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Division II
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NO. 51958-5-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KENNETH ARONSON

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR GRAYS HARBOR COUNTY

The Honorable Ray Kahler, Judge

OPENING BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in excluding appellant Ken Aronson’s out-of-court statement in the “confrontation call” that was relevant to the appellant’s state of mind.

2. The trial court erred in refusing to admit the confrontation call as an excited utterance.

3. The trial court erred in refusing to admit the confrontation in violation of the rule of completeness.

4. The prosecutor committed misconduct during closing argument that deprived Mr. Aronson of his constitutional right to a fair trial.

5. The discretionary legal financial obligations and interest accrual imposed at sentencing should be stricken pursuant to the Supreme Court's decision in *State v. Ramirez*¹ and after enactment of House Bill 1783.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in excluding Mr. Aronson’s statement to Barbara Avant, the mother of the complaining witness A.S., during a recorded “confrontation call” made as part of a police invagination that went to Mr. Aronson’s state of mind that he was shocked by being accused of sexually abusing A.S.? Assignment of Error 1.

2. The trial court err in refusing to admit the “confrontation call” as an excited utterance where the statements were made in reaction to and made under the stress of being accused of sexually abuse made contemporaneously with the startling event and Mr. Aronson was still under the stress of that event? Assignment of Error 2.

3. Where a police officer testified that Mr. Aronson made “one statement that he denied”² the allegation of sexual abuse, where Mr. Aronson had repeatedly and vehemently denied the allegation to Ms. Avant during the “confrontation call,” did the trial court violate the rule of completeness by excluding the confrontation call? Assignment of Error 3.

4. It is serious misconduct to personally attack defense counsel or impugn counsel’s character as a means of convincing jurors to convict. During closing argument the deputy prosecutor told jurors during her closing argument that Ms. Avant is “someone who’s easily swayed and manipulated by others,” “certainly by a forceful personality,” and that the “defense attorney had that.”³ Did this serious misconduct deny Mr. Aronson a fair trial? Assignment of Error 4.

5. Under the Supreme Court's decision in *Ramirez*, and after enactment of House Bill 1783, should the \$200.00 filing fee and interest accrual provision be stricken? Assignment Error 5.

¹191 Wn.2d 732, 426 P.3d 714 (2018).

² 2RP (4/17/18) at 319.

C. STATEMENT OF THE CASE

1. Procedural facts:

Ken Aronson was charged by information filed on May 26, 2015 in Grays Harbor County Superior Court with one count of first degree rape of a child. Clerk's Papers (CP) 1-3. The State filed an amended information on January 19, 2016, charging Mr. Aronson adding one count of first degree child molestation. CP 63-64. The State alleged in both counts that Mr. Aronson had sexual contact with A.S., who was less than twelve years old, and that the acts occurred in the intervening period between October 24, 2006 and December 31, 2011. CP 63-64. The State alleged that the offenses were part of an ongoing pattern of sexual abuse of the same victim manifested by multiple incidents over a long period of time. RCW 9.94A.535(3)(g). CP 63-64. The State filed an amended information on January 27, 2016 correcting the charging statute in Count 1. CP 73-74.

a. *First trial*

After numerous continuances, primarily involving discovery issues, a change of defense counsel, and a voice issue regarding Mr. Aronson's second attorney, the case came on for trial on July 19 and 20, 2017. Report of Proceedings⁴ (RP) (7/19/18) at 68-235, 3RP (7/20/17) at 236-297. The

³3RP (4/18/18) at 517-18.

⁴The record of proceedings consists of the following transcribed volumes: 1RP – May 22, 2015, May 26, 2015, October 14, 2015, January 11, 2016, January 29, 2016, February 1, 2016, April 11, 2016, May 9, 2016, May 16,

State called four witnesses, including Hoquiam Police Sergeant Shane Krohn, A.S., Barbara Avant—the mother of A.S., and SANE nurse Judith Presson. The defense rested without calling witnesses. 3RP (7/20/17) at 265. The jury was unable to reach a verdict and the court declared a mistrial. 3RP (7/20/17) at 295. Mr. Aronson was subsequently found to be indigent and the court appointed new counsel on August 7, 2017. CP 236.

b. Confrontation call

Sergeant Shane Krohn testified at the first trial that he obtained an warrant authorizing police to record a “confrontation call” made by A.S.’s mother, Barbara Avant, to Mr. Aronson. 2RP (7/19/17) at 229. Sgt. Krohn stated the police “came up with a few questions that she would need to ask during this phone conversation,” and he listened to the call as it was being surreptitiously recorded using a device that “mirrors” the conversation to the listener’s phone. 2RP (7/19/17) at 229-30. The “confrontation call,” which is approximately twenty minutes in length, was played to the jury and a

2016, September 25, 2017, April 17, 2018, (second trial, day 1); 2RP – April 17, 2018 (second jury trial, day 1); 3RP – April 18, 2018 (second jury trial, day 2), May 25, 2018 (sentencing); 4RP – March 28, 2016; 1RP – May 28, 2015, July 13, 2015, August 10, 2015, September 11, 2015, October 12, 2015, December 21, 2015, January 19, 2016, February 22, 2016, May 2, 2016, August 22, 2016, January 17, 2017, January 20, 2017, February 27, 2017, April 10, 2017, April 17, 2017, May 8, 2017, May 23, 2017, and July 13, 2017; 2RP – July 19, 2017, (first jury trial, day 1); 3RP – July 20, 2017 (first jury trial, day 2); 4RP– September 11, 2017 (omnibus hearing), October 2, 2017, October 9, 2017, November 22, 2017, January 22, 2018, February 5, 2018 (trial confirmation hearing), February 26, 2018, March 8, 2018 (conditions of release hearing), March 12, 2018, March 26, 2018 (pretrial hearing), and April 17, 2018 (second trial, motions in limine); RP

transcript was provided to the jury. 2RP (7/19/17) at 233. Exhibit 1 (first trial).

