

FILED  
Court of Appeals  
Division II  
State of Washington  
4/30/2019 3:53 PM

NO. 52479-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JACOB DUENAS,  
Appellant.

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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

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BRIEF OF APPELLANT

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## **ISSUES AND ASSIGNMENTS OF ERROR**

1. Mr. Duenas's conviction for criminal attempt was entered beyond the period permitted by the statute of limitations.
2. Mr. Duenas's conviction for criminal attempt was entered beyond the period permitted by RCW 9A.04.080(1)(i).

**ISSUE 1:** The statute of limitations for felonies is three years, with a few enumerated exceptions. Did the trial court err by entering Mr. Duenas's conviction for criminal attempt eighteen years after the alleged offense, when criminal attempt is not one of the enumerated exceptions to the three-year statute of limitations?

3. The trial court violated Mr. Duenas's Sixth and Fourteenth Amendment right to counsel by unreasonably limiting the scope of his attorney's closing argument.
4. The trial court violated Mr. Duenas's article I, section 22 right to counsel by unreasonably limiting the scope of his attorney's closing argument.
5. The trial court violated Mr. Duenas's Fourteenth Amendment right to due process by unreasonably limiting the scope of his attorney's closing argument.
6. The trial court violated Mr. Duenas's article I, section 3 right to due process by unreasonably limiting the scope of his attorney's closing argument.

**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?

7. The trial court violated Mr. Duenas's Sixth and Fourteenth Amendment right to present a defense by prohibiting him from presenting evidence critical to his defense.

8. The trial court violated Mr. Duenas's article I, section 3 right to present a defense by prohibiting him from presenting evidence critical to his defense.
9. The trial court violated Mr. Duenas's article I, section 22 right to present a defense by prohibiting him from presenting evidence critical to his defense.
10. The trial court erred by excluding evidence that Mr. Duenas's cousin wore a uniform that resembled a law enforcement uniform at the time of the alleged abuse.

**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?

11. Prosecutorial misconduct violated Mr. Duenas's Sixth and Fourteenth Amendment right to a fair trial.
12. Prosecutorial misconduct violated Mr. Duenas's article I, section 22 right to a fair trial.
13. Mr. Duenas was prejudiced by the prosecutorial misconduct at his trial.
14. The prosecutor committed misconduct by providing a personal opinion of Mr. Duenas's credibility to the jury.

**ISSUE 4:** A prosecutor commits misconduct by providing a personal opinion of the veracity of the accused. Did the prosecutor commit misconduct at Mr. Duenas's trial by arguing to the jury that Mr. Duenas "took the stand and he lied"?

15. The prosecutor committed misconduct by mischaracterizing the state's burden of proof to the jury.
16. The prosecutor committed misconduct by providing the jury with a "false choice."

**ISSUE 5:** A prosecutor commits misconduct by providing the jury with a “false choice” between conviction on one hand and concluding that the alleged victim is lying or mistaken on the other hand. Did the prosecutor commit misconduct at Mr. Duenas’s trial by providing the jury with that type of false choice?

17. The prosecutor committed misconduct by appealing to the jury’s passion and prejudice.
18. The prosecutor’s misconduct was flagrant and ill-intentioned.

**ISSUE 6:** A prosecutor commits misconduct by appealing to the jury’s passion and prejudice. Did the prosecutor commit misconduct at Mr. Duenas’s trial by focusing the jury on the alleged victim’s testimony that sexual abuse had “kill[ed] [his] soul, ... left him feeling helpless, soulless, ... and no longer innocent”?

19. The cumulative effect of the prosecutorial misconduct at Mr. Duenas’s trial deprived him of a fair trial.

**ISSUE 7:** The cumulative effect of repeated instances of prosecutorial misconduct can require reversal even if each individual instance, standing alone, would not. Did the cumulative effect of the pervasive prosecutorial misconduct at Mr. Duenas’s trial violate his right to a fair trial?

20. The trial court abused its discretion by admitting T.M.’s hearsay statements to his brother as excited utterances.
21. T.M.’s hearsay statements to his brother were not admissible under ER 803(a)(2).
22. Mr. Duenas was prejudiced by the improper admission of T.M.’s hearsay statements to his brother.

**ISSUE 8:** Hearsay statements are admissible as excited utterances if the declarant makes them while “under the stress of excitement” caused by some startling event. Did the trial court err by admitting T.M.’s disclosures to his brother as excited utterances when they were not made until four years after the alleged startling event?

