

FILED  
Court of Appeals  
Division II  
State of Washington  
7/15/2019 12:29 PM  
NO. 51958-5-II

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

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STATE OF WASHINGTON,  
Respondent,

v.

KENNETH ROBERT ARONSON,  
Appellant.

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

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THE HONORABLE RAY KAHLER, JUDGE

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BRIEF OF RESPONDENT

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## **RESPONSE TO ASSIGNMENTS OF ERROR**

### **Confrontation Call Argument**

### **Prosecutorial Misconduct Argument**

### **Legal Financial Obligations Argument**

## **RESPONDENT'S COUNTER STATEMENT OF THE CASE**

On April 17, 2018, a re-trial following a hung jury commenced before the Honorable Judge Ray Kahler with David Mistachkin as the Appellant's retained counsel. The parties began the trial by going over the motions in limine, including a motion under State's motion in limine eleven, which pertained to the use of the confrontation call. RP Vol. IV at 341-349. Defense counsel specifically argued the same arguments being proposed by the Appellant again – that the confrontation call should be an exception to the hearsay rule as to his state of mind, against interest, or as an excited utterance. *Id.* at 345. The trial court heard argument from both parties and excluded the confrontation call since the State was not intending to use the statement as a statement of party opponent. The trial court declined to find that there was otherwise an exception as argued by defense counsel.

In closing, the State went through the dynamics of the relationship between the Appellant and the victim's mother and the various incidents that the mother was aware of between the Appellant and her daughter that were presented during the trial. RP Vol. 3 at 516-518. This included the risk factors presented through expert testimony - that the mother was a single mom, recently separated from her husband, divorced during the relationship, being financial unstable and dependent on the Appellant, the Appellant's control over the house, and that her life was essentially in chaos. *Id.* at 516-517. The State further addressed the fact that the mother was not the type of person who was going to rock the boat or who would push any issues when they came up, which was discussed during her testimony. *Id.* at 517. The State went on to talk about the incidents she was aware of that she probably should have taken more notice of, done something different about, even though those things were not illegal, such as the Appellant taking a picture of her daughter peeing in the woods and the Appellant french kissing her daughter. *Id.*

The State argued that while the mother knew those actions were inappropriate and addressed the actions with the Appellant, she simply

didn't have the type of personality that allowed her to take charge of the situation any more than what she had done in telling him not to. RP Vol. 3 at 517. The State argued that this was exactly the type of situation and type of mother that people like the Appellant seek out in order to gain access their children. *Id.* A mom who is easily swayed and manipulated by others, which the State argued could be seen on the stand by a forceful personality and that the Appellant had that, the defense attorney had that. *Id.* at 517-518. At that time, defense counsel objected and then proceeded to make a speaking objection, stating that the State's argument was an improper comment on counsel performance and assumed facts not in evidence as to the defendant, stating that it was an improper character attack of the defendant and defense counsel. *Id.* at 518. The trial court sustained the objection and instructed the jury to disregard the comments. *Id.* The State moved on and continued to argue to the jury that, while the mother wasn't perfect, that she put things together after the fact, and she now wishes she done things differently, she handled things as best she could at the time. *Id.* at 518-519. The State pointed out that despite her imperfections, the mother was not on trial, but rather the Appellant was and that it was his actions that the jury needed to focus on. *Id.* at 519.

The State further argued that the Appellant was the victim's caregiver under the circumstances, that he was left alone with her as a non-relative caregiver, and pointed out grooming techniques utilized by the Appellant as testified to by the expert. RP Vol. 3 at 519-521. The State went through the grooming process, how it started out small and relatively innocent and progressed into full-blown sexual abuse as she aged and the sexualized-behavior was normalized. *Id.* at 519-520. The State talked about delayed disclosure, again based on the expert's testimony, and how children, including the victim, are taught to listen to adults, follow their rules, do as they say, which is used in the sexual abuse process. *Id.* at 521-522. The State pointed out key points in the victim's testimony and how that was reflected in the expert's testimony about the behavior of children who are sexually abused. *Id.* at 522-524. The State pointed out how the behaviors of children who are sexually abused are not intuitive and explained why the victim delayed in report and took so many years to tell her mother the entirety of what had happened to her, which was all based on the victim's, the mother's, and the expert's testimony in trial. *Id.*