During the call, Mr. Aronson consistently denied molesting or abusing A.S. Exhibit 1. 3RP (7/20/17) at 245-58. In the call, he denied doing anything to A.S., and strenuously and repeatedly denied molesting or abusing her. Statements from the confrontation call elicited during cross examination of Sgt. Krohn include:

- I did not ever touch [A.S.]. I have never laid a hand, anything on her, ever in my life.” 3RP (7/20/17) at 246.
- No, I have never had her watch porn with me. 3RP (7/20/17) at 248.
- Bullshit, that’s a bunch of bullshit. 3RP (7/20/17) at 248.
- Well, how can I help you understand what’s going on when I don’t even know what’s going on. 3RP (7/20/17) at 248.
- I have never laid a finger on her, ever. Never touched her body in a sexual manner or any other way, other than her sitting on my lap. 3RP (7/20/17) at 248.
- She never performed a hand job on me. 3RP (7/20/17) at 249.
- I have never bothered anybody’s kids. I wouldn’t wake up at 56 years old and start touching somebody’s little kid. I have never done that. 3RP (7/20/17) at 249.
- I have never done it. If you want a list, everybody I have known, and all the kids way back to junior high when I babysat, I will give you one. 3RP (7/20/17) at 250.
- Because I don’t know what you are talking about. First of all, I have never touched her. I have never laid a

(July 27, 2015); RP (September 28, 2015); and RP (August 3, 2015).

hand sexually on your daughters, never. 3RP (7/20/17) at 250.

- I have never touched [A.S.] or [M.], or anybody ever you know ever in an appropriate way. 3RP (7/20/17) at 250.
- No, that's a lie, it's not true. 3RP (7/20/17) at 251.
- I never did anything to her. I never touched her, ever. I have never laid any part of my body on her. 3RP (7/20/17) at 251.
- I have never touched her. I have never laid a hand on her in my life. 3RP (7/20/17) at 251.
- How can I tell you why something when I don't know why she is telling you what she is telling you. I can't explain it. 3RP (7/20/17) at 251.
- Tell me what I was doing to her. I never touched her. 3RP (7/20/17) at 251.
- I never performed oral sex on that daughter. That is a lie. 3RP (7/20/17) at 252.
- She told you that I performed oral sex on her, too, huh? 3RP (7/20/17) at 252.
- Well, she is lying. 3RP (7/20/17) at 252.
- No, I never touched your daughter. 3RP (7/20/17) at 253.
- If you want to believe in your daughter and her little lie, go ahead and believe it. I did not ever touch your daughter ever. 3RP (7/20/17) at 253.
- I have never touched your daughter. 3RP (7/20/17) at 253.
- Your daughter has never been touched by me. She might be having flashbacks of somebody else doing something, or maybe she is doing something new with people I don't know. 3RP (7/20/17) at 253.
- I promise you, I have never touched your daughter before, and I would never come over to that house or any house she is ever at and bother her ever. Have I been calling over there or coming around her? If I was that way, I would be pursuing that. If it was like that. I am not like that. I don't do that shit. I have never done

- that to anybody and I never will. 3RP (7/20/17) at 254.
- No, I haven't. don't tell me I have, because I haven't. I have never laid my hands on your daughter. I have never touched her private part with any part of my body ever. 3RP (7/20/17) at 254.
 - You can tell her whatever she is making up, that's false. Also, that I would never touch her, never pursue her, never go after her. 3RP (7/20/17) at 254.
 - I promise you, you can tell her not to worry about me coming around, touching her, or attacking her, because I wouldn't do it. I have never done it, and I wouldn't do it. I am not interested in your daughter, not, what was she when she moved her, four and a half or five years old. 3RP (7/20/17) at 255.
 - I promise you, I never laid a hand or finger, or a tongue, or any part of my body on your daughter. Never happened. Tell her not to worry about me coming around, because I have been coming around. If I was that way, I would be pursuing something like that if I was like that. I don't do that, and I haven't touched her ever. She touched me. I have never touched her. I did not ever perform oral sex on her. That's an effing lie. 3RP (7/20/17) at 255-56.
 - What did she say I did? 3RP (7/20/17) at 246.
 - I don't know what was going on. 3RP (7/20/17) at 246.
 - Tell me exactly what I supposedly did. I don't know what I did, because I still don't know what you are talking about. 3RP (7/20/17) at 247.

c. Second trial

Following declaration of mistrial on July 20, 2017, the case came on for a second trial on April 17 and 18, 2018, the Honorable Ray Kahler presiding. 1RP (4/17/18) at 77-192, 2RP (4/17/18) at 197-348, 3RP (4/18/18) at 353-566. The State called the same witnesses as it did in the

first trial, but did not introduce the recorded confrontation call between Ms. Avant and Mr. Aronson.

At the conclusion of the State's case-in-chief, defense counsel David Mistachkin moved to dismiss Count 1, arguing that there was no evidence of penetration. 3RP (4/18/18) at 443-44. The court denied the motion to dismiss. 3RP (4/18/18) at 445-447.

d. Confrontation call not admitted at the second trial

The State did not introduce the confrontation call during the second trial. While arguing motions in limine, defense counsel argued that Mr. Aronson should be allowed to refer to the confrontation call, and that the call was admissible under the state of mind, statement against penal interest, and excited utterance exceptions to the hearsay rule. RP (4/17/18) at 341-48. The court denied the motion for admission of the call and precluded reference to the call. RP (4/17/18) at 348. Defense counsel requested that the judge listen to the recorded call. RP (4/17/18) at 349.

