

FILED
Court of Appeals
Division III
State of Washington
7/9/2018 2:46 PM

SUPREME COURT NO. 96091-7

Court of Appeals No. 34708-7-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

VINCENTE GUIZAR FIGUEROA, Petitioner

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Vincente Figueroa, appellant below, petitions this Court for the relief designated in Part II.

II. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(1),(2), and (3), Mr. Figueroa seeks review of the unpublished decision *State v. Figueroa*, issued June 7, 2018, by Division Three of the Court of Appeals. A copy of the Court's opinion is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

A. Evidence of prior bad acts is presumed inadmissible at trial, and any doubts as to admissibility are resolved in favor of exclusion. Where the state's evidence is not overwhelming, wrongful admission of evidence under Evidence Rule 404(b) deprives the defendant of the right to a fair trial, requiring reversal.

a. Is it an abuse of discretion for the trial court to fail to provide on the record reasoning for admission of highly prejudicial evidence, or to weigh the prejudicial effect of the evidence ?

b. Evidence of other bad acts is relevant to show identity only if the method employed in the commission of the crimes is so unique that proof that an accused committed one crime creates a high probability that he committed the other crime with which he is charged. Where four

strikingly similar crimes occurred in geographical proximity and time to the currently charged offense, and the trial judge err makes no finding about the distinctiveness, unusualness, and uniqueness of those crimes, which Vincente had not committed, is the analysis fatally flawed?

B. Has a defendant been denied his right to present a meaningful defense under the Sixth Amendment and Article I s. 22, where the trial court does not allow him to cross-examine witnesses about another suspect?

C. Eyewitnesses described the perpetrator as taller, older, and with a different build than Vincente Figueroa, a short and chubby 15-year -old bilingual boy. Where the only evidence tying Mr. Figueroa to the alleged crime was his fingerprints on three pages of school notebook paper, is the evidence insufficient to sustain the conviction?

IV. STATEMENT OF THE CASE

In 2015 Benton County prosecutors charged Vincente Figueroa for crimes he was alleged to have committed in 2011 when he was 15 years old. CP 1-4. By second amended information the prosecutor charged four counts of first-degree kidnapping with a firearm enhancement allegation, two counts of burglary first degree, with a firearm enhancement allegation, one count of robbery in the first degree with a firearm enhancement

allegation, and one count of theft of a motor vehicle. CP 37-41. At the time of charging, Vincente was serving a 29-year criminal sentence in California¹. CP 5-6. The California crimes occurred when he was 15-years old, but later in time than the alleged Washington crimes. CP 147-148.

In seeking to introduce evidence of the California convictions, the State “challenge[d] anyone to find a similar case –ever- in Benton County, Washington...we also challenge anyone to find *any* case in the nation – ever involving all the similarities herein.” CP 165-173. Defense counsel objected, noting four almost identical crimes, over a two-year period, (2009-2011) in close geographical proximity to the Benton County crime, cataloged and presented in a police report to the prosecutor. CP 14-17. (See Appendix B for a chart). Defense counsel asserted the prosecutor's evidence demonstrated the facts were not unique or so unusual as to be categorized as a “signature” crime. Counsel argued the California convictions were irrelevant to establish identity. CP 20-21; 3/30/16 RP 6.

At the evidentiary hearing, Judge Vanderschoor stated he had not prepared, but thought he recalled having read the initial briefing by the state, but not the response brief. 3/30/16 RP 3. The court heard very brief

¹ Vincente and his older brother Umberto share the same last name and for the sake of clarity will be referred to by their first names. No disrespect is intended.

oral argument and determined to read the briefs and issue a ruling within a week. 3/30/16 RP 12. The following day, he issued a memo:

Assuming that the four requirements for admission of other bad acts are appropriately addressed on the record, the Court will grant the State's motion to admit the proposed ER 404(b) evidence along with the appropriate limiting instructions.

CP 30. On the morning of trial, the prosecutor presented written findings and conclusions on the ER 404(b) issue, stating the findings and conclusions were consistent with the court's memo. 1RP 15-16. Defense counsel objected as the findings of fact and conclusions of law were simply culled from the state's brief. Without an 'on the record' analysis of the factors or further discussion, Judge Vanderschoor signed the findings allowing admission of the California crimes only for the purpose of establishing identity. 1RP 16; CP 72-75.

Defense counsel objected to the state's motion in limine barring the defendant from arguing or suggesting in cross-examination that the defendant's brother, Umberto, committed the Benton County crimes. CP 31. Without analysis or explanation on the record, the court ruled the parties could talk about Umberto's involvement in the California case, but "cannot say that he was involved in this case." 1RP 1213.

After the stated rested its case in chief and the defense was to present its case the state's attorney said:

Your Honor, just for the record, I think the defendant might be testifying, but we will actually withdraw our objection. If he wants to get on the witness stand and say that his brother was a perpetrator and he has some direct knowledge about that on our offense here in Kennewick. So, he can say that if he has some direct knowledge that his brother's a perpetrator, we'll withdraw our objection and he can so testify. 3RP 342.

California Crimes

Eighth-grader Vincente lived in Modesto, California with his adopted brother Pedro. RP 345-47. In May 2011, his mother came to visit and drove him back to Grandview, Washington to celebrate Mother's Day with her. RP 345-46,361. His other brother, *23-year old Umberto, lived in Washington and occasionally lived with their mother and her boyfriend in the Grandview home.* RP 347.

When it was time for him to return to Modesto, Umberto and Umberto's friend, Alex, drove him to California. RP 287-288. Vincente testified Umberto and Alex discussed committing a crime and talked him into participating with them. RP 348-49.

On June 6, 2011, Vincente and Umberto carried guns and walked into the unlocked home of Don Younger and his family in Bakersfield, California. 2RP 273-74;291. They *did not wear masks.* 2RP 352. They *did not have or use zip ties.* 2RP 293. Mr. Younger said one of them spoke English to him, but they spoke Spanish to each other. 2RP 277. He *described the English speaker, Vincente, as short and chubby.* 2RP 277.

The entire time he was in the Younger home Vincente spoke to Alex over the phone in Spanish, receiving directions from him. 2RP 275, 282, 361-62. He believed Alex was in front of the house waiting for them. The plan was for Alex to hold the family hostage while Vincente and Umberto went to Younger's pawnshop to obtain money and gold. 2RP 275, 288, 290. Mr. Younger's in-laws went out the back door and called the police. RP 275-276. Vincente and Umberto both pleaded guilty to the crime. RP 354. Vincente told police that his older brother and Alex *told him they were copying something that had happened in Washington*. RP 292. California detective Newell testified at the Washington trial that he contacted Washington police because there were robberies in Washington similar to the California robbery. RP 286.

Washington Crimes

On February 9, 2011, shortly after 5 p.m., Hayley Welsh and her son were at home. 1RP 30. *Two men, wearing construction vests and hard hats*, knocked on the door. 1RP 30. When she answered the door, they told her they were from the energy company and pushed their way into the home and pulled out guns. 1RP 30-32. The men put on ski masks after their entry. 1RP 33.

Ms. Welsh said the English-speaking man was in his *mid-twenties, of a thinner build, short dark hair, and brown eyes, with freckles, or a*

prominent freckle under his eye. 1RP 34, 49-50. She called him a "*smooth talker,*" *said he appeared to be in charge, and was very reassuring and "knew how to talk to people."* 1RP 55,185. She described him as *five feet, nine inches, 180 pounds.* 1RP 182. The second man, who was older and taller, only spoke Spanish. 1RP 34,131.

Shortly after 6 p.m., Ms. Welch's mother and sister arrived at the home. 1RP 35,93. *The men used zip ties on everyone.* 1RP 36. The man said they had been watching the family and knew their schedule. 1RP 68. The plan was for Mr. Welch to drive them back to his jewelry store and they would take the jewelry. 1RP 36-37, 68.

