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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JACOB DUENAS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann Van Doorninck

No. 17-1-04393-3

Brief of Respondent

MARY E. ROBNETT
Prosecuting Attorney

By
THEODORE M. CROPLEY
Deputy Prosecuting Attorney
WSB # 27453

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

1. Was Duenas properly charged for attempted rape of a child in the first degree within the time period permitted by the statute of limitations? 1

2. Did the trial court properly exercise its discretion in excluding evidence and limiting closing argument to prohibit defense counsel from arguing that the victim's cousin committed the crimes? 1

3. Did Duenas fail to demonstrate that the prosecutor committed prejudicial misconduct during closing argument? 1

4. Did the trial court properly exercise its discretion when it allowed into evidence the victim's brother's testimony regarding the victim's statements made to him as "excited utterances"? 1

5. Did the cumulative effect of any of Duenas' claimed "errors" violate his right to a fair trial and require reversal of his convictions? 1

6. Should this court remand the matter to the trial court for the criminal filing fee to be stricken? 1

7. Did Duenas fail to demonstrate that his trial counsel rendered ineffective assistance by not raising his "youthfulness" as a mitigating factor at sentencing? 2

B. STATEMENT OF THE CASE..... 2

1. Procedure 2

2. Facts 3

C.	ARGUMENT.....	6
1.	THE PROSECUTION PROPERLY CHARGED DUENAS FOR ATTEMPTED RAPE OF A CHILD IN THE FIRST DEGREE WITHIN THE TIME PERIOD PERMITTED BY THE STATUTE OF LIMITATIONS.....	6
2.	THE TRIAL COURT PROPERLY PROHIBITED DEFENSE COUNSEL FROM PRESENTING EVIDENCE AND ARGUING THAT BRYAN FRIEBEL, NOT DUENAS, ACTUALLY ABUSED T.M.....	13
3.	THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING CLOSING ARGUMENT.....	24
4.	THE TRIAL COURT PROPERLY ADMITTED AS “EXCITED UTTERANCES” THE STATEMENTS MADE BY T.M. TO HIS BROTHER RECOUNTING THE ABUSE HE SUFFERED FROM DUENAS.....	37
5.	DUENAS IS NOT ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE	44
6.	THIS COURT SHOULD REMAND THE CASE SO THE CRIMINAL FILING FEE CAN BE STRICKEN	45
7.	DEFENSE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE BY NOT RAISING DUENAS’ “YOUTHFULNESS” AS A MITIGATING FACTOR AT SENTENCING.	46
D.	CONCLUSION.....	51

Table of Authorities

State Cases

<i>Ashley v. Hall</i> , 138 Wn.2d 151, 159, 978 P.2d 1055 (1999).....	43
<i>In re Pers. Restraint of Crace</i> , 174 Wn.2d 835, 840, 280 P.3d 1102 (2012).....	47
<i>In re Personal Restraint of Lord</i> , 123 Wn.2d 296, 332, 868 P.2d 835 (1994).....	45
<i>Johnston v. Ohls</i> , 76 Wn.2d 398, 406, 457 P.2d 194 (1969).....	40
<i>State v. Ansell</i> , 36 Wn. App. 492, 496, 675 P.2d 614 (1984)	12
<i>State v. Brett</i> , 126 Wn.2d 136, 892 P.2d 29 (1995).....	24, 26, 27, 33
<i>State v. Bryant</i> , 65 Wn. App. 428, 433, 828 P.2d 1121 (1992).....	40
<i>State v. Bryant</i> , 89 Wn. App. 857, 873, 950 P.2d 1004 (1998).....	25, 35
<i>State v. Casteneda-Perez</i> , 61 Wn. App. 354, 810 P.2d 74 (1991)	30
<i>State v. Chapin</i> , 188 Wn.2d 681, 689-691, 826 P.2d (1992)	41, 42
<i>State v. Coe</i> , 101 Wn.2d 772, 789, 681 P.2d 1281 (1984)	45
<i>State v. Condon</i> , 72 Wn. App. 638, 647, 865 P.2d 521 (1993).....	16
<i>State v. Copeland</i> , 130 Wn.2d 244, 922 P.2d 1304 (1996).....	27, 33
<i>State v. Dixon</i> , 37 Wn. App. 867, 874–75, 684 P.2d 725 (1984).....	43
<i>State v. Downs</i> , 168 Wash. 664, 667, 13 P.2d 1 (1932)	16
<i>State v. Emery</i> , 174 Wn.2d 741, 760, 278 P.3d 653 (2012).....	25, 30, 35

<i>State v. Finch</i> , 137 Wn.2d 792, 839, 975 P.2d 967 (1999).....	25
<i>State v. Flores</i> , 164 Wn.2d 1, 18, 186 P.3d 1038 (2008)	43
<i>State v. Franklin</i> , 180 Wn.2d 371, 325 P.3d 159 (2014). 15, 16, 19, 20, 22	
<i>State v. Freeman</i> , 124 Wn. App. 413, 101 P.3d 878 (2004).....	8, 9, 11
<i>State v. Grier</i> , 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).....	48, 50
<i>State v. Hardy</i> , 133 Wn.2d 701, 714, 946 P.2d 1175 (1997)	38
<i>State v. Israel</i> , 113 Wn. App. 243, 54 P.3d 1218 (2002)	12
<i>State v. Jefferson</i> , 79 Wn.2d 345, 347, 485 P.2d 77, 78 (1971)	12
<i>State v. Johnson</i> , 90 Wn. App. 54, 74, 950 P.2d 981 (1998).....	45
<i>State v. Jones</i> , 168 Wn.2d 713, 720, 230 P.3d 576 (2010)	15
<i>State v. Kwan</i> , 174 Wash. 528, 533, 25 P.2d 104 (1933).....	16
<i>State v. Kyllo</i> , 166 Wn.2d 856, 862, 215 P.3d 177 (2009)	48
<i>State v. Maupin</i> , 128 Wn.2d 918, 924, 913 P.2d 808 (1996).....	15
<i>State v. McFarland</i> , 189 Wn.2d 47, 59, 399 P.3d 1106 (2017).....	49
<i>State v. McKenzie</i> , 157 Wn. 2d 44, 59, 134 P. 3d 221 (2006)	26
<i>State v. Miles</i> , 139 Wn. App. 879, 162 P.3d 1169 (2007).....	30
<i>State v. O'Dell</i> , 183 Wn.2d 680, 688-89, 358 P.3d 359 (2015)	47
<i>State v. Ortuno-Perez</i> , 196 Wn. App. 771, 385 P.3d 218 (2016). 19, 20, 21	
<i>State v. Pacheco</i> , 107 Wn.2d 59, 67, 726 P.2d 981 (1986).....	16
<i>State v. Peltier</i> , 181 Wn.2d 290, 298, 332 P.3d 457, 461 (2014).....	9
<i>State v. Quaale</i> , 182 Wn.2d 191, 196, 340 P.3d 213 (2014).....	15

<i>State v. Ramirez</i> , 191 Wn.2d 732, 747, 426 P.3d 714 (2018).....	45
<i>State v. Ramirez-Estevez</i> , 164 Wn. App. 284, 291-292, 263 P.3d 1257 (2011).....	41, 42, 43
<i>State v. Rehak</i> , 67 Wn. App. 157, 163, 834 P.2d 651 (1992)	16, 38
<i>State v. Russell</i> , 125 Wn.2d 24, 94, 882 P.2d 747 (1994).....	36, 45
<i>State v. Sargent</i> , 40 Wn. App. 340, 344, 698 P.2d 598 (1985).....	27
<i>State v. Stenson</i> , 132 Wn.2d 668, 727, 940 P.2d 1239 (1997).....	25
<i>State v. Strauss</i> , 119 Wn.2d 401, 416–17, 832 P.2d 78 (1992).....	38
<i>State v. Sunde</i> , 98 Wn. App. 515, 985 P.2d 413 (1999).....	40
<i>State v. Swan</i> , 114 Wn.2d 613, 664, 790 P.2d 610 (1990).....	27, 33, 38
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 455, 258 P.3d 43 (2011).....	25
<i>State v. Wade</i> , 186 Wn. App. 749, 764, 346 P.3d 838 (2015).....	15
<i>State v. Willingham</i> , 169 Wn.2d 192, 194, 234 P.3d 211 (2010)	7, 12
<i>State v. Weber</i> , 159 Wn.2d 252, 270, 149 P.3d 646 (2006), <i>cert. denied</i> , 127 S. Ct. 2986 (2007).....	24
<i>State v. Woods</i> , 143 Wn.2d 561, 598-99, 23 P.3d 1046 (2001)	40
<i>State v. Young</i> , 160 Wn.2d 799, 807, 161 P.3d 967 (2007).....	39
Federal and Other Jurisdictions	
<i>Greenfield v. New York</i> , 85 N.Y. 75, 89 (1881)	16
<i>Holmes v. South Carolina</i> , 547 U.S. 319, 326, 330, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).....	15
<i>Strickland v. Washington</i> , 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	47, 48

