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COA NO. 53165-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

CESAR CHICAS CARBALLO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Jerry Costello, Judge

BRIEF OF APPELLANT (AMENDED)

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A. ASSIGNMENTS OF ERROR

1. Admission of the nontestifying codefendant's statement implicating appellant in the crime violated appellant's Sixth Amendment right to confrontation.

2. The court erred in preventing appellant from cross-examining the government's witness with evidence of bias, in violation of his constitutional rights to present a defense and confrontation.

3. The court erred in denying appellant's motion for new trial predicated on court error in preventing appellant from cross examining the government's witness with evidence of bias.

4. Cumulative error deprived appellant of his due process right to a fair trial.

5. The court erred in failing to count the offenses as "same criminal conduct" at sentencing.

6. The court erred in imposing discretionary costs, including supervision costs and collection costs.

7. The interest provision in the judgment and sentence is unauthorized by statute.

Issues Pertaining to Assignments of Error

1. Whether the nontestifying codefendant's out-of-court statement to police implicated appellant as a participant in the charged

crimes, such that its admission violated appellant's right to confront the witnesses against him?

2. Whether the court committed constitutional error in ruling appellant could not cross-examine the government's witness about a police threat to deport her if she did not cooperate, which provided a motive to falsify allegations against appellant? And, if so, whether the court further erred in denying the motion for new trial based on this ground?

3. Whether the combination of errors specified above violated appellant's right to a fair trial under the cumulative error doctrine?

4. Whether the court erred in not addressing the "same criminal conduct" status of the offenses at sentencing and, on the merits, whether the offenses of murder and conspiracy to commit murder meet the standard because they involved the same time, place, victim and intent?

5. Whether the imposition of discretionary collection and supervision costs was a clerical error or whether the court erred in imposing them because the statute prohibits imposition of discretionary costs on indigent defendants?

6. Whether all non-restitution interest on legal financial obligations must be stricken and the provision in the judgment and sentence directing accrual of interest amended to conform to the law?

B. STATEMENT OF THE CASE

Cesar Chicas Carballo stood trial on charges of premeditated first degree murder, conspiracy to commit first degree murder, and second degree felony murder. CP 104-06. Jose Ayala Reyes was his codefendant. CP 12; 2RP¹ 413.

On April 28, 2016, a couple driving home saw a body in the street and called 911. 2RP 657-62. Police responded at 11:20 p.m. and saw a man, identified as Samuel Cruces, lying in the street, bleeding heavily but still breathing. 2RP 588, 596, 708. He had been dragged by a vehicle. 2RP 596. A parked SUV, its driver's door open and still running, was pressed against another vehicle. 2RP 594. There was blood on the inside of the SUV. 2RP 594, 726. A butterfly knife was on the ground. 2RP 603, 736. A shoe was pinched between the two vehicles. 2RP 758. There was a blue latex glove inside the SUV. 2RP 726. Cruces was pronounced dead at the hospital. 2RP 816.

About three weeks later, Braulio Yanez Campos contacted police and told them what he had seen. 2RP 695. On the night in question, Yanez Campos was driving when someone exited a car and signaled for

¹ The verbatim report of proceedings is cited as follows: 1RP - one volume consisting of 6/25/18, 6/28/18; 2RP - 17 consecutively paginated volumes consisting of 9/27/18, 10/1/18, 10/3/18, 10/4/18, 10/8/18, 10/9/18, 10/10/18, 10/11/18, 10/15/18, 10/16/18, 10/18/18, 10/22/18, 10/23/18, 10/24/18, 10/25/18, 10/26/18, 1/18/19.

him to stop. 2RP 689, 691, 696. Concerned for his own safety, Campos kept going. 2RP 689. He looked in his rearview mirror as he drove away and saw two other people emerge from the vehicle and one of them beat the person who had signaled. 2RP 690-93.

Surveillance footage from a nearby business captured some of the events that night. 2RP 924. In one video, a woman later identified as Karina Flores walks by on the street. 2RP 927. Someone else later walks to the SUV. 933-35. There is movement inside. 2RP 935. Cruces exits the vehicle and is run over by an unidentified passing car. 2RP 1231, 1233. An autopsy revealed eight stab wounds and blunt trauma injuries. 2RP 992, 1011-12. The cause of death was multiple stab wounds and blunt force trauma consistent with being run over by a car. 2RP 980. Blood from the knife matched Cruces's DNA. 2RP 954. No phone, fingerprint or DNA evidence linked Chicas Carballo to the crime. 2RP 1204, 1212.