23. The cumulative effect of the errors at Mr. Duenas's trial deprived him of his Sixth and Fourteenth Amendment right to a fair trial.
24. The cumulative effect of the errors at trial requires reversal of Mr. Duenas's convictions.

**ISSUE 9:** 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?

25. The trial court exceeded its authority by ordering Mr. Duenas to pay a criminal filing fee.
26. The trial court violated RCW 36.18.020(2)(h) by ordering Mr. Duenas to pay a criminal filing fee.

**ISSUE 10:** RCW 36.18.020(2)(h) prohibits a court from ordering an indigent criminal defendant to pay a criminal filing fee. Did the trial court err by ordering Mr. Duenas to pay that fee while also finding him indigent?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

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<sup>1</sup>. 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.

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.

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

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 also 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 said 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 FriebeI all testified that FriebeI 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 argued that Mr. Duenas was the one who abused T.M. because

... it's pretty clear that [T.M.] didn't know his name, didn't remember his name from four years before. How did he describe him? The guy staying at grandpa's house who wanted to be a cop. That's pretty specific. And there is only one person who fits that description and he's sitting right there.  
RP 590.

The prosecutor repeated that theme throughout her closing argument. *See* RP 591, 620-21 (“The only person who possibly could have done this is sitting right there. There's nobody else. There is nobody else that was studying to be a cop”).

The prosecutor told the jury that Mr. Duenas “took the stand and he lied” when he testified that he had not been studying to be a police officer during the summer of 2000. RP 595. The court overruled Mr. Duenas’s objection to that argument. RP 595, 599.

The prosecutor also told the jury that they were “left with... three possibilities”: (1) that T.M. was “making it up,” (2) that T.M. was mistaken about the identity of his abuser, or (3) that “he’s telling the truth.” RP 585.

The prosecutor focused the jury on T.M.’s testimony that the abuse had “killed his soul” and left him feeling “helpless, soulless,... no longer innocent.” RP 585. The court overruled Mr. Duenas’s objection to that line of argument as well. RP 585.

The jury found Mr. Duenas guilty of each charge. CP 134-38. The trial court entered convictions for all five counts. CP 182-98.

The court sentenced Mr. Duenas to the high end of the standard range. CP 186. The court found Mr. Duenas indigent at the end of

proceedings but also ordered him to pay the \$200 criminal filing fee. CP 186, 204-05.

This timely appeal follows. CP 203.

### **ARGUMENT**

**I. COUNT III, CHARGING MR. DUENAS WITH CRIMINAL ATTEMPT, WAS BARRED BY THE STATUTE OF LIMITATIONS.**

Mr. Duenas was not charged until more than seventeen years after the alleged offenses had taken place. *See* CP 61-63. Typically, the statute of limitations for felonies is three years. RCW 9A.04.080(1)(i). But the legislature has created exceptions for certain sex offenses. *See* Former RCW 9A.04.080(1)(c).

Count III, however, charged Mr. Duenas with criminal attempt, not with one of the sex offenses exempt from the three-year statute of limitations. CP 62. Accordingly, the limitations period for Count III expired three years after the alleged incidents and the court had no authority to enter a conviction for that charge. *See State v. Peltier*, 181 Wn.2d 290, 297, 332 P.3d 457 (2014). Mr. Duenas's conviction for criminal attempt in Count III must be vacated. *Id.*

A statute of limitation protects accused persons "from having to defend themselves against charges when the basic facts may have become obscured by the passage of time " *Toussie v. United States*, 397 U.S. 112,

114, 90 S. Ct. 858, 25 L. Ed. 2d 156 (1970). Criminal limitations statutes, therefore, are "to be liberally interpreted in favor of repose." *United States v. Habig*, 390 U.S. 222, 227, 88 S. Ct. 926, 19 L. Ed. 2d 1055 (1968).

While not exactly jurisdictional, the expiration of a criminal statute of limitation "deprives a court of authority to enter judgment," thereby effecting "the authority of a court to sentence a defendant for a crime." *Peltier*, 181 Wn.2d at 297.

RCW 9A.04.080(1)(i) generally sets a three-year statute of limitation for felonies, with certain specified exceptions. RCW 9A.04.080(1)(i) ("no other felony may be prosecuted more than three years after its commission").

At the time of allegation against Mr. Duenas, RCW 9A.04.080(1) contained a longer statute of limitation for certain specified sex offenses, allowing prosecution for those offenses "not...more than three years after the victim's eighteenth birthday or more than seven years after their commission, whichever is later." Former RCW 9A.04.080(1)(c) (1998).