During cross-examination of Sgt. Krohn, the following exchange took place:

[MR. MISTACHKIN]: You didn't give his entire statement of what he told you?

[SGT. KROHN]: No.

[MR. MISTACHKIN]: But the gist of it was, he was denying it?

[SGT. KROHN]: Yes.

[MR. MISTACHKIN]: Vehemently denying it, like you would say adamantly denying it?

[SGT. KROHN]: It was-it was one statement that he denied it. I

wouldn't say he—

3RP (4/17/18) at 319.

Mr. Mistachkin asked if Mr. Aronson denied the allegation multiple times over the course of the investigation and an objection by the State was sustained. 3RP (4/17/18) at 319. Following the objection, counsel argued outside the presence of the jury that the jury should be permitted pursuant to the rule of completeness to hear that “there was indeed more statements than just, [‘]oh, it’s crazy ex-girlfriend.[‘]” 3RP(4/17/18) at 320-21. The court permitted defense counsel to ask whether Mr. Aronson said anything other than what Sgt. Krohn testified to at the time of arrest, but emphasized the court’s prior ruling that the confrontation call was not admitted. 3RP (4/17/18) at 321.

Following Sgt. Krohn’s testimony, the court announced that it had listened to the confrontation call and returned a disk of the call to defense counsel. 3RP (4/17/18) at 332. Counsel renewed his argument, stating that although only the State may benefit from the party opponent admission exception, the confrontation call is admissible as a state of mind and excited utterance. 3RP (4/17/18) at 333. Counsel also argued that the statement was admissible as evidence to rebut testimony by Sgt. Krohn that Mr. Aronson’s denial of the accusation was not vehement and that it was “one statement.” 3RP (4/17/18) at 333. Counsel argued that the denial was vehement and that he denied the accusations about fifty times. 3RP (4/17/18) at 333-34. The

court stated that the call did not relate to the kind of startling event that the excited utterance exception applies to, and that it was not a statement against penal interest. 3RP (4/17/18) at 334. Counsel argued that in portions of the call Mr. Aronson makes inculpatory statements, noting that he made statements during the call that State “did use in the first trial[.]” 3RP (4/17/18) at 336. The court ruled that the call was not a statement against penal interest and that the exception did not apply. 3RP at 336.

2. Trial testimony

Barbara Avant began a relationship with Ken Aronson in 2008, when her daughter A.S. was seven or eight years old. 2RP (4/17/18) at 207. A.S.’s father had primary residential placement and A.S. visited with Ms. Avant almost every weekend. 2RP (4/17/18) at 203. Ms. Avant lived with Mr. Aronson in his house in Hoquiam until she moved out of the house in December, 2011. 2RP(4/17/18) at 230.

After Ms. Avant and Mr. Aronson broke up, Ms. Avant moved to Elma, Washington. 2RP (4/17/18) at 216-17. In November, 2013 Ms. Avant and her daughter, M., moved into a house Mr. Aronson owned in Elma, which he rented to her for \$500.00 a month. 2RP (4/17/18) at 219-220.

Around November 23, 2014, shortly after she turned fourteen, A.S. told her mother that she had been sexually abused by Mr. Aronson from the time she was about six years old until her mother and Mr. Aronson broke up

in 2011, when A.S. was eleven. 2RP (4/17/18) at 225, 228, 232. Ms. Avant testified that she did not tell him the reason she moved out and that she left a letter that said she was moving out of the house “due to unforeseen circumstances.” 2RP (4/17/18) at 230.

After Ms. Avant reported the allegation to the Hoquiam Police Department, Sergeant Krohn interviewed A.S. 2RP (4/17/18) at 230. Sgt. Krohn testified that he received a report that the incident took place when A.S. was between the age 6 and 11 in Hoquiam. He interviewed A.S. following receipt of the initial report and also interviewed Ms. Avant. 2RP (4/17/18) at 277, 305-06. Sgt. Krohn testified that he attempted to contact Mr. Aronson at his house but was not initially able to make contact with him. 2RP (4/17/18) at 309. He stated that in messages left for him, Sgt. Krohn “said very little” to Mr. Aronson. 2RP (4/17/18) at 310. Sgt. Krohn said that Mr. Aronson was subsequently arrested, he said that the accusation was from “a crazy ex-girlfriend.” 2RP (4/17/18) at 317.

Ms. Avant testified that while in the relationship with Mr. Aronson she remembered several incidents in particular. She stated that on one occasion, Mr. Aronson said to for A.S. to come to him because he wanted a kiss, and A.S. “went over there and Ken stuck her tongue --- his tongue in my daughter’s mouth and I told him not to do that, that was inappropriate. 2RP (4/17/18) at 214. Ms. Avant said that when A.S. was eight or nine, “there was a time she would be taking a bath and he would go in the

bathroom and I would tell him to get out of the bathroom.” 2RP (4/17/18) at 214-15.

Ms. Avant said that another occasion Mr. Aronson and A.S. came back from a fishing trip and Mr. Aronson showed Ms. Avant “a video of [A.S.] peeing and I deleted it.” 2RP (4/17/18) at 215. She testified that she deleted the video before showing it to anyone. 2RP (4/17/18) at 239.

Ms. Avant also said that A.S. went into the bathroom when Mr. Aronson was taking a shower, and when she told him to lock the door, he said that it was his house and that he should not have to lock anything. 2RP (4/17/18) at 216.

Ms. Avant also testified that A.S. said that Mr. Aronson had her sign on to Ms. Avant’s computer and that he logged onto a porn site. 2RP (4/17/18) at 242.