Investigation showed that Cruces clocked out of work at 10:10 p.m. on April 28. 2RP 906-08. That night, Cruces received multiple calls and texts from a phone number associated with Ayala Reyes. 2RP 909, 916, 1081, 1086-87. Ayala Reyes had worked at Elemental Pizza with Cruces and lived a few blocks from the crime scene. 2RP 788, 847-48, 921.

In early April, Cruces's brother helped Ayala Reyes get a bus ticket to California. 2RP 821, 829-30. Ayala Reyes told him that he was in the MS-13 gang and that, when he received his work check, he had to give money to people in California that would then send the money to a gang in El Salvador. 2RP 831-32. The amounts were small, \$20 or \$30. 2RP 832.

On July 8, 2016 law enforcement took Ayala Reyes into custody. 2RP 1142, 1146. During interrogation, Ayala Reyes admitted to participating, along with others, in the stabbing of Cruces, although he was unwilling to disclose the names of the other people involved. 2RP 1149. He acknowledged the knife found at the scene belonged to him. 2RP 1183-84. He denied killing Cruces but admitted to stabbing him once in the leg. 2RP 1183-84, 1454-55. He also identified the shoe left behind at the scene as his. 2RP 1183. He said Cruces sold drugs. 2RP 1433.

Ayala Reyes was in a boyfriend/girlfriend relationship with Karina Flores. 2RP 786, 1260. Flores identified the street names of others involved in Cruces's death to police as Sombra, Tas and Sicario. 2RP 1150. Flores identified Chicas Carballo as "Tas" after Tacoma police showed her a photo of him. 2RP 1161. He has a tattoo of the Tasmanian Devil cartoon figure. 2RP 1247. Flores identified Juan Jose Gaitan Vasquez as "Sombra." 2RP 1170. Vasquez's DNA was on the blue glove

found at the scene. 2RP 1179. Detective Rock identified Edenilson Misael Alfaro as "Sicario." 2RP 1180.

Flores testified that Ayala Reyes sent money to Sicario to support gang activity. 2RP 1273-74, 1286. He sent the money "because of drugs that he had." 2RP 1269. Flores turned over some money transfer receipts to law enforcement. 2RP 791, 1276-77. The receipts indicated that Ayala Reyes wired money to Chicas Carballo in California in the amounts of \$200, \$300, and \$260 on June 6, June 25, and July 7, 2016 respectively. 2RP 1219, 1241-43.

On April 5, 2016, Ayala Reyes submitted a rental application for an apartment. 2RP 1132-33. He received a move-in date of April 21. 2RP 1134. Flores testified that she was at the apartment when Ayala Reyes, Tas, Sombra, and Sicario talked about killing Cruces. 2RP 1268-69, 1292. According to Flores, they were members of the MS-13 gang. 2RP 1270-71. She described Sicario's position within the gang as "the main one." 2RP 1271. Before that day, the only person she had heard of was Sicario. 2RP 1269. Ayala Reyes went to California a few weeks before Cruces's death and met with Sicario. 2RP 1271-72, 1287. She said it was because of drugs. 2RP 1272. Ayala Reyes returned and rented an apartment so that gang members could come there. 2RP 1287. She also

testified that Ayala Reyes rented the apartment so that he and Flores could live there. 2RP 1923.

According to Flores, the three men picked Ayala Reyes up from his residence in a truck on the day Cruces was killed. 2RP 1293-94, 1297-98. She went to the apartment later. 2RP 1299. While Flores cooked, the four men discussed how they were going to kill Cruces. 2RP 1300-04, 1555, 1578-79. Sombra said he was going to stab him. 2RP 1302. Ayala Reyes was to lure Cruces by calling him. 2RP 1303. Ayala Reyes and Sombra were chosen to do the killing because they were not in the gang. 2RP 1309-10. The men grabbed gloves provided by Ayala Reyes. 2RP 1306-09, 2095. She saw two knives, a butterfly knife and a knife that Sombra passed around. 2RP 1565, 1571-72, 1918-19. The five of them left the apartment and drove to the location where the killing was to happen. 2RP 1547-48. Tas was the driver. 2RP 1548. Flores was dropped off before reaching their destination and she walked home. 2RP 1550-52, 1556.