In 2009, the limitations period for specified sex offenses was amended to allow prosecution up to the alleged victim's 28th birthday and, in 2013, the limitations period was extended again to the alleged victim's 30<sup>th</sup> birthday. Laws of 2009, ch. 61, § 1; Laws of 2013, ch. 17, § 1. The 2009 amendments further added several new crimes to the list of covered

offenses included in the expanded statute of limitation. Laws of 2009, ch. 61, § 1.

But *attempted* rape of a child has never been on the list of offenses subject to a longer statute of limitation in any of the relevant versions of RCW 9A.04.080.

Criminal attempt is a separate offense from a completed crime and is charged under a separate statutory provision governing "anticipatory offenses." RCW 9A.28.020.

At the time of the Mr. Duenas's alleged offenses, the offense of criminal attempt was defined as follows:

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he does any act which is a substantial step toward the commission of that crime.

Former RCW 9A.28.020 (1994). Notably, a conviction for criminal attempt does not require evidence of the type of harm that typically results from the completed crime. *See State v. Luther*, 157 Wn.2d 63, 74, 134 P.3d 205, 211 (2006).

An attempt to commit an offense is "a distinct crime with distinct penalties" from the completed offense. *State v. Freeman*, 124 Wn. App. 413, 415-16, 101 P.3d 878 (2004). This is because "[a]ll that is required in an attempted crime is that the accused take a substantial step toward the commission of a particular crime." *Id.* Accordingly, a conviction for

attempt to commit a crime is not the same as a conviction for actual commission of that crime. *Id.*

As such, the *Freeman* court held that a conviction for attempted harassment did not require an offender to submit a DNA sample, even though a conviction for harassment would have so required. *Id.*

The *Freeman* court explained its holding by reference to basic principles of statutory construction:

When statutory language is unambiguous, the court will look only to that language to determine legislative intent. The court cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language. The court should assume that the legislature means exactly what it says. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). Statutory language is unambiguous when it is not susceptible to two or more interpretations. *Delgado*, 148 Wn.2d at 726.

*Freeman*, 124 Wn. App. at 415. *See also State v. Hale*, 65 Wn. App. 752, 757-58, 829 P.2d 802 (1992) (mandatory minimum for first degree murder did not apply to attempted first degree murder).

The *Freeman* court ruled that omission of the crime of attempt from the list of crimes in the DNA statute was not a “mere oversight” because the legislature had explicitly included attempt in other contexts, such as when delineating categories of crimes for sentencing purposes. *Id.* at 416-17.

This reasoning applies with equal force to the statute of limitations issue in Mr. Duenas’s case. In Count III of the Amended Information, the State charged Mr. Duenas with criminal attempt - not with rape of a child. While the legislature, at various times, changed RCW 9A.04.080, adding crimes to the section that allows for prosecution years after the alleged offense, the legislature did not add to the statute *an attempt* to commit one of the enumerated crimes in RCW 9A.04.080(l)(c).

Like in *Freeman*, this legislative omission cannot be treated as a “mere oversight” because the legislature has demonstrated its ability to include criminal attempt in lists of enumerated offenses when it so desires. *Freeman*, 124 Wn. App. at 416–17. Given the policy of construing such statutes in favor of repose, it is apparent that a charge of attempted first degree rape of a child, charged under RCW 9A.28.020, is subject only to the three-year statute of limitation set out in RCW 9A.04.080(l)(i).

In Mr. Duenas’s case, the statute of limitations for the criminal attempt charge expired in 2003, more than a decade before filing of either the Information or the Amended Information. Count III was time-barred and the trial court did not have authority to enter judgment against Mr. Duenas for that charge. RCW 9A.04.080(l)(i); *Peltier*, 181 Wn.2d at 297. Mr. Duenas’s conviction for Count III must be vacated. *Id.*

**II. THE TRIAL COURT VIOLATED MR. DUENAS’S CONSTITUTIONAL RIGHTS TO DUE PROCESS, TO COUNSEL, AND TO PRESENT A DEFENSE BY PROHIBITING HIM FROM PRESENTING EVIDENCE OR EVEN ARGUING THAT FRIEBEL COULD HAVE BEEN THE ONE WHO ABUSED T.M.**

- A. The trial court violated Mr. Duenas’s constitutional rights to counsel and to due process by prohibiting him from arguing that Friebel – who was studying to be a firefighter at the time of the alleged abuse – could have been the one who committed the offenses against T.M.