Ms. Avant acknowledged that she was sued by Mr. Aronson for damages to the rental house, and that “he got rent, like water, garbage, and sewage, and \$80 of damage.” 2RP (4/17/18) at 243. Mr. Aronson said she called the police on November 23, 2014, and was moved out of his rental house by December 12. 2RP (4/17/18) at 243-44. Ms. Avant said that there was a hole burned in the carpet but that she did not know about the burn until she moved out. 2RP (4/17/18) at 250. She said that cost to repair the carpet was \$80.00. 2RP (4/17/18) at 250.

A.S. testified that her mother lived with Mr. Aronson at this house in

Hoquiam, and that they broke up in 2011 when she was eleven. 2RP (4/17/18) at 259. A.S. lived with her father and visited her mother at Mr. Aronson's house "just about every weekend," and the visits started when she was five or six years old. 2RP (4/17/18) at 260. A.S. testified that when she visited their house when her mother was gone, Mr. Aronson had her watch porn with him and that he would pull out his penis and ask her to touch it, and that he would sometime try to get her to give him oral sex but she did not do so. 2RP at (4/17/18) at 263. She stated that while watching porn he licked her vagina. 2RP at 263. She testified that this took place in the living room, his closet next to a safe, in the garage or in his bed. 3RP (4/17/18) at 263-64. She said that this happened from the time she was six years old until she was eleven. 2RP (4/17/18) at 265-66. She stated that when she was 13 or 14, while watching television shows like Investigation Discovery about sexual assault that "stuff kind of made it click" and she realized that it was not "okay." 2RP (4/17/18) at 268, 272. A.S. said that she knew she had to tell her mother about the abuse after seeing the show, and told her mother at Thanksgiving in 2013. 2RP (4/17/18) at 275. She stated when she started to go through puberty "he would have me pull down my pants and show him my pubic hairs or he would say ["I'll give you a dollar or five dollars if you show me.["]" 2RP (4/17/18) at 270. She stated that she started puberty in the fourth or fifth grade. 2RP (4/17/18) at 270.

A.S. testified that one occasion Mr. Aronson "tried to French kiss me

right in front of my mom,” and on another occasion during a fishing trip when she was in the first or second grade, Mr. Aronson took picture of her going to the bathroom. 2RP (4/17/18) at 272. A.S. said the last abuse took place when A.S. was in the fifth grade, shortly before her mother and Mr. Aronson broke up. 2RP (4/17/18) at 272.

Mr. Aronson testified that his penis has an abnormality caused by a welding accident when he was in high school in 1977. 3RP (4/18/18) at 458. He testified that he was welding in a high school auto body shop class and sparks from an acetylene welder burned through his pants, causing a burn on his penis which later became infected, causing a cyst or lump to develop on his penis. 3RP (4/18/18) at 458. A picture of the abnormality on his penis was taken by defense investigator John Delia in a bathroom at the courthouse on the afternoon of April 17, 2019 and entered as Exhibit 5. 3RP (4/18/18) at 453-54. On rebuttal, Ms. Avant testified that Mr. Aronson’s penis did not have the abnormality depicted in the picture during the time of their relationship and that his penis looked “perfectly normal” to her at the time. 3RP (4/18/18) at 467-68:

Judith Presson, a sexual assault nurse examiner (SANE nurse) at the Sexual Assault Clinic at Providence St. Peter Hospital in Olympia, testified regarding the procedure used for evaluations at the Sexual Assault Clinic, about “grooming” behavior perpetrated by offenders, and delayed reporting. 3RP (4/18/18) at 390-94. Ms. Presson conducted a sexual assault

evaluation of A.S. following a referral by the Hoquiam Police Department. 3RP (4/18/18) at 396. She filed a report of the examination of A.S. on December 23, 2014. 3RP (4/18/18) at 395. Exhibit 6. Ms. Presson stated the information she had prior to the evaluation consisted of the following: a month before the evaluation Ms. Avant reported to the Hoquiam police that A.S. had told her that Mr. Aronson used to make her watch pornographic movies with him and touch her genital area, that he had paid her “to see her pubic hair,” and that this had started when she was seven. 3RP (4/18/18) at 397-98. Ms. Presson stated that when A.S. talked to the police, she said that Mr. Aronson said that once he put his mouth on her vagina and that he had asked her once to lick his penis and that she would not do it. 3RP (4/18/18) at 398. Ms. Presson said that A.S. told her that Mr. Aronson put his mouth on her private area one time, and that this occurred when she was seven years old. 3RP (4/18/18) at 403. She said that A.S. said that this happened “after they watched porn.” 3RP (4/18/18) at 403-04.

Ms. Presson testified that A.S. told her that she learned the term “sexual abuse” from watching television shows and from her mother and her sister. 3RP (4/18/18) at 432-33. She stated on cross-examination that girls do not typically have pubic hair at age seven. 3RP (4/18/18) at 416-17. Ms. Presson said that A.S. reported that she went into puberty at age 11 and that pubic hair can develop up a year before the onset of a menstrual cycle. 3RP (4/18/18) at 439, 440. She stated that A.S. would not have had pubic hair at

age seven. 3RP (4/18/18) at 441.

Ms. Presson said that A.S. did not want to have a genital examination. 3RP (4/18/18) at 406, 408.

a. Verdict and sentencing:

During closing argument, the State argued that Ms. Avant is:

someone who's easily swayed and manipulated by others. You could see that on the stand, right, certainly by a forceful personality. The defendant has that, defense attorney had that.

3RP (4/18/18) at 518.

Defense counsel objected and the court instructed the jury to disregard the comments. 3RP (4/18/18) at 518.