Constitutional Provisions

Article I, section 22 (amendment 10) of the Washington Constitution....15
Sixth Amendment of the United States Constitution.....15

Statutes

RCW 10.82.90.....45
RCW 43.43.754(1)..... 8, 9
RCW 9.94A.535(1)..... 46
RCW 9A.04.073..... 10
RCW 9A.04.080..... 7
RCW 9A.04.080(1)..... 9
RCW 9A.04.080(1)(c) 1, 7, 8, 9, 10, 11
RCW 9A.04.080(1)(i) 7
RCW 9A.04.080(2)..... 11
RCW 9A.28.020..... 7, 10
RCW 9A.28.020(3)(a) 10
RCW 9A.44.073..... 7, 9, 10, 11

Rules

ER 803(a)..... 37
ER 803(a)(2) 37

Other Authorities

House Bill 1783 45

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was Duenas properly charged for attempted rape of a child in the first degree within the time period permitted by the statute of limitations?
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6. Should this court remand the matter to the trial court for the criminal filing fee to be stricken?

7. Did Duenas fail to demonstrate that his trial counsel rendered ineffective assistance by not raising his “youthfulness” as a mitigating factor at sentencing?

B. STATEMENT OF THE CASE.

1. Procedure

On November 14, 2017, the Pierce County Prosecuting Attorney’s Office filed an Information charging Duenas with four counts of rape of a child in the first degree. CP 1-2. On July 10, 2018, an Amended Information was filed charging Duenas with two counts of child molestation in the first degree, one count of rape of a child in the first degree, and one count of attempted rape of a child in the first degree. CP 61-63.

Jury trial began on July 10, 2018, before the Honorable Kitty-Ann Van Doorninck. CP 38-44. On August 13, 2018, the jury found Duenas guilty as charged. CP 134-138. On September 28, 2018, the trial court followed the prosecutor’s recommendations and imposed the high-end of the standard range: 318 months in custody for the rape, 238.5 months for the attempted rape, and 198 months for each child molestation conviction, for a total sentence of 318 months. Based on the circumstances and

defendant's criminal history, the trial court also imposed an exceptional sentence of lifetime community custody. CP 182-202; 5RP 12-13.

Defendant filed a Notice of Appeal that same day. CP 203.

2. Facts

In the summer of 2000, when T.M. was eight years old, he and his older sibling, Kyle, spent a few weeks at the home of their grandfather, Steve Regelin, in Gig Harbor. 2RP 137-138, 146, 261-262. T.M. was having such a good time at his grandfather's house that he did not want to go home when his mother came to get him. He asked to spend additional time at his grandfather's house and his mother reluctantly agreed. While Kyle and the rest of his family returned to California, T.M. remained in Gig Harbor. 2RP 159-162, 209, 212-213, 266-267.

Also staying at Steve Regelin's house that summer was Regelin's wife, Jennifer Tenney, and Tenney's nephew, Jacob Duenas. Bryan Friebel, T.M.'s cousin, may have also been staying at the house during parts of that summer. T.M. has known Friebel his entire life. 2RP 146-147, 185, 265-266; 3RP 360-361, 370-371, 399-405, 421; 4RP 491, 501-502, 510, 513-515. Duenas was taking classes in criminal justice at Crown College that summer and working as a security guard. Duenas often expressed to other members of the household his desire to become a police officer. 2RP 147-150, 205-206, 275-278, 288-289; 3RP 339-340,

360-363, 381-382, 399-400, 422; 4RP 513-517. Friebel was studying to be a firefighter that summer. 3RP 401-405-406, 428-429.

Once Kyle had gone home, Duenas began sexually abusing T.M. This abuse occurred nightly in the bathroom, the hallway, and Duenas' bedroom, and lasted about a week. This abuse included Duenas touching T.M.s penis and performing oral sex on T.M. and forcing T.M. to masturbate him and perform oral sex on him. Duenas also attempted to anally penetrate T.M. with his penis. 2RP 147-148, 152-158, 179-180, 220-222, 273-275. T.M. did not tell anyone of this abuse at the time because he knew Duenas wanted to be a police officer and T.M. loved and trusted law enforcement. T.M. testified that he had talked to Duenas about becoming a police officer because T.M. was also interested in law enforcement. 2RP 147-149, 158; 3RP 339-340.

While this abuse was going on, T.M. told his grandfather and mother that he wanted to go home. Not having been told of the abuse, however, T.M.s grandfather and mother were reluctant to let him go home earlier than planned. 2RP 156, 158-160, 162-164, 212-215, 268-270; 3RP 376-381. During his testimony, Regelin denied that he knew Duenas was abusing T.M., but did recall a time when T.M. told him that Duenas had pulled him and a friend out of the shower and on to the deck naked. 3RP 379-380.

In the years following his abuse, T.M. seemed to change – he became angry, sullen, and withdrawn. 2RP 218-220. About three or four years after that summer, T.M. finally broke down and told his brother Kyle about what Duenas did to him. 2RP 167-171, 181, 220-226, 273-275. T.M. identified his abuser as the person staying at his grandfather’s house that summer who wanted to be a police officer. Duenas was the only person who fit that description.¹ 2RP 147-149, 158, 168, 176-177, 189-192, 223, 238-240, 248, 275-278, 288-289; 3RP 339-342, 349-350, 360-361, 381-382, 399-400; 4RP 501-502. In fact, when T.M. had earlier seen a picture of Duenas in a relative’s house, he got physically ill. 2RP 178-179. T.M. knew his cousin, Bryan Friebel, well and never implicated him or anyone else in the abuse. 2RP 146-147, 185; 3RP 340-342, 349-350; 4RP 493-494.

Meanwhile, Duenas left Washington State in September of 2001 and went to California. He attended the police academy and became an officer with the California Highway Patrol. 3RP 364-365; 4RP 513, 516, 531-532, 540-542, 544-546, 563. At his mother’s gravesite, Duenas admitted to Jennifer Tenney, his aunt, that he had tried to fight his

¹ Duenas denied ever expressing that he wanted to be a law enforcement officer while he was in Gig Harbor. 4RP 539-542.

“demons” and tried to overcome his “urges”; he said that he did not get caught because “I was good.” 3RP 417-419, 428.

Although T.M.'s testimony differed in some aspects from that of other witnesses, including whether T.M. ever slept next to his grandfather (2RP 143-144, 148, 203-204; 3RP 386, 406), whether it was Duenas or Friebel who watched him during the rare occasions when his grandfather and his wife were out (2RP 147, 205-207; 3RP 389-392, 408-409, 421-422; 4RP 501, 509), and Friebel's precise living situation that summer (2RP 146-147, 185; 3RP 370-372, 401, 405-406, 421; 4RP 501-503), T.M. was adamant that, although he could not at first recall the name of the person who abused him, his abuse was perpetrated by the person staying at his grandfather's house that summer who wanted to be a law enforcement officer. That person was Jacob Duenas. 2RP 147-149, 158, 168, 176-177, 189-192, 223, 238-240, 248, 275-278, 288-289; 3RP 339-342, 349-350, 360-361, 381-382, 399-400; 4RP 501-502.

C. ARGUMENT.

1. THE PROSECUTION PROPERLY CHARGED
DUENAS FOR ATTEMPTED RAPE OF A
CHILD IN THE FIRST DEGREE WITHIN THE
TIME PERIOD PERMITTED BY THE STATUTE
OF LIMITATIONS

Duenas committed his crime of attempted rape of a child in the first degree against T.M. between June 1, 1999, and August 31, 2000. CP

62. The prosecution of Duenas commenced on November 14, 2017, when the Pierce County Prosecuting Attorney's Office filed the Information. CP 1-2. Although the statute of limitations for felonies is generally three years (RCW 9A.04.080(1)(i)), it is longer for certain sex offenses, such as rape of a child in the first degree. RCW 9A.04.080(1)(c). The statute of limitations is also tolled during a defendant's out of state absence. *State v. Willingham*, 169 Wn.2d 192, 194, 234 P.3d 211 (2010). Here, the prosecution of Duenas for attempted rape of a child in the first degree was proper as the prosecution against him commenced prior to the expiration of the statute of limitations.