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 to enter 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 77-82. But the trial court prohibited him from making that argument. RP 457. The court would not even permit defense counsel to mention during closing argument 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)); *See also State v. Osman*, 192 Wn. App. 355, 368–69, 366 P.3d 956, 963 (2016); U.S. Const. Amend. VI, XIV.

The right to present a closing argument in one's defense is also protected by due process. *Osman*, 192 Wn. App. at 368 (*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.<sup>2</sup>

A trial court violates these constitutional rights by improperly limiting the scope of defense closing argument. *Ortuno-Perez*, 196 Wn.

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

App. at 798. This is because closing argument is the accused's "last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." *Id.* at 799 (citing *State v. Perez–Cervantes*, 141 Wash.2d 468, 474, 6 P.3d 1160 (2000)).

Accordingly, it 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. *Ortuno-Perez*, 196 Wn. App. at 799.

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.*

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.*

The trial court violated Mr. Duenas's Sixth and Fourteenth Amendment rights by prohibiting him from arguing a reasonable inference from the evidence – that Friebel could have been the person who abused T.M. *Ortuno-Perez*, 196 Wn. App. at 799. Mr. Duenas's convictions must be reversed. *Id.*

B. The 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 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."

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.

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. 6, 14; 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) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); *Rock v. Arkansas*, 483 U.S. 44, 56-58, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)).

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:

[T]he trial court should admit probative evidence [offered by the defense], even if it is suspect. In this manner, the jury will retain its role as the trier of fact, and *it* will determine whether the evidence is weak or false.

*State v. Duarte Vela*, 200 Wn. App. 306, 321, 402 P.3d 281 (2017)

(emphasis in original).

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)).<sup>3</sup> Violation of the right to present a defense requires reversal unless the state can establish harmlessness beyond a reasonable doubt. *State v. Franklin*, 180 Wn.2d 371, 382, 325 P.3d 159 (2014).

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 State v. Ortuno-Perez*, 196 Wn. App. 771,

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<sup>3</sup> 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). But “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.* (citing *Jones I*, 168 Wn.2d at 720).

782, 385 P.3d 218 (2016). Rather, the analysis for the admissibility of “other suspect” evidence:

involves a straightforward, but focused, relevance inquiry, reviewing the evidence's materiality and probative value for ‘whether the evidence has a logical connection to the crime.’

*Ortuno-Perez*, 196 Wn. App. at 783 (citing *Franklin*, 180 Wn.2d at 381-82; *Holmes*, 547 U.S. at 330).

“All relevant evidence is admissible” unless barred by the constitution, the rules of evidence, or other applicable rules. ER 402; *State 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 (quoting *State v. Sargent*, 40 Wash.App. 340, 348 n.3, 698 P.2d 598 (1985)).

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: a blue uniform with a badge on it. 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.

The evidence was relevant and material to Mr. Duenas’s theory of defense. The state had no compelling interest in preventing Mr. Duenas from asking Friebel (whom the state had called as a witness) one additional question about the nature of his uniform. The trial court violated Mr. Duenas’s right to present a defense by prohibiting him from asking

that question of Friebe. *Ortuno-Perez*, 196 Wn. App. at 784; *Darden*, 145 Wn.2d at 622.

The prosecution bears the burden of proving the violation of Mr. Duenas's right to present a defense is harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382. This harmless error analysis does not simply weigh the evidence offered by the prosecution at the flawed trial, but rather must examine whether, had the defense been allowed to challenge the State's case and present the defense he sought, it might have affected the jury's deliberations. *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *State v. Jasper*, 174 Wn.2d 96, 117, 271 P.3d 876 (2012). Improper exclusion of evidence requires reversal when "[g]iven the other proof issues in the case, this additional evidence could have raised enough reasonable doubt to cause the jury to reach a different result." *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 303–04, 359 P.3d 919 (2015).

As noted, the state relied heavily on the idea that Mr. Duenas was *the only one* who met T.M.'s description of someone studying to enter law enforcement. RP 590-91, 620-21. The evidence regarding Friebe's uniform was critical to Mr. Duenas's ability to challenge that theory.