The jury found Mr. Aronson guilty of first degree rape and first degree child molestation and the aggravating factor of "ongoing pattern of sexual abuse." 3RP (4/18/18) at 560; CP 334-35, 336.

Mr. Aronson had no prior felony history. CP 385. Based on an offender score of "3," the court sentenced Mr. Aronson within the standard range to 120 months to life for Count 1 and 89 months to life for Count 2, to be served concurrently. 3RP (5/25/18) at 594; CP 384, 387.

The court imposed a \$500.00 crime victim assessment, a \$200.00 filing fee, a \$100.00 DNA collection fee, and reserved restitution. 3RP (5/25/18) at 595; CP 390. The judgment and sentence also stated that "[t]he financial obligations imposed in this judgment shall bear interest from the

date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090.” CP at 391.

Timely notice of appeal was filed May 25, 2018. CP 404. This appeal follows.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN EXCLUDING MR. ARONSON’S OUT-OF-COURT STATEMENTS IN THE CONFRONTATION CALL

The essence of Mr. Aronson’s defense was that there was no evidence to support A.S.’s allegation of sexual abuse, that A.S.’s accusation was not credible, and that he had consistently, strongly, unwaveringly and vehemently denied the allegations and that he was genuinely shocked at being accused of the offenses. 3RP (4/18/18) at 534, 536, 538, 539, 540, 541, 547.

Sgt. Krohn obtained a warrant to record a “confrontation call” made by Ms. Avant to Mr. Aronson. 2RP (7/19/17) at 229. The call was played to the jury in the first trial 2RP (7/19/17) at 233. Exhibit 1 (first trial). During the call Ms. Avant accused Mr. Aronson of sexually abusing A.S. Mr. Aronson was previously unaware of the allegation or the police investigation until receiving the call. 2RP (4/17/18) at 338. During the call, Mr. Aronson repeatedly, emphatically, vehemently denied any sexual

contact with A.S. approximately 40 times. 3RP (7/20/17) at 245-256; 2RP (4/17/18) at 342, 347.

The prosecution elected not to introduce the confrontation call during the second trial. RP (4/17/18) at 343, 344. Prior to trial, defense counsel moved for admission of the call, not to show the truth of the matters asserted but to show Mr. Aronson's state of mind at the time he was initially accused of the offenses and that it was admissible as an excited utterance. RP (4/17/18) at 342-345. Counsel argued that Sgt. Krohn should be allowed to explain to the jury what a confrontation call is, why the call was made, and the fact that the call occurred as part of the police investigation. RP (4/17/18) at 346-348. The court ruled that the call was not admissible and that no reference to the call could be made, and that reference to the call had no probative value. RP (4/17/18) at 348.

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *State v. Gunderson*, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). A decision based on an error of law is based on an untenable ground and may constitute an abuse of discretion. See *State v. Nieto*, 119 Wn. App. 157, 161, 79 P.3d 473 (2003). The trial court abuses its

discretion if it relies on unsupported facts or applies the wrong legal standard. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

a. *The confrontation call was not hearsay because it went to Mr. Aronson's state of mind.*

The trial court excluded, over defense objection, not only the confrontation call, but any reference to the fact that the call was made as part of the police investigation. RP (4/17/18) at 348; 2RP (4/17/18) at 336.

Mr. Aronson's statements during the call show his extremely strong, unwavering denial of the accusations. Exhibit 1 (first trial). 3RP (7/20/17) at 245-56. The defense offered the confrontation call as evidence of Mr. Aronson's state of mind. RP (4/17/18) at 341-42. The court concluded that the statements were inadmissible hearsay. RP (4/17/18) at 348. The court abused its discretion because hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). It is inadmissible unless an exception or exclusion applies. ER 802. One exception to the hearsay rule is the statement goes to the declarant's state of mind. ER 803(a)(3) provides:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Statements are non-hearsay admissions of a party opponent when offered against a defendant by the State (ER 801(d)(2)(i)), and therefore admissible. But the party's own out-of-court statement offered by the party itself is hearsay when offered for the truth of the matter asserted. ER 801(d)(2); *State v. King*, 71 Wash.2d 573, 577, 429 P.2d 914 (1967). Here, Mr. Aronson's state of mind following the accusation was highly probative of his defense. The statements contained in the call were not hearsay because they were not offered to prove the truth of the matters asserted. Statements not offered to prove the truth of the matter asserted, but rather as a basis for inferring something else, are not hearsay. *State v. Crowder*, 103 Wn. App. 20, 26, 11 P.3d 828 (2000).

Furthermore, "there is no 'self-serving hearsay' bar that excludes an otherwise admissible statement." *State v. Pavlik*, 165 Wn. App. 645, 651, 268 P.3d 986 (2011). There is no general rule that an out-of-court statement is inadmissible hearsay because it is self-serving. *Pavlik*, 165 Wn. App. at 653. The fact that Mr. Aronson himself made and sought to offer the statements did not convert them into hearsay.

Moreover, some of the "statements" in the confrontation call were actually questions. As noted in Tegland, "*questions*, requests, and

statements of advice” are not hearsay. 5B Karl B. Tegland, Washington Practice: Evidence Law & Practice § 801.3, At 320 (5th ed. 2007) (emphasis added). *United States v. Thomas*, 451 F.3d 543, 548 (8th Cir. 2006) (“Questions and commands generally are not intended as assertions, and therefore cannot constitute hearsay.”)

