

FILED  
Court of Appeals  
Division II  
State of Washington  
7/31/2019 12:05 PM

NO. 52479-1-II

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

JACOB DUENAS,  
Appellant.

---

---

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

---

---

REPLY BRIEF OF APPELLANT

---

Skylar T. Brett  
Attorney for Appellant

LAW OFFICE OF SKYLAR BRETT, PLLC  
PO BOX 18084  
SEATTLE, WA 98118  
(206) 494-0098  
skylarbrettlawoffice@gmail.com

**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**

**TABLE OF AUTHORITIES ..... iii**

**ARGUMENT..... 1**

**I. Count III, charging Mr. Duenas with criminal attempt, was barred by the statute of limitations..... 1**

A. The state fails to provide sufficient evidence to toll the statute of limitations..... 1

B. The state is unable to meaningfully rebut Mr. Duenas’s statutory construction argument..... 2

**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..... 3**

A. The trial court violated Mr. Duenas’s constitutional rights to counsel and to due process by prohibiting him from arguing that Friebel could have been the one who committed the offenses against T.M. Respondent does not address this argument in its briefing. .... 3

B. The trial court violated Mr. Duenas’s constitutional right to present a defense by prohibiting him from eliciting evidence that Friebel could have been the one who abused

T.M. The state’s reliance on pre-*Holmes* and pre-*Franklin* precedent is unavailing. .... 4

**III. Prosecutorial misconduct during closing argument deprived Mr. Duenas of a fair trial. .... 8**

**IV. The state is unable to cite to any authority for the contention that a statement made four years after the alleged “startling event” can qualify as an excited utterance. The trial court erred by admitting T.M.’s hearsay statements to his brother..... 8**

**CONCLUSION ..... 10**

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Crane v. Kentucky</i> , 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) . 5	
<i>Holmes v. South Carolina</i> , 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed. 2d 503 (2006).....	5, 6
<i>Rock v. Arkansas</i> , 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) .....	5

### WASHINGTON STATE CASES

<i>State v. Chapin</i> , 118 Wn.2d 681, 686, 826 P.2d 194, 197 (1992) .....	9
<i>State v. Clark</i> , 78 Wn. App. 471, 898 P.2d 854 (1995) .....	6
<i>State v. Condon</i> , 72 Wn. App. 638, 865 P.2d 521 (1993).....	7
<i>State v. Downs</i> , 168 Wash. 664, 677, 13 P.2d 1 (1932).....	7
<i>State v. Franklin</i> , 180 Wn.2d 371, 325 P.3d 159 (2014) .....	5, 6
<i>State v. Freeman</i> , 124 Wn. App. 413, 101 P.3d 878 (2004).....	2
<i>State v. Kwan</i> , 174 Wash. 528, 25 P.2d 104 (1933) .....	7
<i>State v. Luther</i> , 157 Wn.2d 63,134 P.3d 205, 211 (2006) .....	2
<i>State v. Ortuno-Perez</i> , 196 Wn. App. 771, 385 P.3d 218 (2016) .....	5, 6, 8
<i>State v. Pacheco</i> , 107 Wn.2d 59, 726 P.2d 981 (1986) .....	7
<i>State v. Peltier</i> , 181 Wn.2d 290, 332 P.3d 457 (2014) .....	1, 3
<i>In re Pullman</i> , 167 Wn.2d 205, 218 P.3d 913 (2009).....	4
<i>State v. Ramirez-Estevez</i> , 164 Wn. App. 285, 263 P.3d 1257 (2011)...	9, 10
<i>State v. Rehak</i> , 67 Wn. App. 157, 834 P.2d 651 (1992) .....	7

**STATUTES**

RCW 9A.04.080..... 1, 2, 3  
RCW 36.18.020 ..... 2

## ARGUMENT

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

Count III charged Mr. Duenas with criminal attempt, not with one of the sex offenses exempt from the three-year statute of limitations. CP 62; RCW 9A.04.080(1). 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).