Flores went to the apartment later that night, where she met up with Ayala Reyes and saw Tas, Sombra and Sicario leave in their vehicle. 2RP 1558-59. There was blood on the passenger side door. 2RP 1559. Ayala Reyes told her that he and Sombra got into Cruces's car, Ayala Reyes stabbed him in the leg, Sombra stabbed him in the neck, they beat

him on the street and killed him. 2RP 1576-77. Ayala Reyes told her that his shoe got trapped underneath Cruces's car and he left it at the scene. 2RP 1564. He burned his clothes the next day. 2RP 1561. He threw a knife in a lake a week or two later. 2RP 1574-75, 2095-96.

Flores thought Cruces was killed because he sold drugs. 2RP 1286. She also opined that Cruces was killed in part so that Ayala Reyes could be part of "La Mara." 2RP 1286, 1296. Flores made MS-13 drawings in the residence she shared with Ayala Reyes, some of them at his request. 2RP 1283-88, 2101-02.

Flores was interrogated by police in 2016. 2RP 786. She denied any knowledge of the killing or involvement in it for much of her interrogation, repeatedly maintaining that she was being honest in doing so. 2RP 793, 1216, 1824-38, 1849, 1853. Police threatened to arrest her if she didn't tell them the story. 2RP 1900-02, 1929-30.

A detective, testifying as a gang expert, said MS-13 was prevalent in the Los Angeles area. 2RP 1946, 1958. MS-13, short for Mara Salvatrucha, is a gang formed in the 1980's, primarily made up of people from Central America, particularly El Salvador. 2RP 1787-89, 1947-48. MacArthur Park in Los Angeles is the focal point for their turf. 2RP 1953-54, 1971-72. Park View is an MS-13 clique. 2RP 1953, 1960, 1994. Murdering someone can be a way to join a gang. 2RP 1976. MS-13

members are required to financially contribute to the gang. 2RP 1973-74. Those higher up in the hierarchy collect. 2RP 1974. The detective identified Sicario as a Park View gang leader. 2RP 1974.

Chicas Carballo was interrogated in March 2017. 2RP 1613. He told police that he lived in Los Angeles. 2RP 1707. He was originally from El Salvador. 2RP 1703. He denied being a gangster but acknowledged he used to be in a gang. 2RP 1623, 1749. He said he stopped being "active" in 2012. 2RP 1743, 1747-48. He had left "that life." 2RP 1747. At one point he said he had never been called "Tas." 2RP 1754. When later asked why people called him "Tas," he said he did not know. RP 1762. He talked with Park View members, saw them at the park, and gave money to help them. 2RP 1625, 1659-60, 1704, 1708-09, 1743-44. At some point he spoke to a Park View member on the phone while the latter was in custody. 2RP 1726.

Chicas Carballo maintained that he drove to Washington with two others based on a job offer to work construction. 2RP 1668-72, 1676-77, 1687-88, 1693, 1740. He did not remember when. 2RP 1690-91. One of the men was named "Juan," "Jose," or "Juan Jose," who he met him at MacArthur Park where he was looking for work. 2RP 1671-73, 1688-89, 1691-92. He did not know who the other person was. 2RP 1695. When they arrived, he was told to wait in the car. 2RP 1730. Juan/Jose left and

then came back, reporting that he could not reach the man who was offering the job, so they drove back to California. 2RP 1669-70, 1677, 1696-98, 1730-31, 1772. Chicas Carballo said he was tricked into going. 2RP 1738-39. He did not know what happened, "they took me supposedly to work." 2RP 1768. He denied knowing who was killed. 2RP 1666. He denied doing anything. 2RP 1720-21. He denied knowing anyone named "Little Sicario." 2RP 1711.

The defense theory, as argued to the jury, was that Flores lied and that the State had not proven beyond a reasonable doubt that Chicas Carballo was involved. 2RP 2218-21, 2241-42, 2268. The jury found Chicas Carballo guilty on all counts, and returned special verdicts finding a deadly weapon was used in the commission of the offenses. CP 55-56, 58-59, 61-62.² The second degree murder conviction was vacated to avoid double jeopardy. CP 90-92. The jury returned special verdicts finding a gang aggravator for the offenses, but the court did not impose an exceptional sentence based on the aggravator. CP 57, 60, 63; 2RP 2350. The court imposed a total of 608 months in confinement by running the base sentences for the serious violent offenses and the deadly weapon enhancements consecutively. CP 78. Chicas Carballo appeals. CP 93.³

² Ayala Reyes was also found guilty as charged. CP 119-28.

³ Ayala Reyes has a separate appeal under No. 53161-5-II.

