SUPREME COURT NO.
98997-4
COA NO. 37345-2-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JACOB DUENAS,
Petitioner.

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

Pierce County Cause No. 17-1-04393-3

The Honorable Kitty-Ann Van Doorninck , Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Jacob Duenas, the appellant below, asks the Court to review the decision of Division III of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Jacob Duenas seeks review of the Court of Appeals unpublished opinion entered on August 4, 2020. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: Evidentiary error requires reversal if "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." Does the trial court's error of improperly admitting significant hearsay statements attributed to T.M. require reversal of Mr. Duenas's convictions when the state relied heavily on those statements during closing argument to overcome a significant evidentiary shortcoming in the prosecution's case?

ISSUE 2: A trial court violates an accused person's rights to counsel and to due process by unreasonably limiting the scope of defense counsel's closing argument. Did the trial court violate Mr. Duenas's constitutional rights by prohibiting his defense attorney from arguing that his cousin could have been the one who abused T.M., when that inference was supported by the already-admitted evidence?

ISSUE 3: A trial court violates the constitutional right to present a defense by excluding relevant, admissible evidence that is critical to the defense theory. Did the trial court violate Mr. Duenas's constitutional rights by preventing him from eliciting evidence that his cousin wore a blue uniform with a badge on it at the time of the alleged abuse when the state's theory was the Mr. Duenas was the

only one who could have abused T.M. because he was the only one living in the house who was studying to enter law enforcement?

ISSUE 4: The cumulative effect of errors during a trial can require reversal when, taken together, they deprive the accused of a fair trial. Does the doctrine of cumulative error require reversal of Mr. Duenas's convictions when the trial court violated his rights to counsel, to due process, and to present a defense and prosecutorial misconduct also undermined his right to a fair trial?

IV. STATEMENT OF THE CASE

Jacob Duenas is from California, but he lived with his aunt and her husband in Gig Harbor for about eighteen months in 2000-2001 while he attended Crown College. RP 513[1]. His goal was to get his bachelor's degree and then go to law school. RP 515.

Mr. Duenas's cousin, Bryan Friebel, also lived at the house at that time. RP 491. He was about the same age as Mr. Duenas. RP 426. Friebel was studying to be a firefighter. RP 491. He wore a blue uniform to school every day, which had a badge on it. RP 491.

During the summer of 2000, eight-year-old T.M. spent a couple of weeks at the house, as well. RP 137-38, 146, 261-62. T.M. and his siblings were visiting their grandfather, who was married to Mr. Duenas's aunt (Friebel's mother). RP 137, 260.

[1] Unless otherwise notes, citations to the Verbatim Report of Proceedings refer to the chronologically-paginated volumes covering 07/10/18 through 08/13/18.

Because Mr. Duenas was going to school and working fulltime, he was not responsible for taking care of T.M. RP 390, 516-17, 520. Mr. Duenas only saw T.M. and his siblings a few times during dinners. RP 362-63, 520. He did not play with them or spend time with them on his own. RP 375, 409, 520.

But Friebel did babysit T.M. occasionally. RP 390, 409, 501, 509.

About four years later, T.M. claimed that he had been sexually abused by someone living at his grandfather's house that summer. RP 167-68. He did not remember the name of his abuser but claimed that it was the person who was studying to enter law enforcement. RP 168. T.M. also described the abuse as being at the hands of someone who was charged with babysitting him. *See* RP 147.

Crown College, which Mr. Duenas attended, offered a criminal justice program and had commercials depicting police officers. RP 485. A few years after leaving Gig Harbor, Mr. Duenas went to the police academy in California and joined the California Highway Patrol. RP 544.

Accordingly, T.M.'s family decided that Mr. Duenas had been the one who abused T.M. *See* RP 278. But none of them reported the allegations to the police. RP 241, 280.

About thirteen years after T.M.'s disclosure, the state charged Mr. Duenas with two counts of child molestation in the first degree; two

counts of rape of a child in the first degree; and one count of criminal attempt, based on alleged substantial step toward an additional instance of rape of a child. CP 61-63. All of these charges were based on the alleged events from 2000. CP 61-63.

The state's theory at Mr. Duenas's trial was that T.M. had consistently said that his abuser was the person staying at his grandfather's house who had been studying to enter law enforcement. RP 591, 620-21. The state claimed that Mr. Duenas was the only person who fit that description. RP 591, 620-21.

T.M. testified at trial that Mr. Duenas was the one who cared for him (and his siblings) during the day while he was staying at his grandfather's house. RP 147. But no one else who was there at the time remembered it that way. *See* RP *generally*.

T.M.'s grandfather and Mr. Duenas's aunt both testified in support of T.M. *See* RP 351-429. But they both said that it was not Mr. Duenas's responsibility to babysit T.M. RP 390, 409, 421-22. T.M.'s grandfather and Mr. Duenas's aunt both testified that Mr. Duenas was out of the house almost all of the time during that summer. RP 362-63, 389-90, 422. Neither of them remembered Mr. Duenas playing with T.M. or his siblings. RP 375, 409.

T.M.'s grandfather, Mr. Duenas's aunt, and Friebel all testified that Friebel was asked to babysit T.M. at least a few times. RP 390, 409, 501, 509.