Given T.M.'s other significant memory lapses regarding the events surrounding the alleged abuse, the state cannot prove beyond a reasonable

doubt that the jury would have reached the same result at Mr. Duenas's trial absent this constitutional error. *Id.*

The trial court violated Mr. Duenas's constitutional right to present a defense by prohibiting him from presenting relevant evidence, which was essential to his defense. *Ortuno-Perez*, 196 Wn. App. at 784; *Darden*, 145 Wn.2d at 622. Mr. Duenas's convictions must be reversed. *Id.*

### **III. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT DEPRIVED MR. DUENAS OF A FAIR TRIAL.**

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Even absent objection, reversal is required when misconduct is "so flagrant and ill-intentioned that an instruction would not have cured the prejudice." *Glasmann*, 175 Wn.2d at 704.

Prosecutorial misconduct during closing argument can be particularly prejudicial because of the risk that the jury will lend it special weight “not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.” Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

The prosecutor committed misconduct at Mr. Duenas's trial by providing a personal opinion of Mr. Duenas's veracity, mischaracterizing the state's burden of proof by presenting the jury with a “false choice,” and appealing to the jury's passion and prejudice.

- A. The prosecutor committed misconduct by providing a personal opinion that Mr. Duenas had “lied” on the stand.

Over Mr. Duenas's objection, the trial court permitted the prosecutor to argue during closing that Mr. Duenas “took the stand and he lied.” RP 595; *See also* RP 598-99. This argument constituted an improper opinion of Mr. Duenas's veracity.

A prosecutor commits misconduct by providing his/her personal opinion of the guilt or credibility of the accused to the jury. *State v. Lindsay*, 180 Wn.2d 423, 438, 326 P.3d 125 (2014); *State v. Walker*, 182 Wn.2d 463, 478, 341 P.3d 976 (2015); *Glasmann*, 175 Wn.2d at 706; *See*

also RPC 3.4(e). Argument that the accused is lying constitutes an improper prosecutorial opinion of credibility. *Lindsay*, 180 Wn.2d at 438.

At Mr. Duenas's trial, the prosecutor explicitly told the jury that Mr. Duenas had "[taken] the stand and lied." RP 595. The trial court permitted that opinion of Mr. Duenas's credibility even over his objection. RP 595-96. The court permitted the prosecutor to commit misconduct at Mr. Duenas's trial. RP 595-96.

The prosecutor committed prejudicial misconduct by providing a personal opinion of Mr. Duenas's credibility to the jury. *Lindsay*, 180 Wn.2d at 438. Mr. Duenas's convictions must be reversed. *Id.*

- B. The prosecutor committed misconduct and mischaracterized the state's burden of proof by providing the jury with a "false choice" between convicting Mr. Duenas or concluding that T.M. was lying or mistaken.

The prosecutor told the jury during closing argument that:

So what you're left with is essentially three possibilities here. That [T.M. is] making it up, that he's mistaken as to the identity of his abuser or that he's telling the truth.  
RP 585.

The prosecutor then asked the jury:

Do you think he's really going to make this up and keep this charade going up and fly up here to Washington from California, swear an oath to tell the truth and then perjure himself?  
RP 586.

This argument was improper because it mischaracterized the state's burden of proof and presented the jury with a "false choice" between convicting Mr. Duenas on the one hand or finding that T.M. was lying or mistaken on the other hand.

A jury is not required to find that the state's witnesses are lying or mistaken in order to acquit an accused person of criminal charges. *State v. Miles*, 139 Wn. App. 879, 889–90, 162 P.3d 1169 (2007). Rather, the jury is *required* to acquit *unless* it finds that the state has proved each element beyond a reasonable doubt. *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996) ("if the jury were unsure whether D.S. was telling the truth, or unsure of her ability to accurately recall and recount what happened in light of her level of intoxication on the night in question, it was required to acquit. In neither of these instances would the jury also have to find that D.S. was lying or mistaken, in order to acquit").

A prosecutor commits misconduct and impermissibly mischaracterizes the state's burden of proof by obfuscating this concept during closing argument – presenting the jury with a false choice between (a) finding that the state's witnesses are lying or mistaken vs. (b) convicting the defendant. *Miles*, 139 Wn. App. at 889–90; *Fleming*, 83 Wn. App. at 213.

That is exactly what the prosecutor did at Mr. Duenas's trial. *See* RP 585-86, 596. The prosecutor's closing argument revolved around the theory that the jury was presented with "three possibilities:" "That [T.M. is] making it up, that he's mistaken as to the identity of his abuser or that he's telling the truth." RP 585. The prosecutor spent the rest of her closing arguing that the only logical conclusion was that T.M. was telling the truth and that conviction was required. *See e.g.* RP 586.