Unless otherwise provided for in RCW 9A.04.080, the statute of limitations for felonies is three years. RCW 9A.04.080(1)(i). However, a violation of RCW 9A.44.073 (rape of a child in the first degree) can be prosecuted up to the victim's thirtieth birthday. RCW 9A.04.080(1)(c). In the Amended Information, the State charged Duenas in Count 3 with attempted rape of a child in the first degree:

. . . [Duenas] did unlawfully and feloniously with the intent to commit the crime of RAPE OF A CHILD IN THE FIRST DEGREE, as prohibited by RCW 9A.04.073, take a substantial step toward the commission of that crime, contrary to RCW 9A.28.020 . . .

CP 62. RCW 9A.28.020 states, in relevant part:

(1) A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any

act which is a substantial step toward the commission of that crime.

...

(3) An attempt to commit a crime is a:

(a) Class A felony when the crime attempted is murder in the first degree, murder in the second degree, arson in the first degree, child molestation in the first degree, indecent liberties by forcible compulsion, rape in the first degree, rape in the second degree, rape of a child in the first degree, or rape of a child in the second degree; . . .

Duenas argues that because RCW 9A.04.080(1)(c) extends the statute of limitations for rape of a child in the first degree, but does not specifically enumerate attempted rape of a child in the first degree, the statute of limitations for attempted rape of a child in the first degree remains at three years. Appellant's Brief at 11-15. In support of his claim, Duenas relies on *State v. Freeman*, 124 Wn. App. 413, 101 P.3d 878 (2004). However, because the court in *Freeman* addressed a substantively different issue from the one presented in this claim, this court should decline to follow *Freeman*.

In *Freeman*, the defendant was convicted of attempted harassment. As part of his sentence, the trial court required defendant to submit a biological sample for the purpose of DNA identification analysis under RCW 43.43.754(1). *State v. Freeman*, 124 Wn. App. at 414. That statute mandated that any individual convicted of a felony or of certain

enumerated gross misdemeanors, including harassment, was required to submit such a biological sample. *Id.* at 414-415. Defendant argued on appeal that because attempted harassment was neither a felony nor an offense specifically enumerated in RCW 43.43.754(1), the trial court's order requiring him to submit a DNA sample should be stricken. *Id.* Following the plain language of the statute, the Court of Appeals agreed with defendant and struck the DNA requirement. *Id.* at 416-417.

The instant case, however, is quite different from *Freeman*. While the court in *Freeman* addressed the *collateral consequences* of a conviction for a crime not enumerated in a particular statute, the issue here is whether the prosecution of Duenas for his crime of attempted rape of a child in the first degree timely *commenced*. See *State v. Peltier*, 181 Wn.2d 290, 298, 332 P.3d 457, 461 (2014).

Unlike RCW 43.43.754(1), the statute at issue in *Freeman*, which required a biological sample from every individual *convicted* of a felony or any of the other listed offenses, RCW 9A.04.080(1) defines the periods of time upon which a prosecution can *commence*. As set forth above, under this statute, the prosecution for a violation of RCW 9A.44.073 (rape of child in the first degree) can commence up until the victim's thirtieth birthday. RCW 9A.04.080(1)(c). Duenas is correct that *attempted* rape of a child in the first degree is not a specifically enumerated crime in RCW

9A.04.080(1)(c). However, the criminal attempt statute, RCW 9A.28.020, does not in and of itself proscribe specific conduct; rather, it specifies the level or class of crime for a violation of that statute, based on which specific crime has been attempted. *See, e.g.*, RCW 9A.28.020(3)(a) (“An attempt to commit a crime is a . . . Class A felony when the crime attempted is . . . rape of a child in the first degree . . .”). The violation of this statute can be a felony, a gross misdemeanor, or a misdemeanor, depending upon the nature of the underlying crime attempted. Accordingly, there can be no “stand-alone” crime of “attempt” – such a crime must always be in reference to another crime.

Here, the Amended Information referenced both the “attempt” statute, RCW 9A.28.020, and the statute for the completed crime of rape of a child in the first degree, RCW 9A.04.073. CP 62. The extended statute of limitations applies when a certain statute is “violated.” *See* RCW 9A.04.080(1)(c) (“Violations of the following statutes, when committed against a victim under the age of eighteen, may be prosecuted up to the victim's thirtieth birthday: . . . 9A.44.073 (rape of a child in the first degree) . . .”) Therefore, because Duenas cannot have been convicted of a “stand-alone” crime of attempt because the violation of this statute is dependent upon the underlying substantive crime, he was necessarily

prosecuted, convicted, and sentenced for also “violating” RCW 9A.44.073.

Although the court in *Freeman* rejected a similar argument, *State v. Freeman*, 124 Wn. App. at 415, the difference, again, is that *Freeman* dealt with the collateral consequences of a conviction for a crime not enumerated under the mandatory DNA collection statute, while the instant case deals with authority of a court to sentence a defendant for a crime that cannot exist without, and is thus dependent upon, a crime enumerated in RCW 9A. 04.080(1)(c). Accordingly, the prosecution for the crime of attempted rape of a child in the first degree as set forth in Count 3 of the Amended Information can be commenced up until the victim’s thirtieth birthday, and Duenas’ claim to the contrary should be denied.

However, even if this court finds that the statute of limitations for the crime of attempted rape of a child in the first degree is only three years, the State’s prosecution of Duenas commenced within that limitations period because the statute was tolled during the time Duenas resided out of the state. Tolling of the statute of limitations occurs during the time period where a defendant is not usually and publicly resident within this state. RCW 9A.04.080(2). This tolling period includes out-of-state absences regardless of whether the defendant was absent for the purpose of avoiding authorities, even when the State knew of the

defendant's whereabouts. *State v. Willingham*, 169 Wn.2d at 194; *see also State v. Israel*, 113 Wn. App. 243, 293-294, 54 P.3d 1218 (2002) (Limitations period for prosecuting defendant in Washington for robbery was tolled during the period in which defendant was living in California, though defendant had not concealed himself in California and he had remained in contact with his parole officer and paid restitution in Washington); *State v. Ansell*, 36 Wn. App. 492, 496, 675 P.2d 614 (1984) (Defendant's absence from state was sufficient to toll statute of limitations for filing charges against him on basis that defendant was "not usually and publicly resident within this state," though defendant's address within the other state was known to authorities and defendant was living openly and was available for prosecution at all times).

Here, the earliest possible date on which Duenas could have committed his crime of attempted rape of a child in the first degree was June 1, 1999. CP 62. From the record, it is undisputed that Duenas left Washington no later than October 2001 and lived in California from that point on. 4RP 513, 516, 540, 544-546, 563. The prosecution of this case commenced on November 14, 2017, with the filing of the Information. CP 1-2; *see State v. Jefferson*, 79 Wn.2d 345, 347, 485 P.2d 77, 78 (1971) (criminal charges may be commenced with the filing of an information by the prosecutor in superior court). Therefore, as the statute of limitations

was tolled during the time Duenas lived in California, at least six months remained on the three-year statute of limitations when the prosecution against him commenced. Accordingly, Duenas was properly prosecuted within the statutory time period and his claim to the contrary should be rejected.

2. THE TRIAL COURT PROPERLY PROHIBITED DEFENSE COUNSEL FROM PRESENTING EVIDENCE AND ARGUING THAT BRYAN FRIEBEL, NOT DUENAS, ACTUALLY ABUSED T.M.

T.M. was abused by Duenas during the summer of 2000 when he was eight years old and spending the summer at his grandfather's home. 2RP 147-148, 152-158, 179-180, 220-22, 273-275. When T.M. disclosed this abuse three or four years later, he told his brother that the man who abused him was the person staying at his grandfather's house that summer who wanted to be a law enforcement officer. Duenas spent that summer at T.M.'s grandfather's house studying criminal justice and had expressed his desire to become a police officer; Duenas was the only occupant of the house that summer to do so. 2RP 147-149, 158, 168, 167-171, 176-177, 181, 189-192, 220-226, 238-240, 248, 273-278, 288-289; 3RP 339-342, 349-350, 360-361, 381-382, 399-400; 4RP 501-502.

During the hearing on "other suspect" evidence, defense counsel argued that he should be allowed to elicit evidence and argue that someone

other than Duenas committed the crime. Specifically, defense counsel, noting the supposed similarities between Duenas and Bryan Friebel, e.g., that Friebel was training to be a firefighter and Duenas a police officer, wanted to argue that Friebel, T.M.'s cousin, was the person who abused T.M. 4RP 438-439, 442-450. The prosecutor argued that an eight-year-old knows the difference between being a firefighter and a police officer *and that T.M. had known Friebel his whole life* – there was no confusion as to who abused T.M. 4RP 439-440, 444-446, 448-450. The trial court found that an argument pointing specifically at Friebel as the perpetrator would be too speculative; however, the trial court allowed the defense to argue in closing that someone else could have molested T.M., just not Friebel specifically. 4RP 448-449, 452-453, 454, 456-460.