At 7 p.m., when Mr. Welch arrived home, the men put a gun to his head. 1RP 36,75. Mr. Welsh described the English-speaking man as *mid to late twenties, approximately five-eight to five feet ten inches tall.* 1RP 29, 107, 128-129. He said the man seemed *educated, very composed and calm.* 1RP 159.

Mr. Welsh drove them to his jewelry store while a third man stayed with the family. 1RP 127. Mr. Welsh opened the store safes, and the men took the jewelry. 1RP 140. They took none of the over half-dozen guns from the safe. 1RP 159.

They returned to the Welsh home and then drove away in Mr. Welsh's truck. 1RP 145. Mr. Welsh contacted the police, and they found

the truck nearby. 1RP 145,180. Police found a clipboard, backpacks, Welsh's jacket and racquetball gear inside the truck. 1RP 151-52. The clipboard had a paper with information about the number of people in the home, the name Mark Welsh, and the Welsh home address. 1RP 191. The Washington State Patrol crime lab later analyzed *three pieces of school notebook paper from the clipboard and found fingerprints that matched Vincente*. 2RP 310-19.

Months later, officers executed a search warrant on the Grandview home belonging to Mrs. Figueroa. RP 329. Officers photographed a piece of paper they found which had standards information about gold purity and the percentage of pure gold to alloy. RP 152, 330. In a back area of Ms. Figueroa's garage, they located and photographed two ski masks², a generic black and blue backpack, and orange jackets. RP 329-334.

Five years after the home invasion and the day before trial, Hayley Welsh told prosecutors the picture of the backpack found in the garage looked like one that belonged to her son. RP 39, 53. She testified there was a pin on his backpack but could not describe it. RP 54. However, officers confirmed the backpack *did not* have a pin. RP 331-335.

². The state did not present any DNA evidence from the ski masks or the orange jackets. The lead detective's report says he did not see the masks as connected to the case. RP 18

Hayley Welsh, the only person who saw the intruder's faces before they donned masks, viewed a photo line-up of six suspects. RP 339-340. Vincente's picture was included, and she did not identify him as the person who entered her home. RP 339-340.

During closing argument, the prosecutor referenced the California crimes introduced under ER 404(b):

Okay, California evidence.... these two crimes are so unusual and so alike that it's basically a signature. It's basically like somebody painting a portrait and then signing it. It's so close that you should be aware of it it (sic) because it will -- it should help you decide now, hey, this defendant that we have committed this crime in California. It's such an unusual crime, and it was committed in virtually exactly the same way, that that really resolves any issue about whether or not he was involved in it.

RP 396-397.

Vincente was found guilty on all counts. CP 127-139. The court imposed what it believed was a mandatory 50-year sentence. CP 151-52; Sentencing Hearing RP 15. On review, the Court of Appeals affirmed the trial court evidentiary rulings and the convictions but remanded for resentencing in light of *State v. O'Dell*, and the Court's more recent decision in *State v. Houston-Sconiers*, and for an inquiry into his ability to pay legal financial obligations.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Decisions By This Court and Other Divisions Of The Court of Appeals Require A Trial Court To Conduct An On The Record Analysis Of The Purpose And Relevance of ER 404(b), and To Weigh The Probative Value Against The Prejudicial Effect Of Admitting Such Evidence.

To admit evidence of other crimes, wrongs, or acts, the trial judge is obligated to conduct an “on the record analysis” specifically weighing the probative value of relevant evidence against its prejudicial effect.

State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981). A trial judge abuses his discretion when he does not conduct the required analysis on the record. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

It appears to be an issue of first impression whether simply signing prepared written finding and conclusions without the trial judge’s expression of his reasons amounts to an “on the record” analysis.

In this case, the trial judge sent a memo to counsel. The memo was not a decision and provided no analysis. CP 30. The State’s presentation of the written findings and conclusions was not based on any ‘on the record’ analysis that captured the trial judge’s thinking on the matter. The lack of record of the *court’s reasons* for admitting evidence of prior crimes “precludes the trial court’s thoughtful consideration of the issue and frustrates effective appellate review.” *State v. Jackson*, 102

Wn.2d 689, 694, 689 P.2d 76 (1984). “A judge who carefully records *his reasons* for admitting evidence of prior crimes is less likely to err, because *the process of weighing the evidence and stating specific reasons for a decision ensures a thoughtful consideration of the issue.*” *Jackson*, 102 Wn.2d at 694.

In *State v. Asaeli*, 150 Wn.App. 543, 576, n. 34, 208 P.3d 1136 (2009), the court agreed the required analysis *should* be done on the record but held that the trial judge could adopt one of the parties’ express arguments and failure to conduct its full analysis on the record did not require reversal. “[W]here a trial court rules on the admissibility of ER 404(b) evidence *immediately after both parties have argued the matter and the court clearly agrees with one side*, an appellate court can excuse the trial court's lack of explicit findings.” *State v. Stein*, 140 Wn.App. 43, 66, 165 P.3d 16 (2007).

Here, the Court of Appeals held the judge’s memo and the written findings by the State more than satisfied the on the record requirement, and was far better than “an oral monologue, typically spanning less than one minute.” *State v. Figueroa*, 2018 WL 2753656, *Slip. Op.* *5. This reasoning is a bridge too far beyond *Aeseli* and *Stein*.

This record does not reflect the trial judge even had the opportunity to review the findings and conclusions carefully. The written

findings did not address the issue of the four similar cases in southern Washington, northern Oregon which disaffirmed the notion of a unique, distinctive, “signature like” crime necessary under an ER 404(b) identity purpose. Written finding 31 states: "The evidence is more probative than prejudicial” without any analysis or on the record weighing. CP 74. These findings are inadequate, and the method for entering them does not meet an "on the record" analysis requirement. This Court’s review is necessary to establish clear parameters and requirements of an ‘on the record’ analysis for the admissibility of ER 404(b) evidence to prevent admission of unfairly prejudicial evidence.

B. The Trial Court Violated Vincente’s Right To Present Evidence In His Defense By Precluding Cross-Examination of State Witnesses Regarding Other Suspect Evidence.

A criminal defendant has a right to present evidence in defense of the charged crimes. Const. amend. VI; Wash. Const. art. 1 §22; *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). “An erroneous evidentiary ruling that violates the defendant’s constitutional rights...is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt.” *State v. Franklin*, 180 Wn.2d 371, 377, n.2, 325 P.3d 159 (2014). Other suspect evidence should be excluded if its probative value is outweighed by unfair prejudice, confusion of the issues,

or potential to mislead the jury. “[t]he probative value must be based on whether the evidence has a logical connection to the crime- not based on the strength of the State’s evidence: ‘[j]ust because the prosecution’s evidence, *if credited*, could provide support for a guilty verdict, *it does not* follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case.’” *Franklin*, 180 Wn.2d at 381-82. “The proper inquiry is whether the defendant can show the evidence offered tends to create a reasonable doubt as to the *defendant's* guilt, *not* whether it establishes the guilt of the *third party* beyond a reasonable doubt.” *Franklin*, 180 Wn.2d at 381.

Here, Umberto stayed at his mother’s Grandview home until June 2011. An item related to the crime was found at the Grandview home. The Welsh family described the suspects as in their 20’s or 30’s: Umberto was 23. One of the suspects only spoke Spanish: Umberto spoke only Spanish. Umberto had been convicted of the California crime. Where there is an adequate nexus between the alleged other suspect and the crime, the evidence should be admitted. *State v. Giles*, 196 Wn.App. 745, 755, 385 P.3d 204 (2016). The trial court should not have granted the State’s motion to preclude Vincente from cross-examining State witnesses about Umberto’s involvement, because in doing so, it deprived Vincente of his constitutional right to present a defense to the charges.