Contrary to the trial court’s conclusion, Mr. Aronson’s statements were not hearsay because it went directly to his state of mind. The confrontation call consisted largely of Mr. Aronson’s reaction to being accused of vile offenses. Exhibit 1 (first trial). Mr. Aronson’s statements demonstrated his absolute shock at being accused of the crimes. It plainly went to his state of mind. The trial court erroneously excluded Mr. Aronson’s statements in the call on the basis that they were hearsay offered for the truth of the matter asserted. Instead, Mr. Aronson’s statements were not hearsay because they demonstrated his subjective state of mind—that he was shocked to be accused and that he has consistently and vehemently asserted his innocence.

b. Mr. Aronson’s statements in the confrontation call were admissible as an excited utterance

The second hearsay exception argued by Mr. Aronson is that the statements contained in the confrontation call are admissible as an excited

utterance---“[a] statement relating 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). To qualify as an excited utterance the proponent of the statement must establish by a preponderance of the evidence that (1) a startling event occurred, (2) the declarant made the statement while under the stress of the startling event, and (3) the statement related to the startling event. *State v. Young*, 160 Wn.2d 799, 806, 161 P.3d 967 (2007); *State v. Woods*, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001); *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). The underpinning of the excited utterance rule is the idea that while under the influence of a sufficiently startling event, the declarant will lack the reflective capacity to fabricate, and thus a degree of reliability attaches to the statement. *Chapin*, 118 Wn.2d at 686. The statement need not be completely spontaneous and may be in response to a question. *Johnston v. Ohls*, 76 Wn.2d 398, 406, 457 P.2d 194 (1969).

In assessing whether a statement qualifies as an excited utterance, spontaneity is the key to the requirement that the statement was made while under the stress of excitement caused by the startling event. *Chapin*, 118 Wn.2d at 688, see also *State v. Williamson*, 100 Wn.App. 248, 258, 996 P.2d 1097 (2000). Statements are generally not considered to be spontaneous

when the declarant had the opportunity to reflect on the event and fabricate a story about it. *Id.*

A statement admissible as an excited utterance is not excluded if the declarant is available as a witness. ER 803(a). A self-serving statement is not automatically inadmissible. 5B K. Tegland, Washington Practice: Evidence Law and Practice § 803.6, at 423 (4th ed. 1999).

The confrontation call satisfies the three-part test noted above. All three requirements are met here. First, the startling event was the accusation against Mr. Aronson. Second, he was completely unaware that there was an accusation against him; it is clear that he was not told about a police investigation or that he was aware that he was a suspect until he was confronted by Ms. Avant. Finally, Mr. Aronson made the statements in direct response to the accusations made by Ms. Avant. The third requirement is met.

The trial court abused its discretion in concluding the statement did not qualify as an excited utterance and excluding it.

c. *The confrontation call was admissible under the rule of completeness*

During cross-examination Sgt. Krohn testified that he did not provide the entire statement of what Mr. Aronson told him when he arrested, but

stated that Mr. Aronson denied the allegations and that “it was one statement that he denied it.” 3RP (4/17/18) at 319. The State objected to a question whether he denied it multiple times and was sustained. 3RP (4/17/18) at 319. Defense counsel argued that under the rule of completeness he should be permitted to ask if that was the only statement that Mr. Aronson made and that the “jury should get the full picture that there was indeed more statements than just, [‘]oh, its’s crazy ex-girlfriend.[‘]” 3RP (4/17/18) at 320-21. Counsel was allowed to elicit from the witness that Ms. Avant had a pending lawsuit by Mr. Aronson and that the accusation was “for retaliation.” 3RP at (4/17/18) at 323. At the conclusion of Sgt. Krohn’s testimony, defense counsel renewed his motion for admission of the confrontation call on the basis that it was an excited utterance and that it involved statements against Mr. Aronson’s penal interest. 3RP (4/17/18) at 335-36.

A defendant has the constitutional, common law, and statutory right to present a complete defense, including the right to introduce a complete statement, when the State introduces a partial statement that excludes exculpatory information or misleads the trier of fact. A criminal defendant has the constitutional right to a meaningful opportunity to present a complete defense. U.S. Const. amends. VI, XIV; *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). A defendant must be able

to present his version of the facts, so the fact-finder can decide where the truth lies. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996); *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). An accused has the right to “present [his] version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies.” *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004) (quoting *Washington v. Texas*, 388 U.S. at 19).

Here, the trial court erroneously barred Mr. Aronson from introducing his repeated denials made to Ms. Avant during the confrontation call in order to rebut the impression left by Sgt. Krohn that his denial of the accusation was tepid and made only one time.

The rule of completeness allows relevant parts of a conversation to be admitted even when they might otherwise be subject to exclusion under another rule of evidence. In Washington, the common law rule has been partially codified in ER 106 provides, which provides:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.

Closely related to ER 106, the common-law rule of completeness “is an elementary rule of law that when admissions of one on trial for the

commission of a criminal offense are allowed in evidence against him or her, *all that he or she said in that connection must also be permitted to go to the jury*, either through cross-examination of the witness who testified to the admissions or through witnesses produced by the accused so that the accused may have the benefit of any exculpation or explanation that the whole statement may afford.” 29A Am. Jur. 2d Evidence § 772 (emphasis added); see also Karl B. Tegland, 5 Wash. Prac., Evidence Law and Practice § 106.4 (5th ed.). Washington’s version of the rule provides:

Where one party has introduced part of a conversation the opposing party is entitled to introduce the balance thereof in order to explain, modify or rebut the evidence already introduced insofar as it relates to the same subject matter and is relevant to the issue involved.

State v. West, 70 Wn.2d 751, 754-55, 424 P.2d 1014 (1967); *State v. Edwards*, 23 Wn. App. 893, 896, 600 P.2d 566 (1979).