**A. The state fails to provide sufficient evidence to toll the statute of limitations.**

The record indicates that Mr. Duenas moved to California in 2001. *See* RP 544. But the record is silent regarding where he lived for each moment between that time and November 2017, when charges were filed in this case. *See* RP *generally*.

Even so, the state argues that the statute of limitations is tolled by Mr. Duenas's out-of-state residence. Brief of Respondent, pp. 11-13. The state is unable to account for Mr. Duenas's whereabouts for sixteen years. The state's tolling argument is unavailing.

B. The state is unable to meaningfully rebut Mr. Duenas’s statutory construction argument.

Criminal attempt is a separate offense from a completed crime and is charged under a separate statutory provision. RCW 9A.28.020; *See also State v. Freeman*, 124 Wn. App. 413, 415-16, 101 P.3d 878 (2004). 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). Nor does conviction require proof of each element of the completed crime. RCW 9A.28.020.

The crime of criminal attempt has never been on the list of enumerated offenses subject to a statute of limitations beyond the standard three years. *See* RCW 9A.04.080. This legislative omission of the crime of attempt from the enumerated list of sex offenses exempted from the three-year statute of limitations 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; RCW 9A.04.080(1)(c).

The state does not address this statutory construction argument, nor does the state engage in any meaningful statutory construction of its own. *See* Brief of Respondent, pp. 6-13. Instead, without citation to any authority, respondent baldly claims that a person “violates” another

criminal statute (in this case, the rape of a child statute) by engaging in criminal attempt. Brief of Respondent, pp. 10-11.

But Mr. Duenas was not charged with rape of a child. *See* CP 31-63. There was never any allegation that his conduct met the elements of that offense. CP 61-63; *See* RP *generally*. For this reason, the state chose to charge him with a different offense: criminal attempt. CP 61-63. That choice has consequences. In this case, one of those consequences is that Count III was time-barred by the statute of limitations; the trial court did not have authority to enter judgment against Mr. Duenas for that charge. RCW 9A.04.080(1)(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 could have been the one who committed the offenses against T.M. Respondent does not address this argument in its briefing.

The state does not meaningfully address Mr. Duenas's argument regarding right to counsel in its briefing. *See* Brief of Respondent.

Respondent's failure to contest this issue may be treated as a concession.

*See In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

B. The trial court violated Mr. Duenas's constitutional right to present a defense by prohibiting him from eliciting evidence that Friebel could have been the one who abused T.M. The state's reliance on pre-*Holmes* and pre-*Franklin* precedent is unavailing.

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.

According to the prosecutor, this means that Mr. Duenas was the only one who could have committed the abuse against T.M. RP 591, 620-21. But – particularly from the perspective of an eight-year-old – that was not entirely true.

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 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, which 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 U.S. Supreme Court held in *Holmes* that 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 exclusion of defense evidence 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.

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. *Id.*; *See also State v. Ortuno-Perez*, 196 Wn. App. 771, 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).

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 U.S. Supreme Court’s 2006 decision in *Holmes* and the Washington Supreme Court’s 2014 decision in *Franklin* control the analysis of the “other suspect” issue in Mr. Duenas’s case. Taken together, those cases explicitly prohibit a court from excluding “other suspect” evidence so long as the evidence is relevant and raises a reasonable doubt of the guilt of the accused. *Holmes*, 547 U.S. at 326; *Franklin*, 180 Wn.2d at 381-82.

Nonetheless, respondent relies exclusively on pre-*Holmes* and pre-*Franklin* authority (some of which is from long before the Sixth Amendment was even incorporated to the states) to do exactly what the *Franklin* court warned against: improperly inflating the threshold for the admission of “other suspect” evidence. Brief of Respondent, p. 16 (relying

on *State v. Downs*, 168 Wash. 664, 677, 13 P.2d 1 (1932); *State v. Kwan*, 174 Wash. 528, 25 P.2d 104 (1933); *State v. Rehak*, 67 Wn. App. 157, 834 P.2d 651 (1992); *State v. Condon*, 72 Wn. App. 638, 865 P.2d 521 (1993); *State v. Pacheco*, 107 Wn.2d 59, 726 P.2d 981 (1986)).