C. The Evidence Was Insufficient To Sustain The Convictions Because With The Exception Of Being A Bilingual Hispanic Male The Eyewitness Descriptions Of The Perpetrator Do Not Match Vincente Figueroa And The State Cannot Show The Fingerprints Found On School Notebook Paper Were Made At The Time Of The Crime.

The identity of a criminal defendant and his presence at the scene of the crimes charged must be proved beyond a reasonable doubt. *State v. Thomas*, 70 Wn.App. 200, 211, 852 P.2d 1104 (1993). In this case, the description of the intruder did not match Vincente: the height was estimated between five eight and five ten with a slim build. At age 21 (six years after the break-in) Vincente was five seven. The California witness described Vincente as short and chubby. The Washington witness described the intruder as having a slim build.

The California witness described confusion, shouting, and yelling when Vincente and his brother entered the home. The Welsh family described the intruder as a smooth talker, educated, calm, and reassuring.

The items found at Mrs. Figueroa's home were never directly tied to Vincente, and police asserted they believed the ski masks found there were not connected to the Washington crime. The generic black and blue backpack did not contain the identifying pin Ms. Welsh said belonged on her son's backpack.

The State relied on the fingerprint evidence to connect Vincente with the Washington crime. 1RP 11. A reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but it requires that substantial evidence support the state's case. *State v. Fiser*, 99 Wn.App. 714, 718, 995 P.2d 107 (2000). In *State v. Bridge*, 91 Wn.App. 98, 955 P.2d 418 (1998), the defendant was charged with and convicted of the burglary of a barn. The only evidence connecting the defendant to the crime was a fingerprint found on the price tag of a newly purchased tool found at the entrance to the barn. The Court reasoned that fingerprint evidence will support a conviction if the trier of fact could conclude from the circumstances that "the fingerprint could only have been impressed at the time of the crime." *Id.* at 101. Where an object is moveable, such as school notebook paper, the state must make a showing, reflected in the record, that the object on which the fingerprint was found was *inaccessible to the defendant prior to the time of the commission of the crime.* *Id.* at 101 (internal citation omitted, emphasis in the original).

Here, the paper was accessible to Vincente because it was conceivably his school notebook paper. The state could not and did not establish when the fingerprints were impressed. As the *Bridge* Court reasoned, "to allow this conviction to stand would be to hold that anyone

who touches anything which is found later at the scene of a crime may be convicted.” *Bridge*, 91 Wn.App. at 101.

The evidence here was insufficient to sustain the convictions. The remedy for failure of the state to present sufficient evidence of the crime charged is reversal and dismissal with prejudice. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

VI. CONCLUSION

The trial judge here allowed unfairly prejudicial evidence to be admitted at trial without providing a reasoned analysis on the record, and without considering the four other remarkably similar crimes that did not involve Vincente Figueroa. The evidence was insufficient to sustain his convictions. Vincente respectfully asks this Court to accept review of his petition.

Submitted this 9th day of July 2018.

Marie Trombley

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APPENDIX A

FILED
JUNE 7, 2018
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,)	No. 34708-7-III
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
VINCENTE GUIZAR FIGUEROA,)	
)	
Appellant.)	

LAWRENCE-BERREY, C.J. — A jury found Vincente Guizar Figueroa guilty of several felonies arising from kidnapping a family in Kennewick, Washington, and robbing the family’s jewelry store. Vincente¹ committed these crimes when he was 15 years old.

On appeal, he contends (1) the trial court erred in admitting ER 404(b) evidence of another crime he committed in Bakersfield, California, (2) the trial court erred when it denied him his right to present other suspect evidence, (3) the State presented insufficient evidence to sustain his convictions, (4) the sentencing court violated his rights under the

¹ We use defendant’s first name to distinguish him from his older brother, Umberto.

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Eighth Amendment to the United States Constitution when it imposed mandatory consecutive sentences and firearm enhancements without exercising its discretion as required by *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), (5) the judgment and sentence should reflect that his sentence is to run concurrently with his Bakersfield sentence, and (6) the sentencing court erred when it imposed discretionary legal financial obligations (LFOs) without conducting an adequate inquiry into his ability to pay.

We affirm Vincente's convictions. But because the record does not sufficiently show that the trial court understood its full discretion to sentence Vincente without regard to mandatory minimums and mandatory enhancements, we reverse Vincente's sentence and remand for resentencing.

FACTS

Kennewick, Washington

On February 9, 2011, Hayley Welsh was with her young son T.W. at the family home when she heard a knock on the door. Peering through a window, she saw two Hispanic men in orange construction vests with hard hats, one of whom was carrying a clipboard. She opened the door. One of the men told her they were from the energy company and needed to come inside. As she was telling them to come back later, the men

pulled out guns and pushed their way inside the home. Once inside, the men put on gloves and ski masks and took Hayley's cell phone.

One man, suspect 1, spoke English and Spanish. The other man, suspect 2, spoke only Spanish. The men used zip ties to tie Hayley's and T.W.'s hands and feet. Suspect 1 warned Hayley not to look at them. Two additional members of the Welsh family, Mackenzie and Jeanne, came home later. The men, still armed, tied their hands and feet with zip ties. Suspect 1 warned the women not to look at them.

Mark Welsh, the owner of Touchstone Jewelers and the target of the crime, was the last to arrive home. As he entered, one of the suspects ambushed him and held a gun to his head. Suspect 1 told Mark that the three of them would go to Touchstone Jewelers while another man would come and hold the family hostage. Once the third man arrived, Mark drove the two men to the jewelry store in his truck.

Suspect 1 ordered Mark to disarm the security, open the safe, and remove the jewelry. Mark complied. The stolen jewelry was valued at over \$370,000. Mark drove himself and the two others back to his home.

One of the suspects told the family they had additional people watching the house and not to call police for 30 minutes. The men used T.W.'s black and blue backpack to

carry the stolen jewelry. They then took Mark's truck and escaped. Law enforcement later found Mark's truck in a nearby housing development.

Descriptions of the suspects and additional evidence

Hayley described suspect 1 as a "smooth talker" who knew how to talk to people and said he appeared to be in charge. 1 Report of Proceedings (RP) (July 19-21, 2016) at 55. Mark described suspect 1 as very composed and calm.

Members of the Welsh family had slightly different descriptions of suspects 1 and 2. Hayley thought suspect 1 was younger than suspect 2, possibly in his 20s, thin, and possibly with freckles. She thought he might be 5'8" tall. Hayley thought suspect 2 was older, taller, and heavier. Despite seeing the men before they wore masks, Hayley could not identify Vincente in a later photomontage.

Mackenzie could not estimate age or height for either man. Jeanne thought suspect 1 was young, but could not estimate how young. Mark thought suspects 1 and 2 were about the same age, in their 20s, but that suspect 1 was 5'8" to 5'10", and suspect 2 was heavier.

When law enforcement searched Mark's abandoned truck, they found a clipboard with handwritten notes on the top page. The notes included a checklist of items, the

initials PGNE² in large handwriting, and the Welsh's address. An expert witness called by the State later testified that he analyzed the pages attached to the clipboard, that he found several finger and thumb prints on three of the pages, and that they all matched Vincente's prints. He also testified that he found no other prints on any of the pages.

Bakersfield, California

On June 6, 2011, two armed Hispanic intruders entered the home of Donald Younger, owner of Bakersfield Best Pawn, in Bakersfield, California. Donald, his wife, and their daughter were home at the time. The intruders were Vincente and his older brother Umberto.

The family's dogs barked incessantly at the Figueroa brothers, and Vincente instructed the family to quiet the dogs or else he would shoot them. Vincente demanded that Donald drive the three of them to the pawn shop so they could obtain guns and money. Vincente told Donald that another man would arrive to watch the family while they were gone. Neither Vincente nor Umberto wore a ski mask nor used zip ties to tie up the family.