Duenas claims that the trial court violated his constitutional rights to due process, to counsel, and to present a defense by prohibiting him from presenting evidence or arguing that Friebel was the individual who had actually abused T.M. Appellant's Brief at 16-27. As the trial court recognized, however, Friebel did not meet T.M.'s description of his abuser in any way; Friebel was well-known to T.M., was studying to be a firefighter, and the evidence is unclear whether he was even a resident of the house where the abuse took place that summer. The trial court properly prohibited defense counsel from presenting evidence and arguing

that Friebel was the individual who abused T.M. because the evidence did not tend to logically connect Friebel to the abuse of T.M.

Under the Sixth Amendment of the United States Constitution and article I, section 22 (amendment 10) of the Washington Constitution, a criminal defendant has a constitutional right to present a defense. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). But, the right to present a defense is not absolute. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). This right “does not extend to irrelevant or inadmissible evidence.” *State v. Wade*, 186 Wn. App. 749, 764, 346 P.3d 838 (2015).

This court reviews a trial court’s decision to exclude evidence for abuse of discretion. *See State v. Quale*, 182 Wn.2d 191, 196, 340 P.3d 213 (2014). The court must determine whether the probative value is outweighed by other factors, such as “unfair prejudice, confusion of the issues, or potential to mislead the jury,” and focus the trial “on the central issues by excluding evidence that has only a very weak logical connection to the central issues.” *State v. Franklin*, 180 Wn.2d 371, 378, 325 P.3d 159 (2014) (*quoting Holmes v. South Carolina*, 547 U.S. 319, 326, 330, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)).

In order to present evidence suggesting another suspect committed the charged offense, the defendant must show “such a train of facts or circumstances as tend clearly to point out someone besides the prisoner as

the guilty party.” *State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932) (quoting *Greenfield v. New York*, 85 N.Y. 75, 89 (1881)). In other words, “some combination of facts or circumstances must point to a nonspeculative link between the other suspect and the charged crime.” *State v. Franklin*, 180 Wn.2d at 381. “Mere evidence of motive in another party, or motive coupled with threats of such other person, is inadmissible, unless coupled with other evidence tending to connect such other person with the actual commission of the crime charged.” *State v. Kwan*, 174 Wash. 528, 533, 25 P.2d 104 (1933). The evidence must show “some step taken by the third party that indicates an intention to act” on the motive or opportunity. *State v. Rehak*, 67 Wn. App. 157, 163, 834 P.2d 651 (1992). The defendant must lay a foundation establishing a clear nexus between the other person and the crime. *State v. Condon*, 72 Wn. App. 638, 647, 865 P.2d 521 (1993). The defendant bears the burden of showing that the other suspect evidence is admissible. See *State v. Pacheco*, 107 Wn.2d 59, 67, 726 P.2d 981 (1986).

As support for his argument, Duenas points to several “memory lapses” on the part of T.M. Specifically, Duenas asserts that T.M. forgot that Friebel lived in his grandfather’s house during the time he was abused, forgot that Friebel at times “babysat” him, and forgot where he slept during that summer. Appellant’s Brief at 16, 19-20, 25-27. These

“lapses” however, do nothing to change the analysis regarding an “other suspect” theory. There were disputes in the testimony as to whether Friebel actually lived in T.M. grandfather’s house that summer, or only visited occasionally. 2RP 146-147, 185; 3RP 370-372, 401, 405-406, 421; 4RP 501-503. There were also inconsistencies in the testimony regarding whether Duenas or Friebel ever “babysat” T.M. during the rare occasions when T.M.’s grandfather or his wife were not present. 2RP 147, 205-207; 3RP 389-392, 408-409, 421-422; 4RP 501, 509. It is also true that the evidence indicated that T.M. did not sleep in one area of the house consistently – he slept in different parts of the house at different times, as did the other occupants of the house. 2RP 143-144, 148, 203-204; 3RP 386, 406. However, even if these discrepancies constituted “memory lapses” on the part of T.M., these types of details could be expected to become lost or confused during the years between when T.M. was abused and when he disclosed this abuse to his brother.

What these “lapses” *fail* to do, however, is provide any evidence tending to connect Friebel with the crime of abusing T.M. There was simply no evidence presented or proffered of any “nonspeculative link” or “clear nexus” connecting Friebel and the crimes. Although T.M. may not have remembered Duenas’ name when he first disclosed his abuse, that omission in no way constitutes evidence that Friebel committed these

crimes. After all, it was upon seeing Duenas' picture, not Friebel's, at a relative's house, that T.M. became physically ill. 2RP 178-179. What Duenas seems to overlook is that T.M. *knew Friebel well* and certainly could have and would have identified Friebel by name as his abuser had that been the case. 2RP 146-147, 185; 3RP 340-342, 349-350; 4RP 493-494. T.M., even at eight or nine years old, knew the difference between police officers and firefighters and remembered who wanted to be what in the house. Simply put, all of this evidence points to Duenas, and away from Friebel, as the person who sexually abused T.M.

In addition, as to the trial court specifically excluding evidence that Friebel wore a blue uniform with a badge on it, this decision is reviewed for an abuse of discretion. Here, the trial court allowed defense counsel to voir dire Friebel prior to his testimony in front of the jury. 4RP 491-494. During this voir dire, Friebel testified that he lived at home during the summer of 2000 and was going to a fire service program that required him to wear a blue uniform with a badge. However, the badge he wore was very different from the badges worn by law enforcement officers and clearly identified him as a "student firefighter." Furthermore, Friebel testified that he knows T.M. well and that T.M. had asked him about being a fireman. 4RP 491-494. Given this testimony demonstrating both that T.M. knew Friebel well and that T.M. knew the difference between a

police officer and firefighter, it cannot be said that the trial court abused its discretion in prohibiting defense counsel from eliciting this information in front of the jury as such evidence did not connect Friebel to the crimes and was potentially prejudicial, confusing, and misleading

Duenas attempts to analogize the present circumstances to those present in *State v. Ortuno-Perez*, 196 Wn. App. 771, 385 P.3d 218 (2016) and *State v. Franklin*, 180 Wn.2d 371. However, such cases do not assist Duenas.

In *Ortuno-Perez*, the defendant was convicted of murder in the second degree for shooting the victim in the head while the victim was standing outside of his house. *State v. Ortuno-Perez*, 196 Wn. App. at 774-75. When the shot was fired, between 5 to 12 people were standing in close proximity to the victim. *Id.* at 776. That group included Agnish, who was armed with a handgun. *Id.* The defendant had sought to introduce evidence that Agnish was the shooter, but the trial court denied his request because he had not demonstrated that Agnish took steps to commit the crime. *Id.* at 776-77. The Court of Appeals disagreed. *Id.* at 791. It found that the proffered evidence “was of a type that tended to logically connect Agnish” to the victim’s murder. *Id.* Specifically, the court found that if credited by the jury, the evidence would establish “Agnish’s motive (a gang clash), his opportunity (he was present at the

murder scene and in close proximity to Castro at the instant of the shooting), and his means (he was armed with a handgun).” *Id.*

In *Franklin*, the trial court excluded the defendant’s proffered evidence that his live-in girlfriend, Hibbler, committed the cyberstalking crimes with which he was charged. *State v. Franklin*, 180 Wn.2d at 372. The defendant’s proffered evidence included that Hibbler’s personal laptop was the only computer in their home, and she had previously sent threatening messages to the victim via e-mail, text message, and phone, expressing displeasure about the victim’s relationship with the defendant. *Id.* at 376. Hibbler had also accessed the defendant’s e-mail in the past. *Id.* The State Supreme Court reversed the trial court’s decision, stating that the trial court was incorrect to suggest that direct, rather than circumstantial, evidence was required. *Id.* at 381, 383. It explained that the standard for relevance of other suspect evidence is whether there is evidence tending to connect someone other than the defendant with the crime. *Id.* at 381. Taken together, it found that the excluded evidence amounted to a chain of circumstances tending to create reasonable doubt as to the defendant’s guilt. *Id.* at 382.

Although the Court of Appeals in *Ortuno-Perez* ultimately concluded that the proffered evidence tended to logically connect the third person with the crime, there was far more evidence of a “logical

connection” in that case than in the present case. There, the proffered evidence was that the third person was using drugs that could alter his memory and perception, was armed with a handgun and in close proximity to the victim, lied about having access to guns, and was a member of a gang that had expressed belief that the victim belonged to a rival gang. *State v. Ortuno-Perez*, 196 Wn. App. at 785-86. The trial court also prohibited the defense from arguing that *anyone* else could have committed the crime. *Id.* at 790-791.