T.M.'s older brother, likewise, did not remember seeing Mr. Duenas much during the visit. RP 205. He said that he had very little interaction with Mr. Duenas. RP 205 He also testified that Mr. Duenas never babysat for him or T.M. RP 207.

Mr. Duenas's aunt testified that Friebel was going to school to become a firefighter during the time of the alleged abuse. RP 429. Mr. Duenas sought to present additional evidence that Friebel's uniform at the time had resembled one of a law enforcement official. RP 491.

But the court prohibited Mr. Duenas from asking Friebel about his uniform. RP 494. In fact, the court would not even permit Mr. Duenas's attorney to mention Friebel's status as a student firefighter at the time of the abuse during closing argument or to argue that Friebel could have been the true perpetrator of the abuse. RP 457, 460.

T.M. did not even remember that Friebel had been living at his grandfather's house during the summer of 2000. RP 146. But everyone else who lived there there, including Friebel himself, admitted that he lived in the house at the time of T.M.'s visit. RP 370, 405, 491.

T.M. admitted that he did not remember his abuser's name until after his family members told him that it had been Mr. Duenas. RP 168. But T.M.'s older brother – to whom T.M. first disclosed the abuse four years later – claimed that T.M. had used Mr. Duenas's first name at the time of the disclosure. RP 220, 222.

T.M. also said that he never slept with his grandfather during the visit. RP 143. But his grandfather and Mr. Duenas's aunt both testified that T.M. loved to sleep in his grandfather's bed and did so almost every night. RP 386, 406.

The trial court allowed T.M.'s older brother to recount what T.M. had said during his initial disclosure of the abuse, four years after the abuse allegedly occurred. RP 220, 222. The court overruled Mr. Duenas's hearsay objections, ruling that T.M.'s statements were admissible as excited utterances. RP 220, 222. The hearsay statements, recounted by T.M.'s brother, included claims that Mr. Duenas had "raped" T.M., that Mr. Duenas had "made [T.M.] "touch him" and "put his mouth on his area." RP 223. He also said that Mr. Duenas had made T.M do "stuff with the butt." RP 223.

By the time of trial, T.M. identified Mr. Duenas as his abuser, even though he had not known his name when he disclosed the allegations four years after they happened. RP 148.

During closing argument, the prosecutor focused the jury on the hearsay testimony from T.M.'s brother. RP 590-91. The prosecutor argued that the evidence that T.M.'s memory had faded in significant ways should not affect the jury's verdict because T.M.'s testimony regarding the identity of his abuser had been consistent ever since he disclosed the allegations to his brother for years after they took place. RP 590-91.

The jury found Mr. Duenas guilty of each charge. CP 134-38.

Mr. Duenas timely appealed. CP 203. The Court of Appeals affirmed his conviction in an unpublished opinion. *See Appendix.* The Court of Appeals found, *inter alia*, that the trial court had erred by admitting T.M.'s hearsay statements to his older brother but ruled that the error was harmless. *Appendix,* pp. 11-12.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. This Court should grant review and hold that Mr. Duenas was prejudiced by the trial court's improper admission of T.M.'s hearsay disclosures to his brother because the state relied heavily on that evidence to overcome evidence that T.M.'s memory of the alleged abuse had lapsed significantly in the seventeen years since the alleged events.

T.M. did not disclose the abuse to anyone until about four years after it allegedly occurred, when he described it to his older brother. *See* RP 220-23, 226. Over Mr. Duenas's hearsay objection, however, the trial court permitted T.M.'s brother to recount what T.M. had told him in

detail, concluding that the statements were admissible as excited utterances. RP 220, 222.

The Court of Appeals agrees that the trial court erred by admitting those hearsay statements as excited utterances. *Appendix*, pp. 10-12. Even so, the Court of Appeals affirms Mr. Duenas's convictions because the improperly admitted evidence was similar to that which T.M. provided during his testimony at trial. *Appendix*, p. 13.

Evidentiary error requires reversal if "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *In re Det. of Post*, 170 Wn.2d 302, 314, 241 P.3d 1234, 1241 (2010)(*quoting State v. Neal,* 144 Wash.2d 600, 611, 30 P.3d 1255 (2001)); (*State v. Smith,* 106 Wash.2d 772, 780, 725 P.2d 951 (1986)).

In Mr. Duenas's case, T.M.'s testimony displayed significant memory lapses regarding the summer when the alleged abuse took place.

Accordingly, the prosecutor relied heavily on the improperly admitted hearsay evidence in closing argument, claiming that T.M.'s testimony was reliable because it was consistent with what he had told his brother more than a decade before. *See e.g.* RP 590-91. In this context, the admission of the hearsay statements was instrumental in overcoming a substantial shortcoming in the state's case.

"Within reasonable probabilities," the jury could have harbored a reasonable doubt about the quality of T.M.'s memory that was overcome by the state's reliance on the improperly-admitted hearsay evidence. Mr. Duenas was prejudiced by the improper admission of the hearsay statements through his brother. *Post*, 170 Wn.2d at 314

Under different circumstances, evidentiary error can be harmless if the improperly admitted hearsay testimony was merely duplicative of other testimony. *See Ramirez-Estevez*, 164 Wn. App. 285, 293–94, 263 P.3d 1257 (2011). In *Ramirez-Estevez*, however, criminal proceedings against the accused began immediately following the initial disclosure of the abuse. *Id.*

In Mr. Duenas's case, on the other hand, more than a decade passed between T.M.'s improperly-admitted disclosure to his brother and the criminal charges. Given the significant evidence that T.M.'s memory had faded, the prosecutor relied heavily on the alleged consistency between his testimony at trial and his disclosure to his brother in 2004. *See* RP 590-91. In this context, the improper admission of T.M.'s hearsay statements during that disclosure was much more consequential than in *Ramirez-Estevez*.

