the truthfinding process and [a] defendant's right to a fair trial' are important considerations." Jones, 168 Wn.2d at 720 (quoting Hudlow, 99 Wn.2d at 14). "[E]vidence relevant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest." State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000).

Here, the trial court ruled the evidence the defense sought to introduce about A.B.’s misbehavior leading up to her allegation against Pond were simply not relevant. The court could find no “nexus” between that behavior and the subsequent allegation against Pond, noting there was a 10-day gap between discovery if A.B.’s secret phone and her claim of sexual abuse to a counselor. CP 122-32; 4RP 224-25; 5RP 29-31. As such, the court did not require the State to show the evidence was so prejudicial that it would disrupt the fairness of the fact-finding process. Jones, 168 Wn.2d at 720. Nor did the court balance the State's interest in excluding prejudicial evidence with Pond’s need for it, and it did not determine that the State's interest in exclusion outweighed Pond’s interest in admission. Jones, 168 Wn.2d at 720.

A trial court abuses its discretion when applies the wrong legal standard. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). The court here abused its discretion in failing to apply the test set forth in Jones in determining admissibility of the evidence. It did so because it erroneously found the evidence irrelevant.

Using the correct framework for determining admissibility, the evidence was relevant to the defense theory that A.B. had a motive to make up the allegation against Pond; to minimize punishment for having had a secret cell phone and boyfriend in violation of her strict home rules. Unfortunately, Judge Plese, likely influenced by Judge Fennessy’s previously expressed skepticism about the admissibility of the evidence, failed to recognize its relevance to Pond’s defense. Judge Please explain the problem was the timing; a 10-day delay in the discovery of the secret phone and making the accusation against Pond was too long a period in her opinion to qualify as relevant. 5RP 29-31. Judge Plese, like Judge Fennessy, reached this erroneous conclusion based on an overly myopic perspective of the evidence, likely influence by her personal experience with texting and children.[[3]](#footnote-3) According to Judge Plese, A.B.’s credibility was at issue at trial,

but the timeline of even the ten days, if she was going to use it to get out of trouble, she should have told her mom right then and there. So then we wouldn't be here because there would be a nexus.

5RP 31. In essence, this constitutes a factual finding that A.B. would have made the accusation against Pond sooner if it had been a lie to get out of trouble. Judge Plese should have left such factual findings to Pond’s jury.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." ER 401. All facts tending to establish a party's theory are relevant. State v. Harris, 97 Wn. App. 865, 872, 989 P.2d 553 (1999), review denied, 140 Wn.2d 1017 (2000) (citing Lamborn v. Phillips Pac. Chem. Co., 89 Wn.2d 701, 706, 575 P.2d 215 (1978)). “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” ER 403.

It is important to consider how this evidence was to be used. The defense did not want to use the evidence of A.B.’s affair with an older boy to launch an attack on her "general credibility," which is forbidden by the rape shield statute. Hudlow, 99 Wn.2d at 8. That is, the defense argument was not that A.B. should be disbelieved because promiscuity means a lack of veracity, which would draw a false connection between chastity and veracity. Id. at 8-9; Sheets, 128 Wn. App. at 155. Rather, the defense wanted to provide a reasonable explanation for why in this specific instance A.B. made a false allegation against Pond, which was to minimize the punishment for her clear violation of her strict home rules. This would have given jurors a basis to doubt her claim. The rape shield statute allows for this kind of use of prior sexual behavior evidence.

In State v. Horton, 116 Wn. App. 909, 920, 68 P.3d 1145 (2003), evidence that the victim had engaged in previous sexual behavior with someone other than the defendant was not barred by the rape shield statute. The defense offered the victim's prior statements not to show that she had engaged in sexual conduct at some earlier time, "but to show that she was testifying inaccurately at the time of trial; he wanted the jury to compare her prior statements to her trial testimony, find a significant inconsistency, and thus doubt her credibility." Id.; citing State v. Carver, 37 Wn. App. 122, 125, 678 P.2d 842 (1984) (evidence of a witness' prior statement to investigating authorities that she had not engaged in past sexual behavior was admissible not to show that she had engaged in sexual conduct at some earlier time, but to show that she was testifying inaccurately at the time of trial). Similarly, the defense here wanted to use evidence of A.B.’s affair with the boy and the resulting consequences when discovered not as evidence she had engaged in prior sexual behavior, but instead to show she had a reason to make up the claim against Pond.

Neither the State nor the trial court identified a compelling interest in keeping the jury from hearing about this evidence. The fact of the relationship is not inflammatory. It does not show A.B. engaged in sexual intercourse with the boy or anyone else. It does not reveal A.B. as someone with perverse sexual urges. And the defense did not intend to use the evidence to argue A.B.’s credibility should be doubted because she was promiscuous.

The court erred in excluding probative defense evidence without a compelling interest. When evidence tends to prove a defense to a criminal charge, "the probative value of such evidence is of such significance that its admission is required, regardless of the prejudice that might otherwise result from its admission." State v. Bedada, 13 Wn. App. 2d 185, 198 463 P.3d 125 (2020). This has never meant an unfair trial must result because "courts have long recognized that limiting instructions are a readily available means by which to mitigate whatever prejudice might otherwise result from the introduction of evidence that is admissible for one purpose but not for others." Id. "Thus, the calculation is clear: some evidence is so important that it must be admitted and limiting instructions are the mechanism by which unfair trials are avoided and prejudice minimized." Id. at 198-99.