But the proper inquiry for the jury was not whether T.M. was telling the truth or lying; it was whether the state had proved each element of each charge beyond a reasonable doubt. *Id.* The prosecutor committed misconduct by presenting the jury with a false choice between acquittal and the conclusion that T.M. was either lying or mistaken. *Id.*

Prosecutorial misconduct is flagrant and ill-intentioned if it violates case law and professional standards that were available to the prosecutor at the time of the improper conduct. *Id.* at 707. Here, the prosecutor had access to longstanding caselaw prohibiting the type of false-choice argument made at Mr. Duenas's trial. *See Flemming*, 83 Wn. App. at 213 (noting that the Courts of Appeals had "repeatedly" admonished against that type of argument as of 1996). This error requires reversal even though defense counsel did not object to this type of prosecutorial misconduct at trial. *Glassman*, 175 Wn.2d at 707.

The prosecutor committed prejudicial misconduct at Mr. Duenas's trial by making an argument presenting the jury with the false choice between concluding that T.M. was lying or mistaken and acquitting Mr. Duenas. *Miles*, 139 Wn. App. at 889–90; *Fleming*, 83 Wn. App. at 213. Mr. Duenas's convictions must be reversed. *Id.*

C. The prosecutor committed misconduct by appealing to the jury's passion and prejudice.

The trial court permitted the prosecutor to argue, over Mr. Duenas's objection that the abuse "perpetrated by the defendant, it killed [T.M.'s] soul. He felt helpless, soulless, he said it rips it from you, and that he was no longer innocent." RP 585. The prosecutor reiterated to the jury that:

Again, that was [T.M.]'s testimony. Go back through your notes and what he said is it kills your soul, it left him feeling helpless, soulless, ripped your soul from you and that he was no longer innocent. Those were [T.M.]'s words last Monday.  
RP 585.

These arguments constituted prosecutorial misconduct because they improperly appealed to the jury's passion and prejudice rather than focusing on the evidence in the case.

A prosecutor must "seek convictions based only on probative evidence and sound reason" *Glassman*, 175 Wn.2d at 704.

As quasi-judicial officers, prosecutors have a duty to “subdue courtroom zeal” in order to ensure that the accused receives a fair trial. *Walker*, 182 Wn.2d at 477 (citing *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011); *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984)). A prosecutor commits misconduct by, instead, engaging such “zeal” to “distract the jury from its proper function as a rational decision-maker.” *Id.* at 478-79.

Accordingly, a prosecutor commits misconduct by making arguments that are designed to inflame the jury’s passion and prejudice. *Glasmann*, 175 Wn.2d at 704.

Rather than limiting her arguments to the evidence and logical inferences therefrom, the prosecutor at Mr. Duenas’s trial chose to focus the jury on T.M.’s testimony that sexual abuse had “killed his soul” and made him feel helpless, soulless, and no longer innocent. RP 585. The trial court overruled Mr. Duenas’s objection to the argument, stating simply that “It’s closing argument.” RP 585.

The prosecutor’s argument improperly harnessed “courtroom zeal” to inflame the jury’s passion and prejudice and focus the jury on emotion rather than on the facts in the case. *Walker*, 182 Wn.2d 463, 477-79. The prosecutor’s argument was improper.

The prosecutor committed misconduct at Mr. Duenas's trial by making an argument designed to inflame the jury's passion and prejudice. *Walker*, 182 Wn.2d at 477. Mr. Duenas's convictions must be reversed. *Id.*

D. Mr. Duenas was prejudiced by the prosecutor's improper arguments.

There is a substantial likelihood that the prosecutor's improper comment on Mr. Duenas's veracity, presentation of a "false choice," and focus on the jury's passion and prejudice affected the outcome of Mr. Duenas's trial. *Glasmann*, 175 Wn.2d at 704.

The evidence against Mr. Duenas was not overwhelming. T.M. exhibited significant memory gaps on critical issues in the case, such as who was living in his grandfather's home at the time of the alleged abuse, where he slept when he was there, and who was charged with caring for him and his siblings. RP 143, 146-47, 207, 370, 386, 390, 405-06, 409, 421-22, 491, 501, 509.

T.M. also did not identify Mr. Duenas as his abuser by name until he had been fed that name by his family, based on his description of someone who was studying to enter law enforcement. RP 168, 485.

But, by providing an opinion that Mr. Duenas had "lied," arguing that the jury had to either convict Mr. Duenas or conclude that T.M. was lying or mistaken, and by appealing to the jury's emotions, the prosecutor

swayed the jury away from its proper focus on the evidence in the case.