The Court of Appeals erred by holding that the evidentiary error at Mr. Duenas's trial did not require reversal of his convictions. This significant question of constitutional law is also of substantial public interest and warrants review under RAP 13.4 (b)(3) and (4).

B. The Supreme Court should accept review and hold that the trial court violated Mr. Duenas's constitutional rights to counsel and to due process by prohibiting him from arguing that Friebel could have been the one who committed the offenses against T.M. The Court of Appeals' opinion in this case conflicts with Division I's prior decision in *State v. Otruno-Perez*.[2]

T.M. did not remember the name of his abuser when he first reported the allegations to his family. RP 168. He only remembered that he had been abused by someone who was staying at his grandfather's house who was studying law enforcement. RP 168. The state's theory at trial was that Mr. Duenas was the only person who fit that description, so he must have been the person who abused T.M. RP 591, 620-21.

But Mr. Duenas's cousin, Friebel, was also living at the house at the time, a fact which T.M. had forgotten. RP 146, 370, 405, 491. Friebel was studying to be a firefighter when T.M. was visiting. RP 491.

T.M. also mistakenly remembered the Mr. Duenas had been responsible for babysitting him and his siblings. RP 147. In fact, it had been Friebel who did occasional babysitting. RP 390, 409, 501, 509.

Accordingly, Mr. Duenas's attorney sought to argue during closing argument that T.M. could have mistakenly believed that Mr. Duenas was the one who had abused him when it had actually been Friebel. *See* CP 77-

[2]*State v. Ortuno-Perez*, 196 Wn. App. 771, 385 P.3d 218 (2016).

82. But the trial court prohibited him from making that argument. RP 457. The court would not even permit defense counsel to mention that Friebel was attending firefighter school. RP 460. These rulings violated Mr. Duenas's constitutional rights to counsel and to due process.

The constitutional right to counsel protects an accused person's right to have his/her defense attorney deliver closing argument on his/her behalf. *State v. Ortuno-Perez*, 196 Wn. App. 771, 798, 385 P.3d 218 (2016) (*citing Herring v. New York*, 422 U.S. 853, 858, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975); *State v. Frost*, 160 Wash.2d 765, 773, 161 P.3d 361 (2007)); U.S. Const. Amend. VI, XIV. The right to present a closing argument in one's defense is also protected by due process. *State v. Osman*, 192 Wn. App. 355, 368–69, 366 P.3d 956, 963 (2016) (*citing In re Winship,* 397 U.S. 358, 361, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)); U.S. Const. Amend. XIV; Wash. Const. art. I, sec. 3.[3]

A trial court violates these constitutional rights by improperly limiting the scope of defense closing argument. *Ortuno-Perez*, 196 Wn. App. at 798. Tt is a "rudimentary aspect" of the right to counsel that defense attorneys be permitted to argue inferences from the evidence to the jury during closing. *Id.* at 799.

[3] Constitutional issues are reviewed *de novo*. *State v. Budd*, 185 Wn.2d 566, 572, 374 P.3d 137 (2016).

A ruling on "other suspect" evidence relates to the admissibility or inadmissibility of evidence. *Id.* at 799-800. A trial court errs by "extending the reach of its 'other suspect' rulings" to prohibit defense counsel from arguing reasonable inferences from the evidence in closing argument. *Id.*

In *Ortuno-Perez*, the trial court ruled that the accused's proffered "other suspect" evidence was inadmissible and, as a corollary to that ruling, prohibited defense counsel from arguing that the evidence "pointed to" anyone other than the defendant as the potential killer in that murder case. *Id.* The Court of Appeals reversed, holding, *inter alia*, that that the trial court had unreasonably "extended the reach" of its evidentiary ruling and violated the defendant's constitutional rights by prohibiting counsel from arguing logical inferences from the evidence – which had already been properly admitted -- during closing. *Id.*

The trial court made the same error at Mr. Duenas's trial. Under the guise of an "other suspect" ruling, the trial court prohibited Mr. Duenas from arguing that Friebel could have been T.M.'s actual abuser based on the evidence that had *already been admitted*: that Friebel was the one who actually babysat for T.M. and his siblings and that Friebel was studying to become a firefighter. RP 457-60.

The trial court violated Mr. Duenas's constitutional rights to counsel and to due process by unreasonably limiting defense counsel's

ability to argue the inference from the evidence that Friebel could have been the resident of the home who abused T.M. *Id.*[4]

Even so, without any mention of *Ortuno-Perez*, the Court of Appeals holds that there was no error because the trial court's ruling excluding other suspect evidence was reasonable. *Appendix*, pp. 6-8. The Court of Appeals' decision in this case directly conflicts with Division I's prior decision in *Ortuno-Perez*. This Court should grant review to resolve that conflict. RAP 13.4 (b)(2).

Review is also warranted under RAP 13.4(b)(3) and (4) because this significant question of constitutional law is of substantial public interest.