## ARGUMENT

### 1. **Confrontation Call Argument**

Under ER 801(d)(2), a defendant's statements are non-hearsay admissions of a party opponent when offered against him by the State. *State v. Sanchez-Guillen*, 135 Wash.App. 636, 645, 145 P.3d 406 (2006). 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. *Id.* (citing ER 801(d)(2); *State v. King*, 71 Wash.2d 573, 577, 429 P.2d 914 (1967)). The statements made by the Appellant in the confrontation call were statements of a party opponent. If the State did not offer those statements, the Appellant cannot then, in turn, use those statements, making an end-run around the exception for his own benefit.

#### a. State of Mind Argument

The trial counsel in *State v. Sanchez-Guillen* attempted this same argument, asking the court in that case to admit his statements to law enforcement under the hearsay exception for statements, both against penial interested under ER 804(b)(3) and to show the declarant's then-existing statement of mind under ER 803(a)(3). The Court of Appeals found that neither of those exceptions applied. *Sanchez-Guillen*, 135

Wash.App. at 645. The Court of Appeals specifically stated that a statement against interest is admissible under this hearsay exception if the declarant is unavailable. *Id.* at 646. But that a declarant is not “unavailable” for hearsay purposes if the proponent of the evidence, in that case being Mr. Sanchez-Guillen, has asserted a privilege to keep the declarant from testifying. *Id.* Mr. Sanchez-Guillen was unavailable to testify solely because he exercised his constitutional privilege against self-incrimination, which did not satisfy the prerequisites for admission. *Id.* In the case at hand, the Appellant testified, therefore, he was similarly not “unavailable” and therefore, the argument fails.

Statements admitted under the exception for expressions of the declarant’s then-existing state of mind are admissible without regard to the declarant’s availability. *Sanchez-Guillen*, 135 Wash.App. at 646. However, “then” in the term “then-existing” refers to the time the statement was made, not the earlier time the statement describes. *Id.* (citing *State v. Ammlung*, 31 Wash.App. 696, 703, 644 P.2d 717 (1982)). Like the Appellant in his confrontation call, Mr. Sanchez-Guillen offered his later statements to the investigating officer to prove his state of mind on the night of the crime, but his state of mind at the time of his arrest was not at issue. Similarly, the Appellant’s state of mind at the time of the

confrontation call about events that had occurred years earlier are not at issue and his state of mind at that time during the call is not relevant. Therefore, the trial court properly excluded the confrontation call.

b. Excited Utterance Argument

An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement cause by the event or conditions. ER 803(a)(2). 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 Wash.2d 401, 416, 832 P.2d 78 (1992) (citing *Johnston v. Ohls*, 76 Wash.2d 398, 406, 457 P.2d 194 (1969)). Generally, the case law on the subject addresses the excited utterance of a witness and/or victim, not a defendant, but nonetheless the analysis is the same. The key to the rule is spontaneity. *State v. Dixon*, 37 Wash. App. 867, 684 P.2d 725 (1984).

For example, in *State v. Ross*, the appellant court found that statements by a witness during a 911 call were excited utterances in an assault case, noting that the witness was “crying and agitated” throughout the conversation and that the call was made “contemporaneously with the

shooting or shortly thereafter.” *State v. Ross*, 42 Wash.App. 806, 714 P.2d 703 (1986). Verses *State v. Sellers*, in which a detailed description of the alleged incident by the defendant’s 8-year-old son, made to officers at the police station, was inadmissible as an excited utterance because “[a] declarant who is able to give a detailed and complete description of an event is giving a narrative of a past completed affairs. This suggests he has had time to collect his thoughts and fabricate, if that suits his purpose...” *State v. Sellers*, 39 Wash.App. 799, 695 P.2d 1014 (1985).