The rule of completeness is critical in criminal cases because of the asymmetry of evidence rules pertaining to party-opponent admissions. As noted above, under ER 801(d)(2), ordinarily only the prosecution can offer a defendant’s out-of-court statements. Thus, without the rule of completeness, prosecutors would be able to pick and choose only the most damaging parts of a defendant’s conversation with police, even if the portions selected are misleading or do not paint a full picture of the facts.

Here, Sgt. Krohn testified that Mr. Aronson denial of the accusation was “one statement[,]” thereby leaving the false impression that Mr. Aronson’s denial was not made as forcefully, consistently and vehemently as it actually was in the confrontation call. Mr. Aronson should be permitted to rebut that impression with the confrontation call, although it is not a statement he made to Sgt. Krohn at the time of arrest.

d. Erroneous exclusion of the confrontation call was not harmless

The denial of the right to present a defense and the right to confront witnesses is constitutional error. *State v. McDaniel*, 83 Wn. App. 179, 187, 920 P.2d 1218 (1996), rev. denied, 131 Wn.2d 1011 (1997). “Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless.” *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). “The presumption may be overcome if and only if the reviewing court is able to express an abiding conviction, based on its independent review of the record, that the error was harmless beyond a reasonable doubt, that is, that it cannot possibly have influenced the jury adversely to the defendant and did not contribute to the verdict obtained.” *State v. Ashcraft*, 71 Wn. App. 444, 465, 859 P.2d 60 (1993). Sergeant Krohn’s testimony implied that Mr.

Aronson's denial at the time of his arrest was not forceful. Admission of the confrontation call would have shown that contrary to Sgt. Krohn's testimony, his denial was consistent and unwavering.

Mr. Aronson's surprise and shock at being accused and his powerful, prolonged, unwavering denial of wrongdoing during the call went the heart of Mr. Aronson's defense; that he is factually innocent. It cannot be said beyond a reasonable doubt the error was harmless. The case is a classic example of a case that boils down to a question of credibility. This Court cannot determine the same result would have been reached if the trial court had properly heard, and considered, evidence tending to support Mr. Aronson's believability. The trial court wrongly prevented the defense from introducing evidence that would allow the jury to fully evaluate Mr. Aronson's credibility. The denial of right to present a complete defense corrupted and distorted the fact-finding process. Reversal of the convictions is required

**2. PROSECUTORIAL MISCONDUCT DURING
CLOSING ARGUMENT DENIED MR.
ARONSON A FAIR TRIAL.**

A criminal defendant's right to due process of law ensures the right to a fair trial. U.S. Const. amend. 14; Wash. Const., art. I, § 3, 22. A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict

free from prejudice and based on reason. *State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (citing *State v. Kroll*, 87 Wn.2d 829, 835, 558 P.2d 173 (1976)); *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968).

It is serious misconduct to personally attack defense counsel, impugn counsel's character, or disparage defense lawyers as a means of convincing jurors to convict the defendant. *State v. Thorgerson*, 172 Wn.2d 438, 451, 258 P.3d 43 (2011); *State v. Negrete*, 72 Wn. App. 62, 66-67, 863 P.2d 137 (1993), review denied, 123 Wn.2d 1030, 877 P.2d 695 (1994). "Prosecutorial statements that malign defense counsel can severely damage an accused's opportunity to present his or her case and are therefore impermissible." *State v. Lindsay*, 180 Wn.2d 423, 432, 326 P.3d 125 (2014) (citing *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1983), cert. denied, 469 U.S. 920, 105 S. Ct. 302, 83 L. Ed. 2d 236 (1984)).

During closing argument, the State argued that Ms. Avant was someone who was "easily swayed and manipulated" by persons with a forceful personality, and that Mr. Aronson's defense counsel "had that." 3RP at 518. Counsel objected and the court asked the jury to disregard the comments. 3RP at 518.

As argued in Section 1 of this brief, every criminal defendant has the due process and Sixth Amendment right to present a defense. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L.Ed. 2d 636 (1986); U.S. Const. amend. VI

and XIV; Wash. Const. art. 1, §§ 3, 22. It is misconduct for a prosecutor to disparage defense counsel's integrity. *State v. Warren*, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009); *State v. Thorgerson*, 172 Wn.2d 438, 451, 258 P.3d 43 (2011); *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1983). "Prosecutorial statements that malign defense counsel can severely damage an accused's opportunity to present his or her case and are therefore impermissible." *Lindsay*, 180 Wash.2d at 432. In *Lindsay*, the court found that one statement by the prosecutor did impugn defense counsel: "This is a crock. What you've been pitched for the last four hours is a crock." *Id.*, 180 Wn.2d at 433. The *Lindsay* court analogized the statement to a similar statement found to impugn the defense counsel in *State v. Thorgerson*, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011): the prosecutor referred to defense counsel's presentation of his case as " 'bogus' " and involving " 'sleight of hand.' " *Lindsay*, 180 Wn.2d at 433.

In this case, defense counsel objected to the prosecutor's argument that counsel had a "forceful personality" that could sway or manipulate Ms. Avant's testimony. 3RP (4/18/18) at 517. When the defense objects to prosecutorial misconduct, reversal is required if there is a substantial likelihood that the misconduct affected the jury's verdict. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). There is a substantial likelihood that the State's disparagement of defense counsel, to which objection was lodged,

affected the outcome.

The State's case against Mr. Aronson was far from overwhelming; there was no physical evidence and a long delay between the alleged incidents and when the allegations were reported. A.S.'s testimony contained contradictions and was not consistent with her testimony at the first trial. The first trial resulted in a hung jury. The case was, in short, entirely a credibility contest. The question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict. *In re Glasmann*, 175 Wn. 2d 696, 711, 286 P.3d 673 (2012). Statements made during closing argument are intended to influence the jury. *State v. Reed*, 102 Wn.2d 140, 146, 684 P.2d 699 (1984). Prosecutors, in their quasi-judicial capacity, usually exercise a great deal of influence over jurors. *State v. Case*, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956). The prosecutor's disparagement of defense counsel, by conveying a message that counsel was a manipulate bully who swayed the testimony of Ms. Avant, may have goaded the jury into discounting the defense theory that the State had failed to prove its case.