Here, the evidence and proffered evidence, no matter how far it is stretched, simply did not tend to logically connect Friebel to the crime. Friebel certainly may have been present in T.M.’s grandfather’s house during parts of the summer of 2000 and may have even been alone with T.M. at some point, but that is all. There is no evidence – admitted or proffered, including that Friebel wore a blue uniform shirt with a badge – that tends to logically connect Friebel to the crimes. Furthermore, the trial court here, unlike in *Ortuno-Perez*, *did* allow defense counsel, as part of its defense of general denial, to argue that someone else could have abused T.M. – it just prohibited counsel from specifically arguing that Friebel committed the crime. 4RP 448-449, 452-453, 454, 456-460. Again, given the circumstances, this decision was certainly not an abuse of discretion.

Moreover, unlike in *Franklin*, the trial court here *did* properly focus solely on the connection of the proffered “other suspect” evidence to the crime. In *Franklin*, the proffered evidence would have shown that the third person had previously sent threatening messages to the victim via e-mail, text message, and phone, expressing displeasure about the victim’s relationship with the defendant and had accessed the defendant’s e-mail in the past. All of this evidence tends to show a logical connection between the third party and the crimes committed.

In the present case, however, as set forth above, the facts and circumstances do not show a nonspeculative link, much less a logical connection, between Friebel and the crime. Rather, the evidence actual *refutes* Duenas’ claim that Friebel could have been the one who abused T.M.. T.M. could not remember the name of his abuser and identified him as the person staying at his grandfather’s house who wanted to be a police officer. However, T.M. knew Friebel, his cousin, very well and knew Friebel’s name his entire life.

The trial court thus did not abuse its discretion in excluding any purely speculative evidence that defense counsel wanted to use to try to argue that it was Friebel who abused T.M. Accordingly, any “other suspect evidence” and argument was properly excluded.

Even assuming that the trial court did err in prohibiting defense counsel from eliciting testimony that Friebel was studying to be a firefighter and wore a blue uniform with a badge, and did err in prohibiting counsel from arguing during closing argument that Friebel, not Duenas, was the actual abuser of T.M., any such error is harmless under any standard. The same reasons that support the trial court's decision to disallow such evidence and argument support the harmlessness of any such "error" in doing so. Even had the defense been able to elicit such testimony and make such an argument, the jury was presented with overwhelming evidence that Duenas was guilty of sexually abusing T.M. Most importantly, T.M. and Friebel knew each other well, both before the abuse and after. If Friebel had abused T.M., T.M. would have known his name and identified him as his abuser. Instead, it was Duenas whom the evidence overwhelmingly pointed to – the sole occupant of the house that summer who wanted to be a police officer, and ended up actually becoming a police officer; the person whose picture made T.M. physically ill; and the person who admitted committing these crimes years later and proudly stated he got away with it because he was "that good." Accordingly, any possible error in excluding evidence and limiting closing argument was harmless and Duenas' claim to the contrary should be rejected.

3. THE PROSECUTOR DID NOT COMMIT
MISCONDUCT DURING CLOSING
ARGUMENT

Duenas claims that the prosecutor committed misconduct during closing argument “by providing a personal opinion of [his] 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.” Appellant’s Brief at 27-35. Not so. In closing argument, the prosecutor properly focused her argument on credibility and inferences drawn from the evidence showing that Duenas was guilty. In any event, Duenas cannot show that any purported “errors” in the prosecutor’s argument had a substantial likelihood of affecting the jury’s verdict. Duenas’s claim to the contrary should be rejected.

To prove prosecutorial misconduct, the defendant bears the burden of proving that the prosecuting attorney’s conduct was both improper and prejudicial. *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646 (2006), *cert. denied*, 127 S. Ct. 2986 (2007). A court reviews the defendant’s allegations of prosecutorial misconduct under an abuse of discretion standard. *State v. Brett*, 126 Wn.2d 136, 174, 892 P.2d 29 (1995). Furthermore, the prosecutor’s comments are reviewed “in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given.” *State v. Bryant*, 89 Wn. App. 857,

873, 950 P.2d 1004 (1998). If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). If the defendant did not object at trial, the issue is waived unless the "prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." *Id.* at 760–61 (citing *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997)). Under this heightened standard, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." *Id.* at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). The defendant bears the burden of establishing both the impropriety of the prosecutor's remarks and their prejudicial effect. *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999).

A. The Prosecutor Properly Drew Conclusions from the Evidence that Contradicted Duenas' Testimony

Duenas' argues that the prosecutor committed misconduct during closing argument when she said that Duenas "took the stand and he lied." Appellant's Brief at 28-29. However, "[a] prosecutor may argue that a

witness lied, if the prosecutor is drawing a conclusion from other evidence that contradicts the witness' or defendant's testimony." *State v. McKenzie*, 157 Wn. 2d 44, 59, 134 P. 3d 221 (2006). Here, when read in context, the prosecutor did just that.

During closing argument, the prosecutor addressed the part of Duenas' testimony in which Duenas denied that he ever expressed a desire to be a law enforcement officer prior to the end of 2001 and offered a motive for Duenas to lie about this:

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

4RP 594-595. Defense counsel's objection was overruled by the trial court, which stated, "This is closing argument and the jurors will figure out the evidence." 4RP 595.

"It is improper for a prosecutor personally to vouch for the credibility of a witness. ... Prosecutors may, however, argue an inference from the evidence, and prejudicial error will not be found unless it is 'clear and unmistakable' that counsel is expressing a personal opinion." *State v. Brett*, 126 Wn.2d 136, 892 P.2d 29 (1995) (internal quotation marks omitted) (*quoting State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598

(1985)). “[P]rosecutors may argue inferences from the evidence, including inferences as to why the jury would want to believe one witness over another. The same rule has been applied as to credibility of a defendant.” *State v. Copeland*, 130 Wn.2d 244, 290-91, 922 P.2d 1304 (1996) (citation omitted). “[P]rejudicial error does not occur until it is clear that the prosecutor is not arguing an inference from the evidence, but is expressing a personal opinion.” *State v. Swan*, 114 Wn.2d 613, 664, 790 P.2d 610 (1990); *see also Brett*, 126 Wn.2d at 175.

Here, in context, the prosecutor was arguing an inference from the evidence, i.e., that overwhelming evidence presented at trial showed that Duenas had expressed a desire to be a police officer by the summer of 2000, but Duenas testified that he never had expressed such a desire, despite subsequently becoming a law enforcement officer. 4RP 539-542. Ultimately, the prosecutor’s job is to outline to the jury how the evidence points to guilt, and sometimes this involves how the evidence is consistent or inconsistent with a victim’s statement. In the instant case, there was conflicting evidence as to whether Duenas’ expressed a desire to be a police officer during the summer when T.M. was abused – all of the witnesses testified this was true; Duenas testified it was false. Unlike the cases Duenas sets forth in support of his argument (Appellant’s Brief at 28-29), the prosecutor here simply argued inferences from the evidence

that was introduced through the other witnesses. That argument was proper.

B. The Prosecutor Did Not Mischaracterize the State's Burden of Proof

Duenas argues that the prosecutor committed misconduct by mischaracterizing the State's burden of proof by providing the jury with a "false choice" between convicting him or concluding that T.M. was lying or mistaken. Appellant's Brief at 29-32. This claim should be rejected because the prosecutor did not provide such a "false choice" to the jurors; rather, the prosecutor, drawing inference from the evidence, asked the jury to decide whom it believed.

During closing argument, when discussing the testimony of T.M., the prosecutor told the jury:

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

Let's start with the first one, that he's making it up. What possible motive could [T.M.] have to fabricate that he was sexually abused? This isn't fun. He struggled and he struggled through his whole life. And it hasn't only impacted him, it's impacted his family.

...

You have to ask yourself, why do people lie? They do it to make themselves look better or to get out of trouble. Coming in and telling a jury of strangers that [you were] sexually abused 18 years ago accomplished none of those goals.

...

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

...

The circumstances of the first disclosure, again, auger against the fact that [T.M.] would make this up. He didn't want it reported, and he didn't want anybody to know. So what would be the point for him, as a little boy, or at the point which he told his mother, as a 12-year-old, what's the point for making it up? There's no point.

...

Turning to the second possibility, mistaken identity. [T.M.] was eight, turning nine that summer. A little kid, yes, but not a three-year-old, not a four-year-old, an eight-year-old, a sweet eight-year-old. And he was with Jacob Duenas for at least three weeks. We're not talking about a weekend here, we're not talking about a three-night trip, we're talking about a three-plus-week trip where he was under the same roof with the defendant every single day.