Unbeknownst to Vincente and Umberto, Donald's parents-in-law were visiting. They snuck out a back door and used a neighbor's phone to call law enforcement. Police

² Perhaps shorthand for "Pacific Gas and Electric."

arrived and arrested the Figueroa brothers. At the time of the Kennewick and Bakersfield crimes, Vincente was 15 years old, 5'7" tall and weighed approximately 165 pounds. Umberto was the same height, but older and much heavier.

Vincente told Bakersfield police that he, Umberto, and a third man named Alex had been watching Mr. Younger and the pawn shop for about six days. He said he had even gone into the pawnshop to purchase earrings to do reconnaissance. He explained he did all of the talking to the family because his older brother speaks only Spanish.

Vincente also told police that his mother lives in Grandview, Washington, and that he had based the Bakersfield crime on an earlier Washington crime. Although Vincente lived in Modesto, California, he also spent time at his mother's home. Bakersfield law enforcement performed an Internet search and found similar crimes in the Washington area. They then called Washington law enforcement.

Eventually, Vincente and his brother pleaded guilty to the felonies associated with the Bakersfield crime and received sentences in excess of 29 years.

Search of Ms. Figueroa's home

Based on the Bakersfield crime and Vincente's statements, Washington law enforcement obtained a search warrant for Ms. Figueroa's home in Grandview. In her garage, they found two ski masks and two orange vests or jackets similar to the ones used

in the Kennewick crime. They also found a handwritten conversion list from karats to percentage of gold, and a blue and black backpack that matched T.W.'s backpack.³

Procedural history

The State charged Vincente by amended information with two counts of first degree burglary, five counts of first degree kidnapping, one count of first degree robbery, and one count of theft of a motor vehicle. The charges included four firearm enhancements and also a major economic offense aggravator, reflecting the significant value of the stolen jewelry.

1. ER 404(b) identity evidence

Prior to trial, the State sought to admit evidence of the Bakersfield crime to establish identity. Specifically, the State sought to elicit testimony from Mr. Younger and a Bakersfield detective about the Bakersfield crime and Vincente's admissions. The State argued that the two crimes were highly similar but unique from other crimes so that proof that Vincente committed the Bakersfield crime created a high probability that he also committed the Kennewick crime. Vincente objected and argued that the two crimes were not sufficiently unique from other crimes so as to be signature crimes. Vincente noted that there were three or four similar crimes that occurred in Washington and Oregon

³ Hayley Welsh testified that the backpack looked like her son's. The backpack

between 2009 and 2011. The court heard argument. Because it had not yet reviewed Vincente's brief, it took the motion under advisement.

One week later, the court issued a letter to the parties stating, "Assuming that the four requirements for admission of other bad acts are appropriately addressed on the record, the Court will grant the State's motion to admit the proposed ER 404(b) evidence along with the appropriate limiting instruction." Clerk's Papers (CP) at 30. The State thereafter presented proposed detailed findings of fact and conclusions of law consistent with its briefing, which the court had considered. The court signed the State's proposed findings and conclusions.

2. *Other suspect evidence*

On the morning of trial, the State asked the trial court to prevent Vincente from arguing or suggesting in cross-examination of its witnesses that Umberto was involved in the Kennewick crime. Vincente objected and argued that such a limitation would interfere with his right to present a defense. The trial court granted the State's motion.

however was missing a small pin, an award T.W. had received from kindergarten.

The State called several witnesses. At the close of the State’s case-in-chief, the State “withdrew”⁴ its objection. The State told the trial court, if Vincente established he had direct knowledge that Umberto committed the Kennewick crimes, he could testify to that.

Vincente called only one witness—himself. He did not testify that his brother committed the Kennewick crime. Instead, he testified that he was living in California in February 2011, that he had not seen his mother until May 2011, and that the blue and black backpack was his. He also testified that he and his brother had given “Alex” a ride to Bakersfield and how it was his brother’s and Alex’s idea to commit the Bakersfield crime.

During its closing argument, the State argued that the Bakersfield and Kennewick crimes were so similar to each other, but unique from other crimes, that Vincente’s admitted commission of the first showed he committed the second. The State also argued that T.W.’s backpack and Vincente’s fingerprints on the paper attached to the clipboard further linked Vincente to the Kennewick crime.

⁴ The trial court’s ruling prevented Vincente from suggesting through *the State’s witnesses* that Umberto was involved in the Kennewick crime. For this reason, the State’s suggestion that it “withdrew” its objection after its witnesses testified is inaccurate and probably also disingenuous. More accurately, the objection and the trial court’s order simply did not apply beyond the State’s witnesses.

During his closing, Vincente argued that his brother, Alex, and an older person who spoke English and Spanish committed the Kennewick crime. He emphasized that Welsh family members had described suspect 1 as mature, intelligent, and in control, and how their physical descriptions of suspect 1 did not match him. Vincente argued that the Kennewick crime was professional and well-planned. He contrasted that crime with the Bakersfield crime, which was chaotic and not well-planned. Vincente emphasized that he and his brother did not use masks or zip ties. Vincente had testified that the blue and black backpack was his and argued in closing that it was a very common backpack and lacked T.W.'s pin. Vincente explained his prints on the papers by suggesting that his brother took the papers out of his backpack prior to the Kennewick crime.

3. *Verdict and sentence*

The jury returned a guilty verdict on each count and affirmative responses to the four firearm enhancements and the major economic offense special verdict forms.

The State submitted a sentencing brief that asked for a sentence within the standard range, despite the jury's finding of a major economic offense. Citing *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015), the brief discussed the trial court's discretion to impose an exceptional downward sentence based on mitigating factors

associated with Vincente's youth. The State argued, however, that the mitigating factors did not fit the facts of the case.

At the sentencing hearing, Vincente cited *O'Dell* and argued that the mitigating factors applied to the facts of the case.

The sentencing court did not address, analyze, or acknowledge Vincente's request for an exceptional sentence downward. Nor did the sentencing court ask Vincente about his current assets and debts or about his likely future ability to pay costs.

Because of mandatory consecutive sentences and enhancements, the standard sentencing range was 593 to 710 months. The sentencing court imposed a sentence of 600 months. The sentence is calculated as follows: (1) 156 months on the first degree burglary conviction, which subsumed concurrent sentences for (a) the other first degree burglary conviction, (b) a robbery in the first degree conviction, and (c) a theft of a motor vehicle conviction, plus (2) 240 months for four mandatory, consecutive 60-month firearm enhancements, plus (3) 204 months for four 51-month mandatory, consecutive first degree kidnapping convictions. The judgment and sentence indicated that the Kennewick sentence was to run concurrently with the Bakersfield crime. The court also imposed \$1,267.12 in discretionary LFOs.

Vincente appealed.

ANALYSIS

A. ER 404(b) EVIDENCE OF OTHER CRIMES TO PROVE IDENTITY

Vincente argues that the trial court erred by admitting ER 404(b) evidence of the Bakersfield crime to prove his identity. He first argues the trial court erred by not performing an ER 404(b) analysis on the record. He then argues the court abused its discretion by concluding the Bakersfield crime and the Kennewick crime were highly similar so as to create a signature and erroneously concluded that the probative value of the evidence outweighed any unfair prejudice. We disagree with both arguments.

This court reviews the admission of evidence under ER 404(b) for an abuse of discretion. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). The trial court abuses its discretion when its decision is manifestly unreasonable or rests on untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Under ER 404(b), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as . . . identity.”

1. *ER 404(b) analysis on the record*

“Before admitting ER 404(b) evidence, a trial court ‘must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for

which the evidence is to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.” *Foxhoven*, 161 Wn.2d at 175 (quoting *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). The trial court must conduct the ER 404(b) analysis on the record. *Foxhoven*, 161 Wn.2d at 175 (citing *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986) (citing *State v. Jackson*, 102 Wn.2d 689, 694, 689 P.2d 76 (1984))).