Insofar as the authority on which the state relies creates a higher threshold for the admission of “other suspect” evidence than the one outlined above, that authority was impliedly overruled by *Franklin* and *Holmes*.

Finally, any questions of the strength or accuracy of evidence 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).

Despite this, the state relies heavily on arguments weighing the evidence, attempting demonstrate that the “other suspect” evidence in Mr. Duenas’s case did not present an ironclad case against Friebel. Brief of Respondent, pp. 16-23. But those were questions for the jury, not for the state or court. *Id.* Because the evidence was relevant and, if believed,

raised a reasonable doubt of Mr. Duenas's guilt, he had a constitutional right to present it to the jury and for the jury to determine its weight. *Id.*; *Franklin*, 180 Wn.2d at 378.

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. Mr. Duenas's convictions must be reversed. *Id.*

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

Mr. Duenas relies on the argument set forth in his Opening Brief.

**IV. THE STATE IS UNABLE TO CITE TO ANY AUTHORITY FOR THE CONTENTION THAT A STATEMENT MADE FOUR YEARS AFTER THE ALLEGED "STARTLING EVENT" CAN QUALIFY AS AN EXCITED UTTERANCE. THE TRIAL COURT ERRED BY ADMITTING T.M.'S HEARSAY STATEMENTS TO HIS BROTHER.**

T.M. first disclosed the alleged abuse to his older brother about four years after it had occurred. RP 220-23, 226. The court admitted T.M.'s hearsay statements to his brother as excited utterances, over Mr. Duenas's objection. RP 220, 222.

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).

In order to admit a statement as an excited utterance, the proponent must establish that it was made while the speaker was “under the stress of excitement caused by the event.” *Chapin*, 118 Wn.2d at 686. To meet this requirement, the utterance must be made “contemporaneously with or soon after the startling events giving rise to it.” *Id.* at 688.

The passage of two to three years between a startling event and a statement vitiates the reliability of an excited utterance because “there has been considerable time for other factors to have intervened.” *State v. Ramirez-Estevez*, 164 Wn. App. 284, 292, 263 P.3d 1257 (2011).

Even so, the state argues that the trial court did not err in Mr. Duenas’s case by admitting T.M.’s hearsay statements – made four years after the allegedly startling event – as excited utterances. *See* Brief of Respondent, pp. 37-44. But respondent is unable to cite to any authority supporting that argument. Respondent proposes a significant expansion of the excited utterance rule, which is completely unsupported by precedent.

The trial court abused its discretion by admitting T.M.’s hearsay statements to his brother as excited utterances. *Ramirez-Estevez*, 164 Wn. App. at 290. Mr. Duenas’s convictions must be reversed. *Id.*

**CONCLUSION**

For the reasons set forth above and in Mr. Duenas's Opening and Supplemental Briefs, this Court should reverse Mr. Duenas's convictions.

Respectfully submitted on July 31, 2019,



---

Skylar T. Brett, WSBA No. 45475  
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  
Coyote Ridge Corrections Center  
PO Box 769  
Connell, WA 99326

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 July 31, 2019.



---

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

**LAW OFFICE OF SKYLAR BRETT**

**July 31, 2019 - 12:05 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**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

**The following documents have been uploaded:**

- 524791\_Briefs\_20190731120504D2578526\_6853.pdf  
This File Contains:  
Briefs - Appellants Reply  
*The Original File Name was Duenas Reply Brief.pdf*

**A copy of the uploaded files will be sent to:**

- PCpatcecf@piercecountywa.gov
- Theodore.Cropley@piercecountywa.gov

**Comments:**

---

Sender Name: Skylar Brett - Email: skylarbrettlawoffice@gmail.com

Address:

PO BOX 18084

SEATTLE, WA, 98118-0084

Phone: 206-494-0098

**Note: The Filing Id is 20190731120504D2578526**