C. ARGUMENT

**1. ADMISSION OF THE NONTESTIFYING
CODEFENDANT'S OUT-OF-COURT STATEMENT,
WHICH INCRIMINATED CHICAS CARBALLO,
VIOLATED THE SIXTH AMENDMENT RIGHT TO
CONFRONTATION.**

Chicas Carballo challenges admission of Ayala Reyes's out-of-court statement to police that was used as part of the State's effort to convict him. Its admission violated Chicas Carballo's Sixth Amendment right to confront the witnesses against him. Although Ayala Reyes did not name names, a jury could infer from his references to others planning and being involved in the murder that Chicas Carballo was one of them. Reversal is required because the State cannot prove this error was harmless beyond a reasonable doubt.

a. Ayala Reyes's statement to police implicates others in the killing.

Ayala Reyes's statement to police was read to the jury. 2RP 1344-45. Many times, throughout his statement, Ayala Reyes indicated that others besides himself were involved in the killing. Those instances are set forth here.

Ayala Reyes, who was from El Salvador, (2RP 1347), was afraid of being killed if he talked. 2RP 1408. When asked by who, he said he

did not know "who the people are." 2RP 1409. "I'll only tell you that I'm afraid of them." 2RP 1416.

When asked why Cruces stopped the car that night, Ayala Reyes said "I will only tell you that I don't know who the people are." 2RP 1413. He reiterated the point: "But I'm not protecting anyone. I simply don't know who they are." 2RP 1415. Ayala Reyes admitted "I was with him, but I don't know who did that to him" and "we were going there, but I don't know what – why that was done to him." 2RP 1415-16. Cruces "was hiding from those people." 2RP 1433. When asked who was in the car, he said "No one else. Just him with me, but I don't know who those people were." 2RP 1416. When asked how many people were outside, he said "Just one person, but I don't know what he had/what was going on with him." 2RP 1416. Referring to the man waiting when they stopped, he said "I don't know what it is that he was going to do." 2RP 1479.

"I did see who it was." 2RP 1430. "Someone stopped him, flagged him down." 2RP 1432. "I don't know if he was killed, but I left. The person was there and I left." 2RP 1447. When asked why he left his shoe behind, he said "Because I was fleeing because of what they were doing there." 2RP 1423. When he fled, he saw "the person who was doing that to him." 2RP 1426. He answered, "I don't know" to "why did they/you

kill a man?" 2RP 1484. He answered "yes" to "And they said to you, 'If you don't do that, we'll kill you.'" 2RP 1491.

When asked if the man outside the car was a friend, he responded "I don't know that. I don't know who they are." 2RP 1417. When asked what gang the man outside oversaw, he responded "I don't know who he is." 2RP 1419. The one who was outside "came here" and was the top dog, but he did not know his name. 2RP 1493. He denied talking to the person in California. 2RP 1494. "I don't know how they ended up with that plan, but I don't know. They didn't tell me anything about that." 2RP 1494. At one point, he is asked "These people, they're here in Tacoma?" 2RP 1488. Ayala Reyes answered the people were in Los Angeles. 2RP 1488. He was being threatened. 2RP 1488. "They" made him go to California. 2RP 1489.

If he talked, "They will find out you have me locked up here, and they are going to say I talked." 2RP 1489. "I do know who did it, but – but do you think that if I tell you and they catch him, that do you think that either I or my family isn't going to be killed?" 2RP 1453. Ayala Reyes was afraid of people in "La Mara." 2RP 1464. "I did not kill him, but I was an accomplice. But if I tell you that who that person is, do you think I'm not going to get killed?" 2RP 1456. "[T]hey are going to find out, and they are going to murder me, to kill me." 2RP 1504. He nodded yes to

whether he had to stab Cruces to become a member of La Mara. 2RP 1492, 1515-16. When asked if anyone else had to stab, he said "Yes, but I don't know where he is," and he did not know his name. 2RP 1493.

At one point he denied he and Flores were involved, but "Maybe the people who did it are free." 2RP 1429. "The thing is, they use a person like stupid dumb shit like bait, and then all of the sudden you're stuck, and I'm the one who ended up in that movie. They're out free, and me just look." 2RP 1494.