The *Jackson* court explained the two primary reasons for requiring an on-the-record analysis of the ER 404(b) factors:

We cannot overemphasize the importance of making such a record. Here, as in cases arising under ER 609, the absence of a record precludes effective appellate review. *See State v. Jones*, 101 Wn.2d 113, 677 P.2d 131 (1984). Moreover, a judge who carefully records his reasons for admitting evidence of prior crimes is less likely to err, because the process of weighing the evidence and stating specific reasons for a decision insures a thoughtful consideration of the issue.

Jackson, 102 Wn.2d at 694.

Here, the trial court heard argument on the State’s ER 404(b) motion and took the motion under advisement so it could review and consider Vincente’s brief. Next, it issued a letter to the parties saying it would grant the State’s motion. The State then prepared extensive findings of fact and conclusions of law consistent with its briefing. The trial court then signed the prepared pleading.

The procedure followed here more than adequately addresses the two primary concerns expressed in *Jackson*. First, the detail contained in the extensive written findings and conclusions permits more effective appellate review than even the best oral findings. Second, taking the time to review and consider the briefing, as was done by the trial court here, ensures a more thoughtful process than an oral monologue, typically spanning less than one minute. For these reasons, we conclude that the process followed here more than satisfies the requirement that the trial court analyze the ER 404(b) factors on the record.

2. *Application of ER 404(b) factors*

Vincente does not challenge the first two ER 404(b) factors—(1) he committed the Bakersfield crime, and (2) the purpose for admitting evidence of that crime was to establish identity, i.e., that he also committed the Kennewick crime. Instead, he argues that evidence of the Bakersfield crime was not relevant, and the prejudicial effect of the evidence outweighed the probative value.

a. *The Bakersfield crime was relevant*

In *Thang*, our high court held:

When evidence of other bad acts is introduced to show identity by establishing a unique modus operandi, the evidence is relevant to the current charge “only if the method employed in the commission of both crimes is ‘so unique’ that proof that an accused committed one of the

crimes creates a high probability that he also committed the other crimes with which he is charged.”

Thang, 145 Wn.2d at 643 (quoting *State v. Russell*, 125 Wn.2d 24, 66-67, 882 P.2d 747 (1994)). The prior crime ““must be so unusual and distinctive as to be like a signature.”” *Foxhoven*, 161 Wn.2d at 176 (internal quotation marks omitted) (quoting *State v. Coe*, 101 Wn.2d 772, 777, 684 P.2d 668 (1984)). Whether the prior crime is similar enough to the charged crime to warrant admission is left to the discretion of the trial court. *Id.* at 177 (quoting *State v. Jenkins*, 53 Wn. App. 228, 236, 766 P.2d 499 (1989)).

Here, the Bakersfield and Kennewick crimes were highly similar. Both involved (1) two young Hispanic men (2) using guns to (3) intrude into the home of a (4) business owner, (5) using (or planning to use) a third person, yet to arrive, to watch family members at the home, and (6) having (or planning to have) the business owner drive the two intruders to the business to commit the robbery. Even more telling, both involved a younger robber who was bilingual English/Spanish, and an older, heavier robber who was monolingual Spanish.

We recognize that the two crimes also had dissimilarities. For instance, one crime involved a ruse to gain entry, ski masks, and zip ties, whereas the other did not.

Vincente argues that the two crimes were not sufficiently unique because there were four other similar crimes committed in the Northwestern United States from 2009 through 2011. Two of these “similar crimes” occurred in Oregon. Neither of those two crimes involved Hispanic men nor did any of the participants speak Spanish. A third crime occurred in Yakima, and a fourth crime occurred in Wapato, just south of Yakima. The record suggests that those latter crimes and the Bakersfield and Kennewick crimes do have significant similarities.

But even if the Yakima and Wapato crimes had significant similarities to the Bakersfield and Kennewick crimes, this would not require us to reverse the trial court. This is because the Bakersfield and Kennewick crimes are nevertheless highly unique. Because they are highly unique, the trial court did not abuse its discretion when it determined that proof that Vincente committed the Bakersfield crime made it highly probable that he also committed the Kennewick crime.

Moreover, substantial physical evidence corroborated Vincente’s participation in the Kennewick crime. Specifically, the pages attached to the clipboard used during the Kennewick crime bore Vincente’s prints and did not contain anyone else’s prints. This fact contradicts Vincente’s closing argument

that he had no involvement in the Kennewick crime and that his brother likely took his papers from his backpack.

We conclude the trial court did not abuse its discretion when it determined that evidence of the Bakersfield crime was relevant to the Kennewick crime.

b. The probative value outweighs the unfair prejudice

Vincente argues that evidence of the Bakersfield crime was unduly prejudicial because without it, the State's evidence was very weak, consisting only of his prints on papers found in Mark Welsh's truck and a backpack similar to T.W.'s found in Vincente's mother's home.

“‘[U]nfair prejudice’ is that which is more likely to arouse an emotional response than a rational decision by the jury,” not simply evidence adverse to the opposing party. *State v. Gould*, 58 Wn. App. 175, 183, 791 P.2d 569 (1990).

Here, the trial court gave the jury a limiting instruction that specified how the jury was to consider the evidence of the Bakersfield crime. The instruction told the jury that it could consider evidence of the Bakersfield crime only for the purpose of identity and not for any other purpose. We presume that the jury followed the trial court's limiting instruction. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). During closing, the State properly limited its discussion of the Bakersfield crime to the issue of identity.

We conclude the trial court did not err by determining that the probative value of the Bakersfield crime was greater than the undue prejudice caused by its admission.

B. OTHER SUSPECT EVIDENCE

Vincente contends the trial court violated his Sixth Amendment to the United States Constitution right to present a defense when it limited his cross-examination of the State's witnesses. He relies on *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010) and *State v. Starbuck*, 189 Wn. App. 740, 355 P.3d 1167 (2015) for the proposition that a trial court's order limiting cross-examinations of witnesses can violate a defendant's constitutional right to present a defense. But Vincente fails to explain what evidence the trial court's ruling precluded him from eliciting and how that impaired his defense.

The trial court's ruling prevented Vincente from suggesting or arguing through the State's witnesses that Umberto had committed the Kennewick crime. Vincente's defense was not that his brother committed the Kennewick crime. The State never contested that. Vincente's defense was that he was not suspect 1; instead, suspect 1 was an older, bilingual Hispanic man.

The trial court's ruling did not prevent Vincente from cross-examining the State's witnesses to establish that suspect 1 was an older, bilingual Hispanic man. First, the Welsh family members generally described suspect 1 as mature and in control, and in his

20s or 30s. Second, they described suspect 1's physical appearance slightly dissimilar to Vincente. Most importantly, Vincente argued extensively in closing that he was not suspect 1. His argument was based on evidence obtained from the State's witnesses that suspect 1 was an older, articulate, bilingual Hispanic man.

The trial court's ruling did not diminish Vincente's ability to cross-examine the State's witnesses with regard to suspect 1. We conclude that the trial court's ruling did not impair Vincente's ability to present his defense, i.e., that he was not suspect 1.

C. SUFFICIENCY OF THE EVIDENCE

Vincente next challenges the sufficiency of the evidence, claiming the State did not present sufficient evidence that he was the person who committed the Kennewick crime. We disagree.

In a criminal case, the State must provide sufficient evidence to prove each element of the charged offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). In evaluating the sufficiency of the evidence, the court must determine whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences from

that evidence. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). Reviewing courts also must defer to the trier of fact “on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). This court does not reweigh the evidence and substitute its judgment for that of the jury. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (plurality opinion). For sufficiency of evidence claims, circumstantial and direct evidence carry equal weight. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004).