C. The Supreme Court should accept review and hold that trial court violated Mr. Duenas's constitutional right to present a defense by prohibiting him from eliciting evidence that Friebel wore a blue uniform with a badge on it at the time of the

[4] This constitutional error requires reversal unless the state can demonstrate harmlessness beyond a reasonable doubt. *Ortuno-Perez*, 196 Wn. App. at 801. This requires proof that "any reasonable jury would have reached the same result in the absent of the error." *Id*.; *Frost*, 160 Wn. 2d at 782.

The state cannot meet that burden here. The state's primary theory during closing argument was that T.M. had consistently identified his abuser as the person who was studying to enter law enforcement and that Mr. Duenas was the only one who fit that description. *See* RP 591, 620-21. But, in fact, Friebel's status as a student firefighter could have been interpreted as studying to enter law enforcement by an eight-year-old. Given T.M.'s other apparent lapses in memory – e.g. regarding whether Mr. Duenas had babysat for him, whether Friebel was living in the house at the time of the visit, and where he slept during the visit – the state cannot establish that a reasonable jury would not have found reason to doubt Mr. Duenas's guilt if he had been permitted to point out the possibility that T.M. had been abused by Friebel and had misidentified his abuser as Mr. Duenas. *Id.*

alleged abuse, given the state's heavy reliance on the fact that T.M. said that his abuser was someone who "was studying to be a cop." The Court of Appeals' opinion in this case conflicts with This Court's prior decision in *State v. Franklin*.[5]

As noted above, the state's primary theory of Mr. Duenas's guilt was that he was the only person who met T.M.'s description of someone living in the house who was studying to enter law enforcement. RP 591, 620-21.

But Mr. Duenas was not attending the police academy (or doing any law enforcement training) at that time. RP 518. He was working toward his associate's degree. RP 515.

Friebel, however was about the same age as Mr. Duenas and was going to the academy to become a firefighter. RP 462, 491. That program required him to wear a blue uniform with a badge on it. RP 491. From an eight-year-old's perspective, that uniform could have been interpreted as belonging to someone in law enforcement. RP 491.

But the trial court prohibited Mr. Duenas from eliciting the evidence that Friebel's uniform closely resembled one that would be worn by a law enforcement officer. RP 491-94. That ruling violated Mr. Duenas's constitutional right to present a defense.

[5] *State v. Franklin*, 180 Wn.2d 371, 325 P.3d 159 (2014).

The constitutional rights to present a defense and to meaningfully cross-examine the prosecution's witnesses are among the "minimum essentials of a fair trial." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 296 (1973); U.S. Const. amends. VI, XIV; Const. art. I, sec. 3, 22. An accused person has "the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). Rules excluding evidence from a criminal trial may not infringe upon the "weighty interest of the accused" in having a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed. 2d 503 (2006).

The right to present a defense prohibits a judge from limiting the defendant's elicitation of relevant evidence regarding the incidents leading to the allegations against him/her. *State v. Jones*, 168 Wn.2d 713, 721, 230 P.3d 576 (2010). If there are questions of the strength or accuracy of evidence that is critical to the defense, those weaknesses must be established by cross-examination, not by exclusion. *State v. Duarte Vela*, 200 Wn. App. 306, 321, 402 P.3d 281 (2017).

The exclusion of evidence offered by the defense violates the Sixth Amendment right to present a defense when "the omitted evidence evaluated in the context of the entire record, creates a reasonable doubt

that did not otherwise exist." *Id.* at 326 (*citing United States v. Blackwell*, 459 F.3d 739, 753 (6th Cir. 2006)).[6]

Evidence relevant to a theory of defense may be barred only where it is of a character that undermines the fairness of the trial. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). The State bears the burden of showing that the evidence is "so prejudicial as to disrupt the fact-finding process at trial." *Jones*, 168 Wn.2d at 720 (quoting *Darden*, 145 Wn.2d at 622). For evidence of high probative value, "no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22." *Id*.

As the Washington Supreme Court explained in *Franklin*, it violates the U.S. Supreme Court's dictate in *Holmes* to improperly inflate the threshold for admitting "other suspect" evidence. *State v. Franklin*, 180 Wn.2d 371, 378, 381-82, 325 P.3d 159 (2014). Evidence that another person may have committed the crime is not subject to a different set of rules of evidence. *Id.; See also Ortuno-Perez*, 196 Wn. App. at 782.

"All relevant evidence is admissible" unless barred by the constitution, the rules of evidence, or other applicable rules. ER 402; *State*

[6] Evidentiary rulings concerning evidence offered by the defense are reviewed for an abuse of discretion. *State v. Duarte Vela*, 200 Wn. App. 306, 317, 402 P.3d 281 (2017). "The more the exclusion of that evidence prejudices an articulated defense theory, the more likely [an appellate court] will find that the trial court abused its discretion." *Id.*

v. Garcia, 179 Wn.2d 828, 844-45, 318 P.3d 266 (2014). Evidence is relevant if it is material and is "of consequence in the context of the other facts and the applicable substantive law." *Ortuno-Perez*, 196 Wn. App. at 784.