Before trial, counsel for Chicas Carballo identified Ayala Reyes's statement to police as raising a Bruton⁴ issue, which the court and State recognized. 1RP 15-16. The court denied without prejudice Ayala Reyes's motion to sever pending a determination of the Bruton issue. 1RP 19, 31; CP 13. Bruton issues related to various witnesses were later addressed. 2RP 66. The State argued "In regard to Ayala Reyes' statements, they're primarily statements of a party opponent. He doesn't name anybody, so I'm not sure how Mr. Hershman gets to any issue regarding identity, because it's not there. It's the same thing about the particular people. He won't name them." 2RP 69. The court said "As to Mr. Reyes' statement, there was some arguably vague mention of other

⁴ Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

people being involved, but he didn't -- at least the portion of it that I read, he didn't say anything about Mr. Chicas-Carballo being a participant, so that's not necessarily a Bruton issue, if it can be clearly excised in some fashion so that it eliminates him identifying the other party." 2RP 73-74. The State went through its reasons why various out-of-court statements were admissible, saying in regard to Ayala Reyes's in-custody statement: "there is really nothing there as far as specific names, but there is some discussion of activity that would allude to others, and it's all in relation to the conspiracy." 2RP 75.

After further discussion of various Bruton theories, the court stated "the statements made by each of the defendants are problematic only if they violate Bruton, and I think given the fact that they have been pretty focused on their own activities and some random statements about others being involved, like the Washington guy,⁵ they can be properly excised such that there is not a Bruton issue." 2RP 76-77.

Before Ayala Reyes's statement was published to the jury, Chicas Carballo's counsel stated, "before we get going, the Court understands this

⁵ "The Washington guy" in this context refers to Ayala Reyes, who is described as such in an out-of-court statement made by Chicas Carballo to jail inmate Charles Hartzell. 2RP 76. Hartzell did not ultimately testify and the statement was never put into evidence.

is being done over the objection previously made by Mr. Chicas-Carballo?" 2RP 1337. The court said "Yes." 2RP 1337.

a. Ayala Reyes's statement obviously implicated Chicas Carballo as a participant in the killing, in violation of the Bruton rule.

A person accused of a criminal offense has the right to confront the witnesses against him. U.S. Const. amend. VI; Wash. Const. art. I, § 22. The confrontation clause bars admission of testimonial statements of a witness who does not appear at trial, unless the witness is unable to testify and the accused had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). "Witnesses" in this context are "those who bear testimony" against a defendant. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) (internal quotation marks omitted) (quoting Crawford, 541 U.S. at 51). Testimonial statements thus fall within the scope of the confrontation clause. State v. Wilcoxon, 185 Wn.2d 324, 331, 373 P.3d 224, cert. denied, 137 S. Ct. 580, 196 L. Ed. 2d 455 (2016). "Statements taken by police officers in the course of interrogations,' are [] testimonial." Id. at 334-35 (quoting Crawford, 541 U.S. at 52). Claimed confrontation clause violations are reviewed de novo. State v. Fisher, 185 Wn.2d 836, 841, 374 P.3d 1185 (2016).

In Bruton v. United States, 391 U.S. 123, 128, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), the U.S. Supreme Court held a defendant's confrontation clause rights are violated when a nontestifying codefendant's out-of-court statement implicating the defendant is admitted in a joint trial. The Court later clarified that Bruton protections apply when the codefendant's statements facially incriminate the defendant. Richardson v. Marsh, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987).

Marsh involved a joint trial of respondent Marsh and her codefendant, Williams, in which Williams's redacted confession was admitted into evidence. Id. at 203-04. Bruton protections did not apply because the "confession was redacted to omit all reference to respondent — indeed, to omit all indication that *anyone* other than [a named third person] and Williams participated in the crime." Id. at 203. The defendant was linked to the crime only through inferences the jury made as evidence was presented. Id. at 208. Following Marsh, "admission of a nontestifying codefendant's confession with a proper limiting instruction" must be "redacted to eliminate not only the defendant's name, but any reference to her existence." Id. at 211.

In Gray v. Maryland, 523 U.S. 185, 188, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998), the redactions substituted blank spaces or the word "deleted" for defendant Gray's name. The Court held that this "so closely

resemble[d] Bruton's unredacted statements" as to fall within Bruton's protective rule, as the jury will "often realize that the confession refers specifically to the defendant." Id. at 192-93. The possible inferences to be made in Gray involved statements that "despite redaction, obviously refer[red] to someone, often obviously the defendant" and involved "inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." Id. at 196. In such a case, a juror "need only lift his eyes to [the other defendant], sitting at counsel table, to find what will seem the obvious answer." Id. at 193.