Bedada applied the principle to admission of immigration status evidence under ER 413, which is inspired by and comparable to the rape shield statute. See 5A Wash. Prac., Evidence Law and Practice § 413.1, Purpose and History of Rule (6th ed.). The efficacy of a limiting instruction has been recognized in the rape shield context. See Sheets, 128 Wn. App. at 158 (any problem associated with evidence showing complaining witness was uncharacteristically flirtatious earlier in the night "should have been corrected by instructing the jury about the limited purpose of the testimony."). In finding prejudice outweighed probative value, the trial court gave no consideration to how a limiting instruction could ensure the jury did not consider the evidence for an improper purpose. Under Bedada, this was error.

The evidence was relevant to Pond’s defense and was of probative value in relation to the credibility of A.B.’s claim against him. Cross-examination is designed to expose a witness's motivation in testifying and thereby "expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." Olden v. Kentucky, 488 U.S. 227, 231, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988) (quoting Davis, 415 U.S. at 316-17). Confrontation helps assure the accuracy of the fact-finding process; thus, whenever the right to confront is denied, the ultimate integrity of the fact-finding process is called into question. Darden, 145 Wn.2d at 620.

As sole judges of witness credibility, jurors are entitled to have the benefit of all relevant defense evidence before them so they can make an informed judgment regarding the believability of a complaining witness. The more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore the witness's credibility. Darden, 145 Wn.2d at 619. "This is especially so in the prosecutions of sex crimes where, owing to natural instincts and laudable sentiments on the part of the jury, the usual circumstances of isolation of the parties involved at the commission of the offense and the understandable lack of objective corroborative evidence, the defendant is often disproportionately at the mercy of the complaining witness' testimony." State v. Roberts, 25 Wn. App. 830, 835, 611 P.2d 1297 (1980) (quoting State v. Peterson, 2 Wn. App. 464, 466-67, 469 P.2d 980 (1970)).

A.B. was an essential witness for the prosecution. This was a sex case where the only witnesses to the alleged event were Pond and A.B. In this circumstance, the latitude given to defendants to cross-examine and impeach the complaining witness is at its zenith. The evidence was admissible to support Pond’s defense by showing A.B. had a reason to make up the accusation of attempted molestation

d. The error was prejudicial

Violation of the right to present a defense and to confront witnesses is constitutional error. Jones, 168 Wn.2d at 724; State v. McDaniel, 83 Wn. App. 179, 187, 920 P.2d 1218 (1996), review denied, 131 Wn.2d 1011, 932 P.2d 1255 (1997). "Constitutional error is presumed prejudicial and the State bears the burden of showing the error was harmless beyond a reasonable doubt." State v. Chambers, 197 Wn. App. 96, 128, 387 P.3d 1108 (2016), review denied, 188 Wn.2d 1010, 394 P.3d 1004 (2017). "A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." State v. Burke, 163 Wn.2d 204, 222, 181 P.3d 1 (2008). For confrontation errors, the reviewing court must assess whether the error is harmless beyond a reasonable doubt by "assuming the damaging potential of the cross-examination were fully realized." Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

Assuming the full realization of the damaging potential of cross-examination A.B. about her affair with the boy, its discovery and fallout, A.B.’s credibility as to the accusation against Pond would have been undermined because it would have showed she had a motive to fabricate the claim to avoid punishment from her strict parents. A.B.’s credibility was critical to the State's case because she and Pond were the only two people who know whether Pond actually carried her to his bed and tried to molest her. There was no eyewitness corroboration. In a case that rose and fell on which witness the jury found more credible, the exclusion of evidence that could have provided jurors with a basis to find reasonable doubt as to A.B. claims against Pond cannot be deemed harmless beyond a reasonable doubt because the defense theory would have been far less “vague” as the prosecution claimed in rebuttal closing argument. 5RP 353-54. Reversal and remand for a new trial is warranted.

D. CONCLUSION

For the reasons stated, this Court should reverse and remand for further proceedings.

**I certify that this document was prepared using word processing software and contains 10679 words.**

DATED this 27th day of January, 2022.

Respectfully submitted,

A black line on a white background

Description automatically generated with low confidence NIELSEN KOCH GRANNIS PLLC

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

CHRISTOPHER H. GIBSON

WSBA No. 25097

Attorneys for Appellant

1. There are five volumes of verbatim report of proceedings referenced as follows: 1RP – July 25, 2019 (defense motion to dismiss before the Honorable Judge Charnelle Bjelkengren); 2RP – January 28, 2021 (pretrial hearing before the Honorable Judge Timothy B. Fennessy); 3RP – April 12, 2021 (first day of trial); 4RP – April 13, 2021 (second day of trial); and 5RP – April 14-15, 19 & 26, 1 2021 ( remainder of trial) and May 28, 2021 (sentencing). [↑](#footnote-ref-1)
2. RCW 9A.44.020, the so-called “Rape Shield” statute, precludes evidence of a complaining witness’s past sexual behavior to prove credibility. [↑](#footnote-ref-2)
3. In her oral ruling excluding the evidence Judge Please stated, “I don’t find 1500 texts between children unusual. So I text that much myself, so I can’t imagine and having a kid who texts ten time more, I don’t find that unusual.” 5RP 29-30. [↑](#footnote-ref-3)