Evidence that another person may have committed an offense is relevant if it tends to connect someone other than the defendant. *Franklin*, 180 Wn.2d at 378. This is particularly true when the evidence pointing to the "other suspect" is of the same nature as the state's evidence against the accused. *See State v. Clark*, 78 Wn. App. 471, 479–80, 898 P.2d 854, 858–59 (1995). The proper inquiry is whether the evidence offered by the defense "tends to create a reasonable doubt as to the *defendant's* guilt, not whether it establishes the guilt of a *third party* beyond a reasonable doubt." *Id*. at 381; *See also Ortuno-Perez*, 196 Wn. App. at 783–84.

At Mr. Duenas's trial, the prosecutor relied heavily on the idea that Mr. Duenas was *the only one* who fit T.M.'s description of a person living in the home and studying to enter law enforcement. RP 591, 620-21. But – particularly from the perspective of an eight-year-old – that was not entirely true. In fact, Friebel was also living in the house and was studying to be a firefighter at the time of the alleged abuse. RP 491. Critically, Friebel's program required him to wear a uniform that closely resembled one worn by law enforcement. RP 491.

Given the state's theory during closing, the additional evidence that Friebel wore a uniform that could easily have been understood by an eight-year-old to have been belonged to someone in law enforcement "tend[ed] to create a reasonable doubt" as to Mr. Duenas's guilt. *Franklin*, 180 Wn.2d at 378.

Even so, the Court of Appeals finds no error because the evidence "did not constitute evidence that Friebel was the abuser." *Appendix*, p. 7. The Court of Appeals applies the incorrect standard, in violation of This Court's prior decision in *Franklin*.

In order for the evidence to be admissible, it did not need to establish that Friebel was guilty of the crimes. *Franklin*, 180 Wn.2d at 378. Rather, it needed only to raise a doubt as to Mr. Duenas's guilt. *Id.* Considering the state's theory that Mr. Duenas was the only person in the household meeting T.M.'s description of his abuser, the evidence was sufficient to raise a reasonable doubt as to Mr. Duenas's guilt.

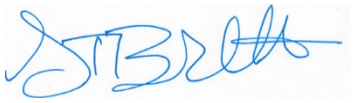
This Court should grant review because the Court of Appeals' decision in this case conflicts with *Franklin* by failing to apply the legal standard mandated by This Court in that case. RAP 13.4(b)(1). This significant question of constitutional law is also of substantial public interest and warrants review under RAP 13.4 (b)(3) and (4).

VI. CONCLUSION

The issues here are significant under the State Constitution. Furthermore, because they could impact a large number of criminal cases, they are of substantial public interest.[7] The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4).

The Court of Appeals' decision also conflicts with Division I's prior holding in *Ortuno-Perez* and This Court's prior holding in *Franklin*. This Court should grant review pursuant to RAP 13.4(b)(1) and (2).

Respectfully submitted September 3, 2020.



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[7] Under the doctrine of cumulative error, an appellate court may reverse a conviction when "the combined effect of errors during trial effectively denied the defendant [his/]her right to a fair trial even if each error standing alone would be harmless." *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010); U.S. Const. Amends. VI, XIV. In the alternative, reversal of Mr. Duenas's conviction is required under the cumulative error doctrine.

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Jacob Duenas/DOC#410002
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

and I sent an electronic copy to

Pierce County Prosecuting Attorney
pcpatcecf@co.pierce.wa.us

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on September 3, 2020.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

APPENDIX:

FILED
AUGUST 4, 2020
In the Office of the Clerk of Court
WA State Court of Appeals Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. JACOB M. DUENAS, Appellant.	))))))))))	No. 37345-2-III UNPUBLISHED OPINION

KORSMO, J. — Raising multiple challenges, Michael Duenas appeals from five convictions for sexual offenses against a child, T.M. We affirm the convictions and remand to strike the criminal filing fee.

FACTS

During the summer of 2000, T.M., then an eight-year-old, traveled from California to visit his grandfather in Gig Harbor for two or three weeks. Also staying there that summer were the child's older cousin, Bryan Friebel, and Jacob Duenas, a son of the

grandfather's wife. Friebel attended firefighting school and Duenas was attending college. T.M. was sexually abused on repeated occasions during the visit.

T.M. disclosed the abuse to his older brother, K.M., three or four years later. He identified the abuser as the person staying at his grandfather's house who wanted to be a police officer. Duenas was studying criminal justice at Crown College in 2000-2001; he moved back to California in the fall of 2001 and eventually joined the California Highway Patrol.

Although T.M. did not want to report the matter, the abuse eventually was brought to the attention of Washington authorities following an investigation in California. Charges were filed against Duenas and the case proceeded to jury trial in the Pierce County Superior Court. Over objection, K.M. repeated his sibling's disclosure conversation for the jury.

The trial court prohibited the defense from asking Friebel about the student uniform he wore while in school and from arguing that Friebel was the abuser. Mr. Duenas testified in his own behalf, telling jurors that he was in Gig Harbor for school before returning to California in 2001. He denied abusing T.M. and told jurors that his interest in law enforcement did not develop until after 9/11. In closing, the prosecutor argued that Duenas lied to the jury about when he desired to become an officer in order to distance himself from T.M.'s childhood description of the abuser as the person studying to be a police officer.

The jury convicted Mr. Duenas of two counts of first degree child rape, two counts of first degree child molestation, and one count of attempted first degree child rape. Although defense counsel asked the court for a bottom of the standard range sentence, the court imposed concurrent high end sentences.