Vincente cites *State v. Thomson*, 70 Wn. App. 200, 211, 852 P.2d 1104 (1993), *aff’d*, 123 Wn.2d 877, 872 P.2d 1097 (1994), for the principle that the identity of the criminal defendant and his presence at the scene of the crimes charged must be proved beyond a reasonable doubt. He raises four specific arguments in his sufficiency challenge. We address each separately.

1. *Whether Vincente was in Washington on February 9, 2011*

Vincente cites his own testimony that he did not come to Washington until May 2011. Nevertheless, he testified that his mother lived in Grandview and that he sometimes visited her. Moreover, the papers found in Mark Welsh’s truck had Vincente’s prints and only his prints. A jury could reasonably discount Vincente’s own

self-serving testimony and put weight on the uncontroverted fact that only Vincente's prints were on the papers found in Mark Welsh's truck.

2. *Whether the Welsh family members sufficiently identified Vincente*

Hayley Welsh was the only person who briefly saw suspect 1 without a ski mask. She described suspect 1 as possibly having freckles. Vincente does not have freckles. In a photomontage, she could not identify Vincente as suspect 1.

In addition, family members variously described suspect 1 as in his 20s to 30s, short, between 5'8" and 5'10," and conflictingly chubby or skinny. All identified suspect 1 as speaking English and Spanish. Vincente was 15 in early 2011, 5'7" tall, and spoke English and Spanish. But a jury could reasonably discount these various descriptions, given that suspect 1 was wearing a ski mask and told the Welsh family members not to look at him.

Hayley Welsh and Mark Welsh described suspect 1 as a smooth talker, in charge, and very composed and calm. Although this description of suspect 1 would not match most descriptions of a 15 year old, the record contains no evidence about Vincente's intelligence, maturity, and verbal ability. We note that the jury heard Vincente testify and could reach its own conclusion on this issue.

3. *No evidence that Vincente touched certain items in his mother's home*

Vincente argues that the State presented no evidence that he touched the ski masks or the orange vests or jackets found in his mother's garage. Although true, this does not preclude the jury from reasonably finding that other evidence, such as the three papers found in Mark Welsh's truck, linked Vincente to the Kennewick crime.

4. *Fingerprints alone cannot sustain a conviction*

Vincente relies on *State v. Bridge*, 91 Wn. App. 98, 955 P.2d 418 (1998) for the proposition that fingerprints alone cannot sustain a conviction. In *Bridge*, an unidentified person broke into the victim's barn by destroying the door and moving various items around. *Id.* at 99. The perpetrator moved a newly purchased tool to the point of entry, and law enforcement found Mr. Bridge's fingerprint on the price tag. *Id.* The victim did not know or recognize Mr. Bridge and law enforcement arrested him. *Id.* He was convicted of second degree burglary. *Id.* On appeal, this court reversed and dismissed the charges, reasoning that the only evidence was the single fingerprint, and it was located on a movable, recently purchased object that had been accessible to anyone while in the stream of commerce. *Id.* at 101. In those circumstances, that sole fingerprint was insufficient evidence.

The facts of this case are distinguishable. The State presented (1) ER 404(b) evidence to show identity between the Bakersfield and Kennewick crimes, (2) items

recovered from Vincente's mother's home that connected a family member with the Kennewick crime, and (3) Vincente's prints, and only his prints, on three papers found in Mark Welsh's truck. The quantity of evidence tying Vincente to the Kennewick crime is substantially greater than the paucity of evidence presented in *Bridge*. In addition, the presence of Mr. Bridge's fingerprint on a price tag attached to a recently purchased item could have an innocent explanation. Here, Vincente never provided an innocent explanation why his prints, and his prints only, were on three papers found in Mark Welsh's truck.

In conclusion, the State presented sufficient evidence for a jury to find beyond a reasonable doubt that Vincente was suspect 1.

D. SENTENCING UNDER *HOUSTON-SCONIERS*

Vincente claims the sentencing court violated his protections under the Eight Amendment when it did not consider the hallmark features of his youth and related mitigating considerations. The State responds that the mitigating considerations do not apply because the Kennewick crime was well-planned and was not an impetuous act of a youth. Alternatively, and somewhat contradictorily, the State argues that the sentencing court exercised its discretion and mitigated Vincente's sentence when it imposed a

sentence on the low end of the standard range and when it declined to impose the major economic crime aggravator.

The Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, provides that a standard range sentence “shall not be appealed.” RCW 9.94A.585(1); *see also* former RCW 9.94A.210(1) (1989). ““However, this prohibition does not bar a party’s right to challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision.”” *State v. Ramos*, 187 Wn.2d 420, 433, 387 P.3d 650, *cert. denied*, 138 S. Ct. 467, 199 L. Ed 2d 355 (2017) (quoting *State v. Williams*, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003)).

In *O’Dell*, the defendant had just turned 18 when he had sex with a 12-year-old girl. 183 Wn.2d at 683. *O’Dell* noted that youth may relate to a defendant’s crime, and therefore “youth can . . . amount to a substantial and compelling factor, in particular cases, justifying a sentence below the standard range.” *Id.* at 696. *O’Dell* held that trial courts “must be allowed to consider youth as a mitigating factor when imposing a sentence” on a youthful offender. *Id.*

In *Houston-Sconiers*, the defendants were 16 and 17 at the time they used a gun to rob mostly Halloween candy from children. *Houston-Sconiers*, 188 Wn.2d at 9-11. The juveniles were convicted in adult court of multiple crimes, including several counts of

robbery, together with several mandatory firearm enhancements. *Id.* at 12. The trial judge commented during sentencing that he wished he had discretion to impose a lesser sentence but could not because he had taken an oath to follow the law. *Id.* at 13.

Houston-Sconiers affirmed the convictions but remanded for resentencing. *Id.* at 34.

Houston-Sconiers notes that children are not adults, and that the Eight Amendment to the United States Constitution requires sentencing courts to consider the offender's youthfulness at the time the offense was committed when imposing the sentence.

Houston-Sconiers holds:

[S]entencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system, regardless of whether the juvenile is there following a decline hearing or not. To the extent our state statutes have been interpreted to bar such discretion with regard to juveniles, they are overruled. Trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements.

Id. at 21 (footnote omitted). *Houston-Sconiers* explains:

[I]n exercising full discretion in juvenile sentencing, the court must consider mitigating circumstances related to the defendant's youth—including age and its "hallmark features," such as the juvenile's "immaturity, impetuosity, and failure to appreciate risks and consequences." [*Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 2468, 183 L. Ed. 2d 407 (2012)]. It must also consider factors like the nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, and "the way familial and peer pressures may have affected him [or her]." *Id.* And it must consider

how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated. *Id.*

Id. at 23 (second alteration in original).

Arguably, the record shows that the sentencing court believed a mitigated sentence was appropriate. Here, the sentencing court did not impose the major economic crime aggravator and sentenced Vincente at the very low end of the standard range.

But the record is insufficient to show whether the trial court understood it could impose a mitigated sentence without regard to mandatory minimums and mandatory consecutive sentences. This is not surprising. The trial court sentenced Vincente before *Houston-Sconiers* and no Washington court had yet explicitly held that a trial court had authority to disregard mandatory minimums and mandatory consecutive sentences when sentencing a defendant who was a minor at the time the crime was committed. The dissent is mistaken when it claims the trial court understood its authority to do so. The State's sentencing brief did not concede that point nor did the State concede this point during argument at sentencing. A trial court is not required to explicitly explain its sentence on the record. However, had the trial court stated on the record that it knew it had authority to sentence Vincente without regard to mandatory minimums and mandatory consecutive sentences, but was electing not to exercise such authority, we

would not be required to remand this matter for resentencing.⁵

On remand, the trial court should explain whether and to what extent the mitigating circumstances of Vincente's youth apply to the Kennewick crime. If the trial court finds that mitigating circumstances do apply, it should also explain its understanding of its full discretion to sentence Vincente without regard to mandatory minimums and mandatory consecutive sentences.