Mr. Duenas was prejudiced by the prosecutor's misconduct at his trial. *Id.*

E. The cumulative effect of the prosecutor's misconduct requires reversal of Mr. Duenas's convictions.

The cumulative effect of repeated instances of prosecutorial misconduct can be "so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *Lindsay*, 180 Wn.2d at 443.

The prosecutor's closing argument at Mr. Duenas's trial was littered with improper arguments throughout. The prosecutor provided an improper personal opinion of Mr. Duenas's credibility, presented the jury with a false choice between conviction and concluding that T.M. was lying or mistaken, and appealed to the jury's passion and prejudice.

Whether considered individually or in the aggregate, the prosecutor's extensive improper arguments to the jury require reversal of Mr. Duenas's convictions. *Id.*; *Walker*, 164 Wn. App. at 737.

**IV. THE TRIAL COURT ERRED BY ADMITTING T.M.'S BROTHER'S HEARSAY TESTIMONY RECOUNTING T.M.'S DESCRIPTION OF THE ALLEGED ABUSE AS AN EXCITED UTTERANCE WHEN THE STATEMENTS WERE MADE FOUR YEARS AFTER THE "STARTLING EVENT."**

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, 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 trial court erred by ruling that the hearsay statements were excited utterances because four years is far too long for T.M. to still have been “under the stress of excitement” caused by the allegations.<sup>4</sup>

The “excited utterance” exception to the hearsay rule permits the admission of an out-of-court statement offered for the truth of the matter asserted if it constitutes:

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).

The excited utterance exception is based on the idea that “under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control.” *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194, 197 (1992). Under such conditions, the statement is presumed to be

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<sup>4</sup> Evidentiary rulings are reviewed for abuse of discretion. *State v. Ramirez-Estevez*, 164 Wn. App. 284, 289–90, 263 P.3d 1257 (2011). A trial court abuses its discretion if its decision is manifestly unreasonable, based on untenable grounds/reasons, unsupported by the facts, applies the wrong legal standard, or is based on an erroneous view of the law. *Id.* (citing *State v. Lord*, 161 Wash.2d 276, 284, 165 P.3d 1251 (2007)).

“spontaneous and sincere” rather than based on reflection or self-interest.

*Id.*

In order to qualify as an excited utterance, each of three requirements must be met: (1) a startling event must have occurred, (2) the statement must be made while the speaker is “under the stress of excitement caused by the event,” and (3) the statement must be related to the startling event. *Chapin*, 118 Wn.2d at 686.

“The key to the second element is spontaneity.” *Id.* at 688. The utterance must be made “contemporaneously with or soon after the startling events giving rise to it.” *Id.*

The *Chapin* court found that a statement made “within a day or so” of an alleged rape did not qualify as an excited utterance because the declarant was “unlikely to still have been in an excited state caused by the alleged rape itself” at that time. *Chapin*, 118 Wn.2d at 689. This was particularly true because the declarant had been “calm and had engaged in his usual activities” during the interim period between the alleged rape and the statement. *Id.*

Likewise, statements made to counselors and family members two to three years after an alleged rape are not excited utterances. *State v. Ramirez-Estevez*, 164 Wn. App. 284, 290, 263 P.3d 1257 (2011).

While the *Ramirez-Estevez* court noted that “the startling event or condition ... need not be the ‘principal act’ underlying the case” and “[t]he passage of time alone ... is not dispositive,” it nonetheless held that the passage of two to three years vitiates the reliability of an excited utterance made close in time to an underlying traumatic event. *Id.* at 291-92. This is because “there has been considerable time for other factors to have intervened.” *Id.* at 292.

Accordingly, even while acknowledging that recalling the rapes to a counselor and aunt was highly stressful to the alleged victim in *Ramirez-Estevez*, the statements were not excited utterances because too much time had passed. *Id.* (“... the Supreme Court did not intend to stretch the excited utterance exception to circumstances ... where the victim was recounting the traumatic events more than two years later; at this much later point, the reliability of an excited utterance close in time to the underlying traumatic event is no longer a predominant reliability factor”).

Similarly, T.M.’s hearsay statements to his brother were not admissible as excited utterances because they were made four years after the startling event of the alleged sexual abuse. *Id.* Like in *Chapin*, T.M. had returned to his normal life for a lengthy period between the starting event and the statements. *Chapin*, 118 Wn.2d at 689. Even though the disclosure of the abuse to T.M.’s brother was undoubtedly stressful, too

much time had permitted other factors to intervene for the statements to fall within the justification of the excited utterance exception. *Ramirez-Estevez*, 164 Wn. App. at 290.