Mr. Duenas timely appealed. This case was administratively transferred to Division Three. A panel then considered the appeal without conducting oral argument.

ANALYSIS

Mr. Duenas raises seven arguments; we address six of them.[1] In order, we consider his contentions: (1) the statute of limitations barred the attempted rape charge, (2) the exclusion of other suspects evidence, (3) prosecutorial misconduct, (4) disclosure to K.M., (5) imposition of criminal filing fee, and (6) counsel's performance at sentencing.

Statute of Limitations

The initial contention is a claim that the attempted child rape conviction was untimely filed. His own testimony defeats the argument.

This court has stated that the statute of limitations period can be argued for the first time on appeal. *State v. Novotny*, 76 Wn. App. 343, 345 n.1, 884 P.2d 1336 (1994),

[1] In the absence of multiple errors, we do not address his cumulative error claim.

abrogated in part by In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 353, 5 P.3d 1240 (2000). That particular statement was based on a theory of jurisdiction that subsequently was rejected by *Peltier*. Since the State does not contest Mr. Duenas's ability to raise this issue, we will consider it.

However, like many arguments raised for the first time on appeal, there must still be an adequate record to permit review of the issue. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). In the event of an inadequate record or the need to develop additional evidence, a personal restraint petition (PRP) is the appropriate vehicle for raising an argument that was not presented to the trial court. *Id*. at 338.[2]

The parties debate which statute of limitations applies to an *attempted* child rape. For felony charges not otherwise specified, the three year limitations period of RCW 9A.04.080(1)(i) applies. Since 2000, various extended time periods have governed the time for filing child rape and child molestation charges. *See* Former RCW 9A.04.080(1)(c) (1998); former RCW 9A.04.080(1)(c) (2009); former RCW 9A.04.080(1)(c) (2017). There currently is no statute of limitations on those offenses. *See* LAWS OF 2019, ch. 87, §2.

[2] Because an appellate ruling on the merits of an argument will often foreclose review of the issue in a PRP, an appellant is not well served raising an issue on appeal that is not fully developed. *In re Pers. Restraint of Taylor*, 105 Wn.2d 683, 688, 717 P.2d 755 (1986). However, we leave the wisdom of raising issues on appeal to appellate counsel and will assume that they will not raise claims better brought in a PRP.

However, the statute does not expressly list attempted crimes. That omission is the basis for appellant's argument and the State's rejoinder. We need not resolve that dispute because the defendant's own testimony establishes it is unnecessary.

The exception to the statutory limitations period is found in RCW 9A.04.080(2):

> The periods of limitation prescribed in subsection (1) of this section do not run during any time when the person charged is not *usually and publicly resident within this state*.

(Emphasis added.)

Assuming that the crime of attempted child rape is subject to a three year limitations period, the argument fails here. Mr. Duenas and the family members testified that he left Washington in the fall of 2001 and returned to California. He completed law enforcement training in California, joined the California Highway Patrol in 2003, and was living in that state at the time the crimes were divulged to law enforcement more than a decade later. There is no evidence that he ever resided in Washington after leaving Gig Harbor in 2001.

On this record, the statute of limitations argument must fail. If he has evidence that he later resided publicly in Washington, he must bring it in a PRP. *McFarland*, 127 Wn.2d at 338; *In re Pers. Restraint of Taylor*, 105 Wn.2d 683, 688, 717 P.2d 755 (1986).

Other Suspects Evidence

Mr. Duenas next argues that his constitutional right to counsel and his right to present a defense were violated when the court (1) excluded evidence that Mr. Friebel

wore a blue uniform while attending firefighting school and (2) prohibited him from arguing that Friebel committed the crimes. The trial court did not err.

The federal and state constitutions guarantee a defendant the opportunity to present a defense to the crime charged. *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004). The party seeking admission of evidence bears the burden of establishing relevance and materiality. *State v. Pacheco*, 107 Wn.2d 59, 67, 726 P.2d 981 (1986). In establishing a foundation for admission of "other suspects" 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*, 134 S. Ct. 170 (2013).

The trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *State v. Franklin*, 180 Wn.2d 371, 377 n.2, 325 P.3d 159 (2014). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "An erroneous evidentiary ruling that violates the defendant's constitutional rights, however, is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt." *Franklin*, 180 Wn.2d at 377 n.2. However, a defendant does not have a constitutional right to present irrelevant or inadmissible evidence. *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).

A trial court's exclusion of "other suspects" evidence is an 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. *Franklin*, 180 Wn.2d at 378 (citing *Holmes v. South Carolina*, 547 U.S. 319, 326-27, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)). Before the trial court will admit "other suspects" evidence, the defendant must 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.*

The blue uniform evidence did not satisfy the standard. The purpose of the testimony was to attempt to impeach T.M.'s in-court identification of Duenas as the abuser. As a child, the boy had identified the abuser as the person who was studying to be a cop. He did not state that the abuser wore a blue uniform. The attempted impeachment did not constitute evidence that Friebel was the abuser. Accordingly, it was not "other suspects" evidence. The trial court had a tenable basis for excluding the evidence. There was no abuse of discretion.

Similarly, the court did not err in prohibiting Duenas from arguing that Friebel was the abuser. There was no evidence that he committed the crimes. Duenas was properly allowed to argue that others were in the house and that T.M. may have been

mistaken in his identification. However, he lacked evidence that Friebel did abuse the child. The court had a tenable basis for prohibiting the argument.