...

So what you're left with is that there was no credible evidence that [T.M.] is mistaken as to the identity of the person who sexually abused him. So really, the only option that you're left with, and it's the one supported by the evidence, is that [T.M.] is telling the truth about what happened to him in his descriptions of the sexual abuse he endured.

4RP 585-586, 588-589, 593.

Duenas' defense counsel did not object to any of this argument.

As set forth above, if a defendant does not object at trial, a claim of prosecutorial misconduct is waived unless the "prosecutor's misconduct

was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice.” *State v. Emery*, 174 Wn.2d at 760–61. Here, as set forth below, the prosecutor’s argument was not flagrant and ill-intentioned, nor does Duenas show that an instruction could not have cured any potential prejudice.

Courts have repeatedly held that it is misconduct for a prosecutor to argue that *in order to acquit* a defendant, the jury must find that the State’s witnesses are either lying or mistaken. *State v. Casteneda-Perez*, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991) (“it is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying”). However, here, the prosecutor did not make this type of verboten “false choice” argument. Rather, the prosecutor pointed out that, factually, T.M. could only be doing one of three possible things in his testimony – he was lying, he was mistaken, or he was telling the truth. The prosecutor then went through the evidence to argue that T.M. was neither lying nor mistaken.

In *State v. Miles*, 139 Wn. App. 879, 162 P.3d 1169 (2007), one of the cases relied on by Duenas to support his argument (Appellant’s Brief at 30-32), the Court of Appeals found prosecutorial misconduct when, in closing, the prosecutor told the jury that they had heard “mutually exclusive” versions of events—the State’s version and Miles’s version.

He continued: “What do I mean by that? To simplify it as much as possible, if one is true, the other cannot be, as I’m sure you all know. If the State’s witnesses are correct, the defense witnesses could not be and vice versa.” *Id.* at 889. The Court of Appeals found that to be misconduct:

Although prosecutors have “wide latitude” to make inferences about witness credibility, it is flagrant misconduct to shift the burden of proof to the defendant. *State v. Stenson*, 132 Wash.2d 668, 727, 940 P.2d 1239 (1997) (citing *State v. Hoffman*, 116 Wash.2d 51, 94–95, 804 P.2d 577 (1991)); *State v. Fleming*, 83 Wash.App. 209, 213–14, 921 P.2d 1076 (1996). Miles is correct that the jury did not have to believe Miles to acquit him; they had only to entertain a reasonable doubt as to the State’s case. When the State’s evidence contradicts a defendant’s testimony, a prosecutor may infer that the defendant is lying or unreliable. *State v. McKenzie*, 157 Wash.2d 44, 59, 134 P.3d 221 (2006) (citing *State v. Copeland*, 130 Wash.2d 244, 291–92, 922 P.2d 1304 (1996)). Nonetheless, to the extent the prosecutor’s argument presented the jurors with a false choice, that they could find Miles not guilty only if they believed his evidence, it was misconduct. The jury was entitled to conclude that it did not necessarily believe Miles and Bell, but it was also not satisfied beyond a reasonable doubt that Miles was the person who sold the drugs to Wilmoth.

Id. at 890.

In the instant case, the prosecutor did not put the jury in the position that it could find Duenas not guilty *only* if they believed that T.M. was lying or mistaken. The prosecutor here just set forth the three ways that the jury could characterize T.M.’s testimony, and those happen to be

the *only* three ways that the jury could so find. The prosecutor did not tell the jury what it needed to or should do once it made that finding – there was nothing to prevent the jury here from believing T.M. but acquitting Duenas. Simply put, the prosecutor did not “force” the jury to choose sides “*in order to acquit.*” The prosecutor asked the jury to decide whom they believed. Merely asking essentially rhetorical questions of the jury does not rise to the level of misstating the law or misrepresenting the role of the jury and the burden of proof. Accordingly, the prosecutor here did not misrepresent the role of the jury, the burden of proof, or the law.

Here, the prosecutor’s argument was proper. Moreover, Duenas’ waived any claim of prosecutorial misconduct by failing to lodge an objection at trial. As Duenas has not met his burden to show that the prosecutor’s argument was so flagrant and ill-intentioned that any potential prejudice could not be rectified by a curative instruction, he is barred from asserting this argument for the first time on appeal. For these reasons, Duenas’ claim should be denied.

C. By Quoting T.M.’s Testimony During Closing Argument, the Prosecutor Did Not Make an Improper Appeal to the Jury’s Passion or Prejudice

Duenas also argues that the prosecutor committed misconduct during closing argument by appealing to the jury’s passion or prejudice. Appellant’s Brief at 32-34. However, a prosecutor’s remarks that are

based on facts in evidence do not constitute misconduct. *State v. Copeland*, 130 Wn.2d at 290-91; *State v. Swan*, 114 Wn.2d at 664; *State v. Brett*, 126 Wn.2d at 175.

During closing argument, the prosecutor reminded the jury of T.M.'s testimony:

Ask yourself, when [T.M.] was testifying last Monday, did he look comfortable? Did he look like he wanted to be telling you all of these things that happened to him in 2000? You can consider his demeanor. You can consider the fact that he struggled. You can consider the fact that he displayed emotion, in assessing his credibility

What else did he say? That this abuse, sexual abuse perpetrated by the defendant, it killed his soul. He felt helpless, soulless, he said it rips it from you, and that he was no longer innocent.

4RP 584-585. After defense counsel's objection was overruled, the prosecutor continued:

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.

4RP 585.

Duenas is correct insofar as he claims that a prosecutor must refrain from making remarks which are not based on facts in evidence but are an attempt to inflame the jury and disparage the defendant or defense counsel. *State v. Copeland*, 130 Wn.2d at 290. However, Duenas does not explicitly set forth what, exactly, the prosecutor said that was *not*

“based on facts” in evidence. Here, the prosecutor quoted the exact language from T.M.’s testimony:

Q. Did you want anybody else to know about this?

A. No.

Q. How come?

A. Shame.

Q. And why were you ashamed?

A. As a straight male, it’s not really anything you ever want to talk about is being touched by another man. It hurts your pride, kills your soul. As a little boy, you feel helpless, soulless, rips it all from you. Being innocent, you don’t have that any more after something like that happens.

2RP 170-171.

The testimony of T.M. was in evidence. The prosecutor, during closing argument, in properly arguing to the jury that it could consider T.M.’s demeanor, his struggle, and his emotion in determining his credibility, quoted exactly what T.M. said to remind the jury and to advance the argument that T.M. was credible. Rather than “inflaming” the jury to find Duenas guilty based on “passion or prejudice,” the argument here also helped explain to the jury why it may have taken so long for T.M. to disclose his abuse and the resulting delay in prosecution. Since this argument was clearly based on “facts in evidence,” it was proper and Duenas’ claim to the contrary should be rejected.

D. Even Assuming that the Prosecutor Committed “Error”
During Closing Argument, Any Such Error was Harmless

Duenas claims that he was prejudiced by the prosecutor’s “improper arguments.” Appellant’s Brief at 34-35. As set forth above, the prosecutor properly argued inferences from the evidence during closing argument and thus did not commit any error. However, even assuming that the prosecutor’s challenged comments during closing argument were somehow “error,” such error did not prejudice Duenas.

Again, a prosecutor's comments are reviewed “in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given.” *State v. Bryant*, at 873. If the defendant objected at trial, the defendant must show that the prosecutor’s misconduct resulted in prejudice that had a substantial likelihood of affecting the jury’s verdict. *State v. Emery*, 174 Wn.2d at 760. If the defendant did not object at trial, the issue is waived unless the “prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice.” *Id.* at 760–61.

Here, defense counsel objected to two of the three challenged comments and did not object to the third. Even under the more lenient standard of prejudice, however, Duenas cannot show that any of the prosecutor’s challenged comments “had a substantial likelihood of affecting the jury’s verdict.”

As set forth above, all of the challenged comments were based on the evidence presented at trial, evidence that was in front of the jury. The jury knew that Duenas told a completely different story than all of the other witnesses – they did not need the prosecutor to point this out. The jury knew that during T.M.’s testimony, he was either telling the truth, lying, or mistaken – there could be no other alternative. The jury heard T.M.’s own testimony that he felt helpless, soulless, and ripped from innocence – they heard this from T.M.’s own mouth.

As stated above, and will not be repeated again here, the evidence of Duenas’ guilt was overwhelming. Given the prosecutor’s specific objected-to arguments and statements, and evaluating them in context as they have to be, Duenas fails to demonstrate prejudice.