Because resentencing is required, we do not address Vincente's arguments about whether his sentence should be corrected to reflect that it is concurrent with the Bakersfield sentence and whether the sentencing court erred in not conducting an adequate inquiry into his ability to pay.

Finally, Vincente asks that we exercise our discretion and not award appellate costs to the State in the event it substantially prevails. We conclude there is no substantially prevailing party and deny the State an award of appellate costs.

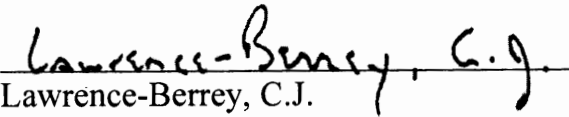
⁵The dissent pens compelling arguments for the State to make on remand. We are confident that Vincente can make his own compelling arguments and so refrain from making those arguments for him.

In addition, the dissent seemingly invites the sentencing court to impose a greater sentence on remand than imposed by the original judge who is now retired. We express no opinion whether the sentencing court on remand should impose a lesser, greater, or equal sentence. Nor do we agree with the dissent that a greater sentence by a different judge may not be deemed vindictive.

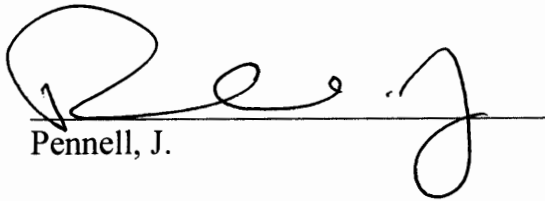
No. 34708-7-III
State v. Figueroa

We affirm Vincente's convictions, but we reverse his sentence and remand for resentencing.

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.


Lawrence-Berrey, C.J.

I CONCUR:


Pennell, J.

No. 34708-7-III

KORSMO, J. (dissenting) — The trial court already did everything that it was required to do and apparently concluded that this crime did not exhibit the impulsiveness of youth that is the constitutional basis for treating leniently some minors who commit major crimes. Since the trial court considered the argument already, there is no reason to send this back for another review. I also part company with the majority's needless and erroneous criticism of the prosecutor withdrawing his motion in limine after the State's evidence had been presented. Far from being critical, we should be commending this approach to all trial judges who face efforts from a party attempting to enter evidence without sufficient foundation. For both reasons, I respectfully dissent from those two portions of the majority opinion.

As to the sentencing issue, the record of this case is clear that the trial judge and the parties knew that Vincente Figueroa's youth at the time of the offense was a basis for granting an exceptional sentence under *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015). It was briefed by the parties and, indeed, the very first words out of defense counsel's mouth at sentencing expressly addressed the topic:

MS. HARKINS: Your Honor, just a couple things. I know you read the state's sentencing memo, and I'm obviously just going to be addressing the portion that talks about going below the 593 months and doing an

exceptional sentence downward, and that's based on *State vs O'Dell*. And the state did lay out three reasons that you can do that: Impulsivity, poor judgment, susceptibility to outside influences, and I'm sure that you're familiar with that case. And in that case we're talking about an 18-year-old, who actually it's ten days past his 18th birthday, and in that case the Court of Appeals sent the case back for the Court to consider his youth and because they've now learned that youth does make a difference. In fact, the brain isn't even developed as it is in people who are in their later 20s.

I think that's relevant, because here we're not talking about somebody who just turned 18. At the time of this crime, it was six years ago, and he was 15 years old. If in any case youth is taken into consideration, I think that it needs to be taken into consideration in this case.

Report of Proceedings (RP) (Aug. 25, 2016) at 5-6.

Defense counsel continued in this vein and argued that it made no sense to impose more time than the 29 years defendant already was serving on the California convictions. RP at 8-10. The court also heard two victim impact statements and heard the defendant deny involvement in the offense. RP at 11. The trial court also knew that the jury had found the presence of an aggravating factor—this crime involved a major economic offense. Clerk's Papers (CP) at 139. The prosecutor's trial memorandum noted the aggravating factor and indicated it would not seek an exceptional sentence, but would seek a standard range sentence of 600 months. CP at 145. The trial court concluded sentencing by choosing low or midrange sentences for each offense and running consecutively those offenses and enhancements that normally are "required" to be run consecutively and running concurrently those offenses that needed to be run concurrently.

The 600 month total sentence was a mere seven months above the bottom end of the sentencing range.

Mr. Figueroa received a standard range sentence. By statute, affirmed by our case law, Mr. Figueroa cannot challenge that sentence. RCW 9.94A.585(1); *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). Instead, all he can challenge is the trial court's failure to follow a *mandatory* procedure at sentencing. *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). In the context of youthful offenders, the dictate of the constitution is that the trial court consider the offender's youth when imposing sentence and have the discretion to mitigate a sentence because of that factor. *State v. Scott*, No. 94020-7 slip op. at 8-11 (Wash. May 10, 2018) <http://www.courts.wa.gov/opinions/pdf/940207.pdf>.

Here, the trial court did what it was required to do—*consider* the defendant's request for an exceptional sentence that would have been similar in length to and concurrent with the California sentence. Thus, there is no basis for even hearing this challenge, let alone a reason for reversing the sentence. Nonetheless, apparently interpreting the word "consider" as meaning "articulate on the record," the majority faults the trial judge for not "considering" the exceptional sentence. There is no basis for this conclusion. In the nearly 34 years that Washington has acted under the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW, there is no provision under that statute and no case law requiring a trial court to explain why it is refusing to impose an exceptional

sentence. It is not a mandatory procedure under the SRA. Mr. Figueroa has no basis for even bringing this challenge to his standard range sentences.

Of course, it also is plain why his pitch for an exceptional sentence was rejected. Not only did he pull off a successful robbery and commit 8 serious or serious violent offenses, the \$372,000 worth of diamonds has gone unrecovered for more than 8 years. The jury understandably concluded this was a major economic offense, a decision that could justify the successor judge on remand¹ exceeding the 710 month top end of the standard range. The request also failed under the facts of this case. This was an exceptionally well-planned and well-executed crime. It did not bear any hallmarks of youthful impulsiveness. It also appeared to be part of a pattern of similar crimes and did not suggest immaturity. The defendant moved across state lines, worked with two adults, and had a major role in the operation. This was not a juvenile lark.

Moreover, the defense presented no evidence that even attempted to establish the youthful mitigation factor. There was no evaluation of the defendant nor any indication about his maturity level at the time of the crime. He did not claim to be acting under the direction of his big brother or some other adult. Of course, since he continues to deny

¹ With the retirement of the original trial judge and the passage of nearly a decade from the successful robbery with the diamonds remaining missing, a successor judge may view the facts of the case differently than the trial judge did; there would be no possibility of judicial vindictiveness in giving a greater sentence. *State v. Parmelee*, 121 Wn. App. 707, 708-709, 90 P.3d 1092 (2004) (no presumption of vindictiveness arises when different judge imposes more severe sentence).

committing the offense, it is highly unlikely on remand that there will be any evidence presented to justify an exceptional sentence below the standard range.

The trial court “considered” the exceptional sentence under the typical meaning of that term. There was no evidence to support a mitigated sentence. Given that the jury also found an aggravating factor present, there is no reason to order a resentencing in this case.

While the foregoing is a sufficient reason to dissent, the majority’s inclusion of footnote 4 would have compelled me to dissent even if the sentencing argument had been rejected. Far from criticizing the prosecutor, we should be commending this tactic to all trial judges and trial attorneys.