The court did not err in its treatment of the other suspects evidence.

Prosecutorial Misconduct

Appellant next argues that the prosecutor engaged in misconduct by telling the jury that Duenas lied about when he decided to enter into law enforcement. The prosecutor clearly tied that statement to the evidence and did not engage in misconduct.

Familiar standards guide our review of this issue. The appellant bears the burden of demonstrating prosecutorial misconduct on appeal and must establish that the conduct was both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Prejudice occurs where there is a substantial likelihood that the misconduct affected the jury's verdict. *Id.* at 718-719. The allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Reversal is not required where the alleged error could have been obviated by a curative instruction. *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995). The failure to object constitutes a waiver unless the remark was so flagrant and ill-intentioned that it evinced an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *Id.*; *State v. Swan*, 114 Wn.2d 613, 665, 790 P.2d 610

(1990); *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Finally, a prosecutor has "wide latitude" in arguing inferences from the evidence presented. *Stenson*, 132 Wn.2d at 727.

In closing, the prosecutor argued that Mr. Duenas had a strong motive to lie about the timing of his choice to enter into law enforcement:

> So what are the two things that he distanced himself from this morning? Identity and opportunity. He knew that because [T.M.] was not able to provide a name for his disclosure, he identified him as the guy who wanted to be a law enforcement officer. Jacob Duenas is smart enough to know that he needs to distance himself from that. So he took the stand and he lied.

Report of Proceedings at 594-595. For several pages leading up to this statement, and again afterward, the prosecutor noted all of the witnesses who had stated Duenas desired to go into law enforcement prior to 9/11. She focused on that testimony and asked the jurors to conclude that Duenas was lying about the timing. This was not a statement of personal opinion; the prosecutor was arguing an inference from the conflicting testimony.

Mr. Duenas also argues that the prosecutor erred in misstating the burden of proof and in appealing to the jury's passions. Neither argument has merit.

The prosecutor told the jurors that T.M. was either making up the story, was mistaken about the identity of the abuser, or was telling the truth. She then went through the evidence and explained why it supported T.M.'s testimony. This was not an instance of the prosecutor giving the jury a "false choice" between either believing the victim or

acquiting the defendant. Rather, she listed the possible explanations and then discussed why only one of those options was supported by the evidence.

Finally, Mr. Duenas argues that the prosecutor appealed to the emotions of the jury when she repeated some of the victim's testimony. Again, this was done in the context of explaining why T.M. should be believed—he discussed difficult topics that cost him emotionally. Those were not the type of statements one would expect to hear if the victim were creating a false narrative. He had a difficult time talking about the abuse and how it impacted him. The jury could properly weigh the sincerity of T.M.'s testimony in reaching its decision.

Appellant has not established that the prosecutor engaged in misconduct in closing argument.

Disclosure to K.M.

Mr. Duenas next argues that the court erred in allowing K.M. to repeat his brother's description of the sexual abuse as an excited utterance. We agree, but conclude that the error was harmless.

Trial court judges have great discretion with respect to the admission of evidence and will be overturned only for manifest abuse of that discretion. *State v. Luvene*, 127 Wn.2d 690, 706-707, 903 P.2d 960 (1995). The trial court erred in applying the test for admitting an excited utterance.

ER 803(a)(2) provides that any statement "describing or explaining an event or condition" is admissible hearsay if it was "made while the declarant was under the stress of excitement caused by the event or condition." *Id*. The requirements of this exception were discussed in *State v. Woods*, 143 Wn.2d 561, 597, 23 P.3d 1046, *cert. denied*, 534 U.S. 964 (2001):

> An out-of-court statement offered to prove the truth of the matter asserted is admissible at trial if the statement relates to "a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." ER 803(a)(2). We have previously stated that three closely connected requirements must be satisfied in order for a hearsay statement to qualify as an excited utterance. First, a startling event or condition must have occurred. Second, the statement must have been made while the declarant was under the stress or excitement caused by the startling event or condition. Third, the statement must relate to the startling event or condition. [*State v.*] *Chapin*, 118 Wn.2d [681], 686, [826 P.2d 194 (1992)]. Often, the key determination is whether the statement was made while the declarant was still under the influence of the event to the extent that the statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment. *State v. Strauss*, 119 Wn.2d 401, 416, 832 P.2d 78 (1992).

An excited utterance is admissible because it is "believed to be 'a spontaneous and sincere response to the actual sensations and perceptions already produced by [an] external shock.'" *Chapin*, 118 Wn.2d at 686 (quoting 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1747, at 195 (James H. Chadbourn rev. ed. 1976)). As noted above, an excited utterance has three requirements: (1) a startling event or condition occurred, (2) the declarant made a statement that relates to the startling

event, and (3) the declarant made the statement while still under the stress of excitement caused by the event. ER 803(a)(2); *Woods*, 143 Wn.2d at 597.