Here, there is nothing about the circumstances of the Appellant’s statements in a confrontation call that supports that he was under the influence of “startling event or condition” at all or that he was so much under the influence of that event that his statements could not be the result of fabrications, intervening actions, or the exercise of choice or judgment. The Appellant was being questioned by his ex-girlfriend about alleged sexual contact that had occurred between him and his ex-girlfriend’s child years earlier over the phone. While it could be argued that having a person accuse you of such actions could be initially startling, that is not the type of event that is addressed by this exception. The Appellant was talking to the girl’s mother about past events and denying that they had occurred. He wasn’t overly emotional and primarily wanted to talk to his

ex-girlfriend about the damage she had allegedly done to his place when the family moved out of his rental property. Therefore, the Appellant's argument again fails.

c. Rule of Completeness Argument

Even just utilizing the Appellant's argument alone, this argument fails. The statements made to Barbara Avant in the confrontation call are not related to any statements he made to Sergeant Krohn. The State made no offer of the confrontation call, not in part or in whole, therefore any testimony by Sergeant Krohn about statements the Appellant made to him are not related or relevant to an argument that the rule of completeness requires the admission of the confrontation call.

**2. Prosecutorial Misconduct Argument**

Among the grounds for granting a new trial under CrR 7.5(a) is “[m]isconduct of the prosecution or jury.” *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006); CrR 7.5(a)(2). When deciding a motion for a new trial based on claims of prosecutorial misconduct, the trial court applies the same standard as an appellate court reviewing such claims. A defendant claiming prosecutorial misconduct “bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect.” *Id.* (citing *State v. Brown*, 132 Wash.2d 529,

561, 940 P.2d 546 (1997)). Comments will be deemed prejudicial only where “there is a *substantial likelihood* the misconduct affected the jury’s verdict.” *Id.* (emphasis added). The prejudicial effect of a prosecutor’s improper comments is not determined by looking at the comments in isolation but by placing the remarks “in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” *Id.* Where the defense fails to object to an improper comment, the error is considered waived “unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” *Id.*

Here, defense counsel objected to the comment by the State, which indicated that both the Appellant and his counsel have forceful personalities. Defense made a speaking objection, actually drawing even more attention to the comment, and the trial court sustained the objection and asked the jury to disregard. While the Appellant now compares the State’s comment to conduct in *Thorgerson* and *Lindsay*, in which the State accused defense of presenting a “bogus” and “slight of hand” case and of pitching crock for four hours, there is nothing similar in what occurred in this case. See *State v. Thorgerson*, 172 Wn.2d 438, 258 P.3d 43 (2011);

*State v. Lindsay*, 180 Wn.2d 423, 326 P.3d 125 (2014). The State did not disparage defense counsel's integrity as the cited case law requires nor did the State damage the accused's opportunity to present his case. The objection was made and the issue was addressed with a curative instruction by the trial court. There is nothing about the State's comment or the trial court's actions that would have affected the outcome of the verdict, particularly in light of the evidence presented at trial and the overall content of the State's closing arguments addressing that evidence.

### **3. Legal Financial Obligations Argument**

Based on similar circumstances in this case as the State has had in previous cases before this court, the State concedes that the discretionary legal financial obligations and interest accrual imposed at sentencing may be stricken despite the Defendant not being found indigent and having private counsel.

At the time the fines and fees were assessed in this case, the *Ramirez* case was not being applied to indigent cases, which effectively eliminated fees such as the criminal filing fee and the DNA collection fee for indigent defendants. *State v. Ramirez*, \_\_ Wn.2d \_\_, \_\_ P.3d \_\_, 2018 WL 4499761 (Sept. 20, 2018). Even though the Appellant was not and is not indigent, this court has previously ordered all financial obligations

stricken with similarly-situated appellants, therefore, the State sees no reason to argue this point before the court in this case.

**CONCLUSION**

Based on the above-cited case law and arguments, the State respectfully requests, with the exception of the legal financial obligation argument, that the court find for the State and hold that the Appellant's conviction stands.

DATED this 14<sup>th</sup> day of July, 2019.

Respectfully Submitted,



BY: \_\_\_\_\_  
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**July 15, 2019 - 12:29 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51958-5  
**Appellate Court Case Title:** State of Washington, Respondent v. Kenneth Aronson, Appellant  
**Superior Court Case Number:** 15-1-00192-5

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