E. As the Prosecutor did not Commit Misconduct, There is No “Cumulative” Impact of Any “Prejudice”

Finally, Duenas argues that the cumulative effect of the prosecutor’s misconduct requires reversal of his convictions. Appellant’s Brief at 35. Under the cumulative error doctrine, a reviewing court can reverse a trial court verdict when it appears reasonably probable that the cumulative effect of errors materially affected the outcome, even when no one error alone mandates reversal. *State v. Russell*, 125 Wn.2d 24, 94, 882 P.2d 747 (1994). Here, however, Duenas has not identified any

instances of prosecutorial misconduct. Therefore, his argument that cumulative error requires reversal fails.

4. THE TRIAL COURT PROPERLY ADMITTED AS “EXCITED UTTERANCES” THE STATEMENTS MADE BY T.M. TO HIS BROTHER RECOUNTING THE ABUSE HE SUFFERED FROM DUENAS

Duenas claims that the trial court erred by admitting T.M.’s brother’s testimony recounting T.M.’s description of his “alleged” abuse as excited utterances because these statements were made four years after the “startling event.” Appellant’s Brief at 35-40. Duenas’ claim is without merit as these statements were made while T.M. was still under the stress of his abuse and were thus admissible as excited utterances under the ER 803(a)(2) exception to hearsay.

ER 803(a) provides that “excited utterances” are exceptions to the rule otherwise excluding hearsay statements:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

....

(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

“Excited utterances,” for purposes of the hearsay exception, are spontaneous statements made while under the influence of external physical shock before declarant has time to calm down enough to make a

calculated statement based on self-interest. *State v. Hardy*, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997). Three requirements must be met for hearsay to qualify as excited utterance: (i) a startling event or condition must have occurred; (ii) statements must have been made while declarant was still under the stress of startling event; and, (iii) statements must relate to the startling event or condition. *Id.* at 714. “The passage of time alone ... is not dispositive” to whether statements are excited utterances. *State v. Strauss*, 119 Wn.2d 401, 416–17, 832 P.2d 78 (1992).

The admission or exclusion of evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d at 658; *State v. Rehak*, 67 Wn. App. at 162. The trial court’s decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak*, 67 Wn. App. at 162. The trial court here properly found these statements to be excited utterances.

T.M.’s brother, Kyle, testified as to what T.M. told him happened three or four years earlier during the summer at his grandfather’s house where he was abused by Duenas. Per Kyle, the family was getting into the car when T.M. stormed out of the car, crying and upset. 2RP 221-222. Kyle followed him to his bedroom and asked T.M what was going on. T.M. cried that Duenas raped him. 2RP 222.

Kyle testified that T.M. was “angry, emotional, fist clenched, tears rolling, face is really red. I could tell that he had a lot of built up emotion and anger and obviously a lot of weight on his shoulders, carrying that around.” 2RP 222. T.M. was so flustered and frustrated that Kyle had to hold him. 2RP 224. Overcome by emotion, T.M. begged Kyle not to tell anyone else. 2RP 225-226.

The trial court overruled defense counsel’s continuing objection and found that the foundation had been laid for “excited utterance.” 2RP 222.

Duenas specifically complains that three or four years is too long of a period of time for statements to qualify as excited utterances because such statements could not still be made while under the “stress of excitement.” Appellant’s Brief at 36-39. However, the record here belies this contention.

Whether a declarant’s utterances were made while under the stress of excitement caused by the event or condition must be established by evidence independent of the declarant’s bare words. *State v. Young*, 160 Wn.2d 799, 807, 161 P.3d 967 (2007). Such evidence can include “the declarant’s behavior, appearance, and condition, appraisals of the declarant by others, and the circumstances under which the statement is made.” *Id.* at 810. Although the statement may be spontaneous, it need

not be completely spontaneous; rather, under certain circumstances, the statement may be made in response to a question. *State v. Bryant*, 65 Wn. App. 428, 433, 828 P.2d 1121 (1992)(citing *Johnston v. Ohls*, 76 Wn.2d 398, 406, 457 P.2d 194 (1969)). For example, in *State v. Woods*, the court upheld the admissibility of a victim's statements made in response to paramedic's questions some 45 minutes after the startling event. 143 Wn.2d 561, 598-99, 23 P.3d 1046 (2001). The crucial question is whether the declarant is still under the influence of the event so as to preclude any chance of fabrication, intervening influences, or the exercise of choice or judgment. *Johnston*, 76 Wn.2d at 406. However, the fact that the victim may have spoken to other persons in between the startling event and the statements in question does not necessarily bear on admissibility. *State v. Sunde*, 98 Wn. App. 515, 985 P.2d 413 (1999).

Here, although T.M.'s disclosure came several years after he was sexually abused, the evidence independent of T.M.'s words demonstrated that he was still under the stress and excitement of those events. T.M.'s behavior, demeanor, appearance, condition, and appraisal by Kyle, which included the spontaneous manner in which the statements came out, demonstrate that T.M. was still under the stress of the abuse, even though the statements were in response to questions from Kyle. In any event, given this independent evidence, it certainly cannot be said that the trial

court acted unreasonably in finding that these statements constituted excited utterances.

Duenas cites two cases in support of his position; neither is persuasive. In *State v. Ramirez-Estevez*, 164 Wn. App. 284, 291-292, 263 P.3d 1257 (2011), the court found that a two-year delay in reporting a rape disqualified the statements from being excited utterances made under the stress of the event. In that case, however, the victim did not have a spontaneous and emotional outburst that prompted questions and then disclosure. Rather, the child victim in *Ramirez-Estevez* was pulled out of class because of a parent phone call and was asked if she had anything “inside her.” At that point, the victim told her teacher about the rapes and got upset and nervous while doing so. *Id.* at 287.

In *State v. Chapin*, 188 Wn.2d 681, 689-691, 826 P.2d (1992), the trial court found that a rape victim’s statement made “within a day or so” of an alleged rape did not qualify as an excited utterance. In that case, however, the victim, a nursing home patient, saw the perpetrator several times a day and each time expressed anger at him. When the victim had calmed down, he was asked why he was angry with the defendant and the victim made his statement that defendant had raped him. *Id.* at 690. In finding that the statement did not qualify as an excited utterance, the Court noted that the victim’s mental deterioration was severe, he was frequently

confused and disoriented, he was generally hostile, and his medical records indicated he was prone to confabulation, was paranoid, and was delusional:

In sum, Hillison was confused, prone to confabulation, subject to persecutory delusions, hostile to those who tried to direct his behavior, and hostile in particular to male attendants. Hillison made the statement, "Raped me", after calming down from being angry, not from being excited, and in response to a question from his wife. In addition, Hillison's anger was elicited not by any startling event, but by seeing Chapin, which was a normal part of Hillison's life at the Center and which had occurred at least twice previously that day. These factors leave us persuaded that Hillison's statement was not a spontaneous and reliable utterance made while he was under the stress of excitement caused by the occurrence of a startling event. Accordingly, we hold the trial court erred in admitting Hillison's statement under the excited utterance exception of ER 803(a)(2).

Id. at 691.

Both of those case are easily distinguishable from the instant case. Rather than being prompted to tell what happened and then becoming upset, like the victim in *Ramirez-Estevez*, or having the host of mental problems that cast doubt on the mental state and reliability of the victim in *Chapin*, T.M. made his statements to Kyle after the stress of his abuse simply got too much for him to bear alone anymore – his outburst was unprompted and spontaneous. T.M. emotionally burst into tears and told his brother what happened to him, despite his shame and desire to keep what happened a secret. That this happened several years after the abuse

is of no particular moment – the trial court could, and did, reasonably find that T.M.s disclosure was due to the stress of the underlying event.

Even if this court finds that the statements T.M. made to Kyle do not qualify as excited utterances, Duenas’ claim should be denied because any such error was harmless. Improper admission of evidence may be harmless error. *State v. Flores*, 164 Wn.2d 1, 18, 186 P.3d 1038 (2008) “[A]dmission of testimony that is otherwise excludable is not prejudicial error where similar testimony was admitted earlier without objection.” *Ashley v. Hall*, 138 Wn.2d 151, 159, 978 P.2d 1055 (1999); *see also State v. Dixon*, 37 Wn. App. 867, 874–75, 684 P.2d 725 (1984)(erroneous admission of written statement as excited utterance was harmless error where trial judge heard essentially same details in victim’s testimony).