The disclosure in this case came three to four years after the abuse. That is well after the stress of the abuse had passed. Although the mere passage of time does not necessarily prevent a finding of continuing influence, the timing of the statement is still key. In other cases where statements have been determined to be timely, the disclosure had come within hours, not years, of the exciting event: *State v. Thomas*, 46 Wn. App. 280, 284, 730 P.2d 117 (1986), *aff'd*, 110 Wn.2d 859, 757 P.2d 512 (1988) (victim still under influence six to seven hours after rape); *State v. Flett*, 40 Wn. App. 277, 287, 699 P.2d 774 (1985) (victim still under influence of event when reporting rape seven hours after occurrence); *State v. Woodward*, 32 Wn. App. 204, 206-207, 646 P.2d 135 (1982) (report 20 hours after rape); *State v. Fleming*, 27 Wn. App. 952, 956, 621 P.2d 779 (1980) (three to four hours after rape).

The disclosure in this case came much longer after the event than the time periods noted in the earlier cases. This case is far closer to the facts in *State v. Ramirez-Estevez*, 164 Wn. App. 284, 263 P.3d 1257 (2011). There the victim made disclosures to a family member and a counselor two to three years after the event. This court concluded that too much time had passed for the victim to still be under the stress of the original attack.

Accordingly, we conclude that the court erred in admitting the statements as excited utterances. Nonetheless, the error was harmless. Evidentiary error is harmless if,

within reasonable probability, it did not materially affect the verdict. *State v. Zwicker*, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986). The testimony was similar to that T.M. recited to the jury. Generally speaking, the improper admission of cumulative evidence does not constitute reversible error. *State v. Todd*, 78 Wn.2d 362, 372, 474 P.2d 542 (1970). At worst, that is what happened here.[3]

The erroneous testimony did not materially impact the verdict. The error was harmless.

Criminal Filing Fee

Mr. Duenas next argues, and the State concedes, that the court erroneously imposed the $200 filing fee after finding him indigent. After the sentencing here, the legislature amended the statutes governing imposition of financial obligations on criminal defendants. In *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), the Washington Supreme Court ruled that the amendments were retroactive and applied to all sentencings that were not final on the effective date of the new legislation, June 7, 2018. LAWS OF 2018, ch. 269.

We accept the concession of error and remand for the trial court to strike the criminal filing fee.

[3] Some of the identity testimony appears to have been admissible in response to the cross-examination of T.M. We need not parse the testimony to determine what was admitted in error and what was not.

Sentencing Hearing

Lastly, Mr. Duenas argues that his defense counsel erred in not arguing his youth as a mitigating factor. There is no factual support in the record for this argument.

We also consider this issue in accordance with well settled law. Counsel's failure to live up to the standards of the profession will require a new trial when the client has been prejudiced by counsel's failure. *McFarland*, 127 Wn.2d at 334-335. Review is highly deferential and we engage in the presumption that counsel was competent; moreover, counsel's strategic or tactical choices are not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under *Strickland*, courts apply a two-prong test: whether or not (1) counsel's performance failed to meet a standard of reasonableness and (2) actual prejudice resulted from counsel's failures. *Id*. at 690-692. When a claim can be resolved on one ground, a reviewing court need not consider both *Strickland* prongs. *Id*. at 697.

An exceptional sentence may be imposed if the trial court finds "substantial and compelling" reasons to go outside the standard range. RCW 9.94A.535. The trial court must enter written findings of fact and conclusions of law if it does impose an exceptional sentence. *Id*. A nonexclusive list of mitigating factors is recognized by statute. RCW 9.94A.535(1).

The Washington Supreme Court has recognized that all youthful offenders sentenced in adult court must be able to seek exceptional sentences based on their

immaturity at the time of the commission of the crime. *State v. Houston-Sconiers*, 188 Wn.2d 1, 18-21, 391 P.3d 409 (2017); *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015). However, a youthful offender has no presumption or entitlement to a mitigated sentence. *State v. Gregg*, 9 Wn. App. 2d 569, 578-581, 444 P.3d 1219, *review granted*, 104 Wn.2d 1002, 451 P.3d 341 (2019). The defendant still bears the burden of establishing that mitigating circumstances exist. *Id*. at 574.

An exceptional sentence may be available to a youthful offender whose offense bears the hallmarks of youth—lack of maturity, impetuous or ill-considered actions and decisions, susceptibility to peer pressure, and transitory (rather than fixed) character traits. *Gregg*, 9 Wn. App. 2d at 574-575 (citing *Roper v. Simmons*, 543 U.S. 551, 569-570, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)). To receive a mitigated sentence, a defendant must demonstrate he is less culpable because of his age and immaturity. *State v. Moretti*, 193 Wn.2d 809, 824, 446 P.3d 609 (2019).

Here, Mr. Duenas was prosecuted in adult court for an offense committed while he was 19, making an exceptional sentence based on youthfulness possible. *Odell*, 183 Wn.2d 680. However, his argument fails because Mr. Duenas presented no evidence that he committed these offenses because of youthful character traits. Indeed, since Mr. Duenas denied committing the offense, it is exceptionally unlikely that he would have appealed for sentencing leniency by admitting that he perjured himself before the jury.

Understandably, there was no evidence in the record suggesting that youthful immaturity was a factor in this crime.

Counsel could not have erred by failing to pursue the youthfulness mitigating factor under the facts of this case. He did not perform ineffectively.

Affirmed and remanded.

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

Korsmo, J.

WE CONCUR:

Fearing, J.

Pennell, C.J.

LAW OFFICE OF SKYLAR BRETT

September 03, 2020 - 3:28 PM

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Superior Court Case Number:	17-1-04393-3

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