3. THIS COURT SHOULD STRIKE THE FILING FEE AND INTEREST ACCRUAL PROVISION FOLLOWING RAMIREZ AND HOUSE BILL 1783

In 2018, the law on legal financial obligations changed when the legislature enacted Second Substitute House Bill (SSHB) 1783, effective June 7, 2018, which amended several statutes related to the imposition of

discretionary costs on indigent defendants and interest on such costs. See LAWS OF 2018, ch. 269. In *State v. Ramirez*, 191 Wn.2d 732, 742, 426 P.3d 714 (2018), the Supreme Court held that these amendments applied to cases that are not yet final. *Ramirez*, 191 Wn.2d at 747-50. In *Ramirez*, an appellant challenged discretionary LFOs, arguing the trial court had not engaged in an appropriate inquiry regarding his ability to pay under *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). *Rameriz*, 191 Wn.2d at 742. Because the defendant in *Ramirez* was indigent, the Supreme Court ordered the filing fee stricken. *Id.* at 748-50. Applying the change in the law, our Supreme Court in *Ramirez* ruled the trial court impermissibly imposed discretionary LFOs, including the \$200.00 filing fee. *Id.*

In this case the trial court imposed a \$200 criminal filing fee pursuant to RCW 36.18.020(2)(h). RCW 36.18.020(2)(h) states that “this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c).”

Sentencing courts are required to conduct an individualized inquiry into a defendant's ability to pay before imposing discretionary costs. *Ramirez*, 191 Wn.2d at 744; *Blazina*, 182 Wn.2d at 839. “State law requires that trial courts consider the financial resources of a defendant and the nature of the burden imposed by LFOs before ordering the defendant to pay discretionary costs.” *Ramirez*, 191 Wn.2d at 744 (citing former RCW 10.01.160 (3)(2015)); *Blazina*, *id.*

In this case, the filing fee should be stricken. The court imposed what it termed “the mandatory obligations of \$200 filing fee, \$500 crime victim assessment, \$100 DNA collection fee[.]” 3RP (5/25/18) at 595. The court made no inquiry into Mr. Aronson’s ability to pay. 3RP (5/25/18) at 595. The record shows, however, that Mr. Aronson is indigent and that he qualified for court appointed trial and appellate counsel. CP 410-11.

RCW 36.18.020(2)(h) now provides: “Upon conviction or plea of guilty, ... an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c).” As in *Ramirez*, the change in the law applies to this case as it is on direct appeal and not final. Therefore, in accordance with the statutory amendment and *Ramirez*, this Court should reverse the imposition of the filing fee LFO, and remand to the trial court for individualized inquiry into his ability to pay and to impose LFOs consistent with the recent amendments and holding in *Ramirez*. On remand, the trial court should strike the \$200 criminal filing fee if Mr. Aronson remains indigent as defined in RCW 10.101.010(3)(a) through (c).

Mr. Aronson also challenges the interest accrual on non-restitution LFOs assessed in Section 4.3 of the judgment and sentence. CP 391. The 2018 legislation eliminated the accrual of interest on non-restitution LFOs. The judgment and sentence stated that financial obligations imposed by it shall bear interest from the date of the judgment until payment in full at the rate

applicable to civil judgments. CP 391. Section 5(b) of the 2018 legislation states that as of its effective date “penalties, fines, bail forfeitures, fees, and costs imposed against a defendant in a criminal proceeding shall not accrue interest.” The recently amended RCW 10.82.090 eliminates any interest accrual on non-restitution LFOs as of June 7, 2018. LAWS OF 2018, ch. 269, § 1. Therefore the provision in the judgment and sentence pertaining to non-restitution LFOs should be stricken.

E. CONCLUSION

The reasons stated, Ken Aronson respectfully asks the Court to reverse his convictions and grant him a new trial.

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In the alternative, Mr. Aronson is indigent. Recent amendments to the LFO statute apply retroactively to prohibit the imposition of discretionary costs. Moreover, the sentencing court failed to conduct an adequate *Blazina* inquiry. Mr. Aronson is also entitled to relief from the statutory changes of House Bill 1783. This matter should be remanded to the sentencing court to strike the interest accrual provision to the extent it applies to non-restitution LFOs. Mr. Aronson respectfully requests this Court remand to the sentencing court with instructions to strike the criminal filing fee and interest accrual provision.

DATED: April 4, 2019.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
ptiller@tillerlaw.com
Of Attorneys for Kenneth Aronson

CERTIFICATE OF SERVICE

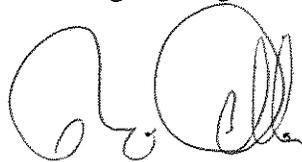
The undersigned certifies that on April 4, 2019, that this Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Joseph Jackson Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, to the following:

Katherine Lee Svoboda
Deputy Prosecuting Attorney
Grays Harbor County Prosecutor's Office
102 West Broadway, Room 102
Montesano, WA 98563

Mr. Derek M. Byrne
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

Mr. Kenneth Aronson
DOC # 407365
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326
LEGAL MAIL/SPECIAL MAIL

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on April 4, 2019.



PETER B. TILLER

THE TILLER LAW FIRM

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Appellate Court Case Number: 51958-5
Appellate Court Case Title: State of Washington, Respondent v. Kenneth Aronson, Appellant
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