The footnote errs in suggesting that there was anything untoward in maintaining a proper objection (supported by the trial court ruling) during the State’s case since none of the State’s witnesses could present any evidence in support of the defendant’s purported theory that Mr. Figueroa’s brother Umberto committed these offenses.² The trial court correctly excluded this evidence for lack of foundation. Moreover, the statement that the prosecutor “withdrew” his objection is factually accurate. It also was the proper thing to

² It also would have been stupid for the defense to make the argument that Umberto committed the Kennewick crimes since both brothers had been convicted of the California crimes. Tying his brother to the current offenses was further circumstantial evidence of Vincente’s guilt in these crimes.

do once the defendant decided to testify. Prior to the defense presentation of its case, the prosecutor addressed the court:

Your Honor, just for the record, I think the defendant might be testifying, but we will actually withdraw our objection. If he wants to get on the witness stand and say that his brother was a perpetrator and he has some direct knowledge about that on our offense here in Kennewick. So he can say that if he has some direct knowledge that his brother's a perpetrator, we'll withdraw our objection and he can so testify.

2 RP (July 21, 2016) at 342.

Accordingly, I do not know how the majority can suggest either this statement, or the correct citation to it in the briefing, is the least bit “disingenuous.”³ The only possible source for the majority’s discomfort is that the prosecutor waited until the State’s case had concluded before withdrawing its objection.

That was perfectly proper and probably constitutionally compelled. Although the defendant has the constitutional right to present a defense, that right does not include evidence that is irrelevant or inadmissible. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). With respect to “other suspects evidence,” Washington has very strict standards that are consistent with those of the United States Supreme Court. *See State v. Franklin*, 180 Wn.2d 371, 378, 325 P.3d 159 (2014) (a trial court’s exclusion of “other suspect evidence” is an

³ The term means “lacking in candor” or “giving a false appearance of simple frankness.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 650 (1993).

application of the general evidentiary rule that excludes evidence if its probative value is outweighed by such factors as unfair prejudice, confusion of the issues, or potential to mislead the jury (citing *Holmes v. South Carolina*, 547 U.S. 319, 326-327, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)).

Washington permits a criminal defendant to present evidence that another person committed the crime when he can establish “a train of facts or circumstances as tend clearly to point out some one besides the prisoner as the guilty party.”⁴ *State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *cert. denied*, 508 U.S. 953 (1993). The United States Supreme Court has approved this standard for admitting “third party guilt” evidence. *Holmes*, 547 U.S. at 327. Moreover, this evidence will only be admitted if the defendant can present a combination of facts or circumstances that points to a nonspeculative link between the other suspect and the crime. *Franklin*, 180 Wn.2d at 381. The standard for the relevance of such evidence is whether it tends to connect someone other than the defendant with the charged crime. *Id.*

⁴ In establishing a foundation for admission of “other suspect evidence,” the defendant must show a clear nexus between the other person and the crime. *State v. Rafay*, 168 Wn. App. 734, 800, 285 P.3d 83 (2012), *review denied*, 176 Wn.2d 1023, *cert. denied*, 571 U.S. 867 (2013). The proposed evidence must also show that the third party took a step indicating an intention to act on the motive or opportunity. *Id.* Evidence of possible motive alone is insufficient to establish this nexus. *State v. Kwan*, 174 Wash. 528, 533, 25 P.2d 104 (1933); *State v. Condon*, 72 Wn. App. 638, 647, 865 P.2d 521 (1993).

Here, the defendant had no evidence that Umberto Figueroa committed these crimes to the exclusion of Vincente Figueroa. He can point to no evidence possessed by any of the State's witnesses that suggested Umberto's involvement in the crimes.⁵ Accordingly, the trial court correctly granted the motion in limine to exclude questioning of the State's witnesses about the possible involvement of Umberto Figueroa.

That changed once the defendant was ready to take the stand. If he had personal knowledge that his brother was involved, prohibiting testimony about that topic might have violated Vincente Figueroa's right to present a defense. *Jones*, 168 Wn.2d at 720. It was prudent for the prosecutor to withdraw his objection in the (highly unlikely) event that Mr. Figueroa wanted to blame his brother for the Kennewick crimes.

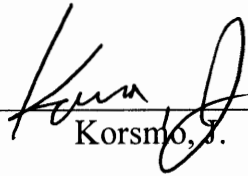
Accordingly, there was nothing disingenuous about the prosecutor's actions. He convinced the trial judge to prohibit the improper questioning of witnesses who had no evidence to present on the topic. However, once the defendant decided to testify and was in a position to provide a proper foundation for other suspects evidence, the objection was withdrawn in order to facilitate the right to present a defense. The defense had no constitutional right to ask foundationless questions of witnesses who did not know about Umberto Figueroa's involvement in the Kennewick crimes.

⁵ We may well speculate that Kennewick law enforcement suspected Umberto was involved due to his work with Vincente Figueroa in the California case and his presence in Kennewick at the time of these crimes, but there appears to be no hard evidence supporting that suspicion.

No. 34708-7-III

State v. Figueroa—Dissent

This was excellent practice and should be commended to all. Since the majority thinks otherwise, I also dissent on this point.


Korsmo, J.

APPENDIX B

Date/Time	11/4/2009; 8:30 pm	3/25/2010; 6:15 -8:30 pm.	6/15/2010; 10 p.m.	1/11/2011; 7:45 pm.	6/6/2011;	2/9/2011; 5 p.m.
Type of Store	Diamond Store Beaverton, OR	Jewelry Store Clackamas OR.	Super Pawn, Yakima WA	First Choice Pawn, Wapato, WA	Bakersfield Best Pawn, Bakersfield, CA.	Welsh Jewelry Store, Kennewick, WA
Number of Suspects	3 or 4	3	3	3 ; spoke Spanish and English	3	3: spoke English and Spanish
Suspect Description	Black and white males	White males	Males in their 20's. One male was chubby with painted on eyebrows	Hispanic or Native American males in their 20's. Wearing hooded sweatshirts, ski masks, shoes with red laces.	Hispanic males; younger one was short and chubby;	Males in mid to late 20's, Bilingual Spanish/English; wore construction vests and hard hats; ski masks after entry.
Method of Entry	Door to Door Salesmen	Forced entry		Unlocked door		Said they were Energy company workers; forced entry
Level of Violence	Used handgun and shot gun	Moderate level of violence, hands on threats	Gun and threats	No threats	Guns	Guns
Types of Restraints	Zip ties and duct tape	Flex ties and duct tape.	No restraints	Duct Tape	No restraints	Zip ties
Method of Restraint	Gun, Restraints	Flex Ties and duct tape		Duct Tape		Zip ties

Procedure for going to Shop	Two suspects drove victim to store in victim's car.	One suspect stayed at home with owner's wife, two drove with victim	One suspect stayed with family, two drove the victim to his shop.	Owner drove 2 suspects to his shop.	Two suspects were to ride with owner; third was to stay with family	Owner drove 2 suspects to his shop, the 3 rd stayed with the family.
Jewelry Type	Gold and diamonds	Gold and a diamond wallet		Gold, silver, cash		Jewelry
Departure	Drove Victim back to his home	Drove victim back to his home		Drove victim back to his home		Drove victim back to his home.
Vehicle Stolen or Left	Left car in nearby neighborhood	Left car about ¼ mile away.		Car recovered the same day in the city.		Truck recovered by police from a nearby area.
Suspects Arrested or Developed	Composite sketches, no fingerprints.	Unknown suspects	Suspects not identified	Suspects arrested, but date is not in the record.	Vincente and Umberto Figueroa were arrested and pleaded guilty.	Vincente Figueroa charged with crime.

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Vincente Figueroa, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Petition for Review was sent by first class mail, postage prepaid on

July 9, 2018

Vincente Figueroa # AT7917, A3-240
PO Box 5004
Calipatria, CA. 92233-500

And by electronic service by prior agreement between the parties to:

EMAIL: Benton County Prosecuting Attorney at
prosecuting@co.benton.wa.us

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July 09, 2018 - 2:46 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34708-7
Appellate Court Case Title: State of Washington v. Vincente Guizar Figueroa
Superior Court Case Number: 15-1-00143-8

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