The trial court abused its discretion at Mr. Duenas's trial by admitting T.M.'s hearsay statements to his brother – made four years after the alleged abuse – as excited utterances. *Ramirez-Estevez*, 164 Wn. App. at 289–90. The ruling was unreasonable, unsupported by the facts, and misapplied the law. *Id.*

T.M. displayed significant memory lapses regarding the summer when the alleged abuse took place. So the prosecutor relied heavily in closing argument on the claim that T.M.'s testimony 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. Mr. Duenas was prejudiced by the improper admission of the hearsay statements through his brother.<sup>5</sup>

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<sup>5</sup> Under different circumstances, this Court has found a similar error to be harmless because the improperly-admitted hearsay testimony was merely duplicative of prior testimony. *See Ramirez-Estevez*, 164 Wn. App. at 293–94. 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 disclosure to his brother and the criminal charges. Given the significant possibility 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 around 2004. *See* RP 590-91. In this

(Continued)

The trial court abused its discretion by admitting T.M.’s hearsay statements – made four years after the alleged abuse – as excited utterances. *Ramirez-Estevez*, 164 Wn. App. at 290. Mr. Duenas’s convictions must be reversed. *Id.*

**V. THE CUMULATIVE EFFECT OF THE ERROR AT MR. DUENAS’S TRIAL VIOLATED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.**

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 Mr. Duenas’s case, the cumulative effect of the violations of the constitutional rights to counsel, to due process, and to present a defense, in combination with significant prosecutorial misconduct and the erroneous admission of hearsay statements that were critical to the state’s case is sufficient to undermine confidence in the outcome of Mr. Duenas’s trial.

If Mr. Duenas had been permitted to present the evidence and arguments necessary to his theory of the defense and the jury had not been steered away from focusing solely on the evidence in the case or exposed

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context, the improper admission of T.M.’s hearsay statements during that disclosure was much more consequential than in *Ramirez-Estevez*.

to inadmissible hearsay evidence that significantly bolstered the state's case, the proceedings would have been pointedly different.

The cumulative effect of the errors at Mr. Duenas's trial deprived him of a fair trial and requires reversal of his convictions. *Id.*

**VI. THE SENTENCING COURT ERRED BY ORDERING MR. DUENAS – WHO IS INDIGENT – TO PAY A \$200 FILING FEE.**

The sentencing court found Mr. Duenas indigent for purposes of appeal but also ordered him to pay a \$200 criminal filing fee. CP 186, 204-05.

But amended RCW 36.18.020(2)(h), which went into effect before Mr. Duenas's trial, prohibits a court from ordering an indigent criminal defendant to pay that fee. RCW 36.18.020(2)(h); *See also State v. Ramirez*, 191 Wn.2d 732, 746, 426 P.3d 714 (2018).

In the alternative, the order requiring Mr. Duenas to pay a criminal filing fee must be stricken from the Judgment and Sentence. *Id.*

**CONCLUSION**

Mr. Duenas's conviction for criminal attempt was entered more than a decade beyond the expiration of the statute of limitations. The trial court violated Mr. Duenas's rights to counsel and to due process by unreasonably prohibiting defense counsel from arguing inferences from

the evidence during closing argument. The trial court violated Mr. Duenas's right to present a defense by prohibiting him from introducing relevant evidence that was critical to his defense. The prosecutor committed misconduct during closing argument by providing an opinion of Mr. Duenas's veracity, presenting the jury with a false choice, and appealing to the jury's passion and prejudice. The trial court erred by ruling that T.M.'s hearsay statements during his disclosure to his brother – made four years after the alleged incidents – were admissible as excited utterances.

These errors, whether considered individually or cumulatively, require reversal of Mr. Duenas's convictions.

In the alternative, the trial court erred by ordering Mr. Duenas, who is indigent, to pay a \$200 criminal filing fee.

Respectfully submitted on April 30, 2019,



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Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Jacob Duenas/DOC#410002  
Washington Corrections Center  
PO Box 900  
Shelton, WA 98584

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 April 30, 2019.



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

**LAW OFFICE OF SKYLAR BRETT**

**April 30, 2019 - 3:53 PM**

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**Appellate Court Case Number:** 52479-1  
**Appellate Court Case Title:** State of Washington, Respondent v. Jacob M. Duenas, Appellant  
**Superior Court Case Number:** 17-1-04393-3

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