Here, the jury heard T.M. himself testify as to making the same statements that were admitted as excited utterances. 2RP 167-168, 171, 181. Although Duenas asserts that the trial court’s “error” was prejudicial due to T.M.s memory lapses and the prosecutor’s reliance on the consistency of T.M.’s testimony and the statements admitted as excited utterances (Appellant’s Brief at 39, fn. 5), the testimony from the victim of the crimes himself cannot be understated. T.M. was subject to cross-examination and the jury chose to believe T.M.’s testimony. *See State v. Ramirez-Estevez*, 164 Wn. App. at 293 (“Being subject to such cross-

examination itself diminished, if not extinguished, the type of prejudice that sometimes results from admission of hearsay where the declarant is not subject to cross-examination at trial”). The statements admitted as excited utterances were not more inflammatory than T.M.’s testimony; in fact, it was T.M. himself who testified as to the explicit sexual abuse perpetrated on him by Duenas and who described these acts as soul-destroying and which stole his innocence and left him feeling helpless. 2RP 170-171. Given T.M.’s own testimony, it is not reasonably probable that the jury’s verdict would have been affected even if the excited utterances were not admitted. Duenas’ argument to the contrary should be denied.

5. DUENAS IS NOT ENTITLED TO RELIEF
UNDER THE CUMULATIVE ERROR
DOCTRINE

Duenas claims that the cumulative effect of error at his trial violated his constitutional right to a fair trial. Appellant’s Brief at 40-41. However, as no prejudicial error was committed at trial, Duenas has no basis for relief under the cumulative error doctrine and his argument should be rejected.

The doctrine of cumulative error recognizes the reality that sometimes numerous errors, each of which standing alone might have been a harmless error, can combine to deny a defendant not only a perfect

trial, but also a fair trial. *In re Personal Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). The analysis is intertwined with the harmless error doctrine, in that the type of error will affect the court's weighing those errors. *State v. Russell*, 125 Wn.2d at 93-94.

In this case, for the reasons set forth above, Duenas has failed to establish any error, much less an accumulation of it. As such, no cumulative error occurred, and this court should reject Duenas' argument.

6. THIS COURT SHOULD REMAND THE CASE
SO THE CRIMINAL FILING FEE CAN BE
STRICKEN

At sentencing, the trial court found Duenas indigent and imposed a \$500 Crime Victim Assessment, a \$100 DNA Database Fee, and a \$200 Criminal Filing Fee. CP 186, 204-205; 5 VRP 13. House Bill 1783, effective March 27, 2018, amended RCW 10.82.090 to prohibit the imposition of the \$200 Criminal Filing Fee. As held in *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018), House Bill 1783 is applicable to cases that are on appeal and therefore not yet final. The State agrees that House Bill 1783 prevents the imposition of the Criminal Filing Fee on indigent defendants. Because the defendant is indigent, the State agrees

with Duenas (Appellant's Brief at 41) that the Criminal Filing Fee should be stricken.

7. DEFENSE COUNSEL DID NOT RENDER
INEFFECTIVE ASSISTANCE BY NOT RAISING
DUENAS' "YOUTHFULNESS" AS A
MITIGATING FACTOR AT SENTENCING.

In his supplemental brief, Duenas claims that his counsel rendered ineffective assistance at sentencing when he failed to raise his youthfulness as a mitigating factor. Duenas was 19 years old at the time he committed his offenses. Relying on recent case law and on recent research into the brains of adolescents and young adults, Duenas argues that his counsel had a duty to raise the issue of his youthfulness at sentencing and, if he had, it was possible that the trial court would have rendered an exceptional sentence downward. Appellant's Supplemental Brief at 2-7. Duenas' claim should be denied because even if the trial court had raised the issue of Duenas' youthfulness, the trial court would not have imposed a different sentence.

The trial court may impose an exceptional sentence below the standard range if it finds mitigating circumstances by a preponderance of the evidence. RCW 9.94A.535(1). In *State v. O'Dell*, the Washington Supreme Court held that a defendant's youthfulness is a mitigating factor that may justify an exceptional sentence below statutory sentencing guidelines, even when the defendant is a legal adult. 183 Wn.2d 680, 688-

89, 358 P.3d 359 (2015). In that case, the defendant was convicted of second-degree rape, committed at the age of 18. At sentencing, defense counsel requested a downward exceptional sentence because the defendant's youthfulness impaired his ability to appreciate the wrongfulness of his conduct and act in conformity with the law. *Id.* at 685. The trial court ruled that it could not consider age as a mitigating circumstance because O'Dell was a legal adult. *Id.* On appeal, the Supreme Court held that the sentencing court abused its discretion because it erroneously believed that it could not consider youth as a mitigating factor and, as a result, failed to consider whether O'Dell's youth impacted his culpability. *Id.* at 696–97.

Here, unlike in *O'Dell*, Duenas' defense counsel did not request an exceptional sentence downward, and he made no argument at sentencing that youth was a mitigating factor that impacted his culpability. To establish ineffective assistance of counsel for failing to make such an argument, Duenas must show that his attorney's performance was deficient and that he was prejudiced by this deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012). In doing so, Duenas must overcome the "strong presumption that counsel's performance was reasonable." *State v. Grier*, 171 Wn.2d

17, 33, 246 P.3d 1260 (2011) (quoting *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)).

Duenas makes no showing from the trial court record that youthfulness was a mitigating factor in his crime. Absent such evidence, he fails to establish that his counsel performed unreasonably by not raising the issue and instead advocating for the low-end sentence based on personal qualities that witnesses attributed to him. 5RP 11. With no showing of deficient performance by counsel, Duenas' ineffective assistance of counsel claim fails under *Strickland*.

Even if his counsel had raised this issue, the record indicates that Duenas' sentence would not have been affected; Duenas thus suffered no prejudice from his counsel's alleged failure to do so. A defendant establishes prejudice by showing that there is a reasonable probability that the result of the proceeding would have been different but for counsel's unprofessional errors. *State v. Grier*, 171 Wn.2d at 34. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland v. Washington*, 466 U.S. at 694).

To support his claim that he was prejudiced, Duenas states there was "at least the possibility that the sentencing court would have considered imposing a lesser sentence had it properly understood its discretion to do so." Appellant's Supplemental Brief at 7, quoting *State*

v. McFarland, 189 Wn.2d 47, 59, 399 P.3d 1106 (2017). At sentencing, the prosecutor argued for the high end of the standard range sentence – 318 months – based on Duenas’ criminal history and the circumstances of the current offenses. The prosecutor also asked for an exceptional sentence of lifetime community custody. 5RP 7-10. Defense counsel in turn argued for the low end of the standard range – 240 months – citing Duenas’ intelligence, faith, and the fact the Duenas himself was sexually and physically abused as a child. 5RP 11. The trial court accepted the prosecutor’s recommendation:

Okay. Well, I have to say that when [T.M.] testified, as a young man, it was incredibly compelling. The way that he described what happened, the things that you did to him, the impact that it’s had on his whole life and his ability to come forward and to have courage to be able to testify so many years later, because I think his concern is about you doing this to other children because you have a pattern of that. So the high end of the range is absolutely appropriate. I will impose the high end of the range on each of the counts.

I do believe that lifetime community custody is appropriate, given the fact that, as Ms. Williams indicated, you previously had treatment, from all the reports, and that’s in the pre-sentence report, which includes the California pre-sentence report, being deceitful in therapy, basically trying to just skate your way through that, and then having that dismissed is pretty manipulative, basically.

So I think in terms of safety to the community, I need to make sure that you're in custody as long as I can possibly keep you in custody. And you need to be on lifetime community custody so that the community can be protected.

5RP 12-13.

Given the trial court's findings, even had defense counsel asked for mitigation based on Duenas' youthfulness, the sentence would have been unaffected.² Simply put, based on the trial court's rejection of defense counsel's argument for a low-end standard range sentence and its imposition of a sentence at the high-end of the range, including an exceptional sentence for lifetime community custody, and the court's finding that Duenas is dangerous based on his previous criminal history of abusing children, there is no reasonable probability that the trial court would have imposed a sentence below the standard range but for counsel's "unprofessional errors." *State v. Grier*, 171 Wn.2d at 34.

Because Duenas cannot show that the outcome of the proceedings would have been different if his counsel had requested an exceptional sentence downward, his ineffective assistance claim fails.

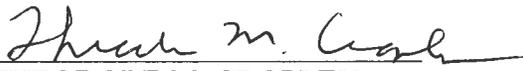
² Here, the trial court did not find that it did *not* have discretion to impose an exceptional downward sentence based on the youthfulness of Duenas. In fact, in the statement of findings of fact and conclusions of law, the court indicated that it *did* consider Duenas' age in sentencing. CP 202.

D. CONCLUSION.

For the foregoing reasons, this court should remand for the trial court to strike the criminal filing fee, deny Duenas's other claims of error, and affirm his conviction and sentence.

DATED: July 1, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney


THEODORE M. CROPLEY
Deputy Prosecuting Attorney
WSB # 27453

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below

7-1-19 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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