Thus, "the exact form of the redaction is not dispositive. Rather, under Marsh and Gray, the question is whether the redaction obviously refers to the defendant." Fisher, 185 Wn.2d at 845. Fisher involved a joint trial of defendant Fisher and her codefendant, Trosclair, in which Fisher's redacted confession was admitted into evidence. Id. at 840. The statement was redacted to replace Trosclair's name with "the first guy." Id. While "the first guy" was not an obvious redaction and did not implicate Trosclair by name, "it nonetheless obviously refers to Trosclair. Before hearing Fisher's statement, the jury knew that the codefendants were Fisher and Trosclair, Fisher's statements implicate three people: Steele, 'the first guy,' and a man from California." Id. at 845. Steele was referred to by name and the "California guy" was eliminated as a possible

codefendant, leaving Fisher as the person fitting "the first guy" description. Id. at 845-46. "Marsh and Gray require that the redaction omit the existence of anyone other than the codefendant." Fisher, 185 Wn.2d at 847. "Applying this standard," the Court concluded that substituting "the first guy" for Trosclair's name in Fisher's statement implicated Trosclair and that the admission of Fisher's statement during the joint trial amounted to constitutional error. Id. at 847.

The legal standard set forth in Fisher is now applied to Chicas Carballo's case. Precedent requires a codefendant's confession omit the existence of other defendants. Fisher, 185 Wn.2d at 847. That is, "admission of a nontestifying codefendant's confession with a proper limiting instruction" must be "redacted to eliminate not only the defendant's name, but any reference to her existence." Id. at 843 (quoting Marsh, 481 U.S. at 211).

Ayala Reyes's statement to police did not redact the existence of the other defendant. His statement was not sanitized to remove any reference to the existence of another person involved in the crime. In his confession, Ayala Reyes often refers to others who were involved in the planning and killing of Cruces, and who threatened him if he did not participate or would kill him if he identified them to police. Cf. State v. Cotten, 75 Wn. App. 669, 690, 879 P.2d 971 (1994) (admission of the

codefendant's statement in a joint trial was proper because it did not implicate or acknowledge the presence of a coconspirator).

His statement refers to one person who was outside the car and killed Cruces, but just as clearly indicates others were involved. Those others were referred to using phrases such as "they," "we," "those people" and "the people." Ayala Reyes did not identify Chicas Carballo by name, but to avoid Bruton error, it must be clear that the statement "does not obviously refer to the defendant." Fisher, 185 Wn.2d at 845. There were two people on trial: Chicas Carballo and Ayala Reyes. Ayala Reyes's statement obviously includes Chicas Carballo as either the person who directly did the killing or as one of the other people involved in the killing because Chicas Carballo was the only other defendant in the courtroom.

In State v. Vannoy, 25 Wn. App. 464, 473-75, 610 P.2d 380 (1980), in a joint trial of three defendants, where the State introduced two codefendants' confessions admitting that "we" saw a good service station to rob, "we" pulled around the corner, and "we" got out of the car, the court held that it was improper to admit the statements against the third codefendant because a jury could "readily conclude that [the defendant] was included in the 'we's' of the codefendants' statements." Here, too, a jury could readily conclude that Chicas Carballo was the person referred to as being outside the car or included in the group of "they," "we," "those

people," and "the people." The jury needed only look to the man sitting at the defendant's table as a codefendant to understand that Chicas Carballo was implicated.

State v. Medina, 112 Wn. App. 40, 48 P.3d 1005, review denied, 147 Wn.2d 1025, 60 P.3d 93 (2002) is distinguishable or, alternatively, applies the wrong legal standard and is therefore not controlling. In Medina, defendant Hunt's redacted statement referred to "other guys," "the guy," "a guy," "one guy," and "they." Id. at 51. The statements did not refer directly to codefendant Medina, and the redactions were "so ambiguous that it is impossible to track the activities of any particular 'guy' referenced in the statement." Id. Further, "[t]he fact that the jury acquitted one of the codefendants is also an indication that no specific individual was identified and that the jury did not base its verdict on the statement." Id.

Here, there was only two codefendants on trial and the jury acquitted no one, so the assurance in Medina that the jury did not base its verdict on the statement is missing here. In Chicas Carballo's case, evidence from other sources showed there were three possible accomplices, but the jury would not know that just by looking to Ayala Reyes's statement. In assessing whether a Bruton error has occurred, courts consider whether a codefendant is implicated just by looking at the

statement at issue, not by assessing inferences that could be made by a jury based on other evidence. Marsh, 481 U.S. at 203; Gray, 523 U.S. at 196. The question is whether a juror could infer a statement implicates a codefendant on trial "even were the confession the very first item introduced at trial." Fisher, 185 Wn.2d at 846 (quoting Gray, 523 U.S. at 196). Thus, in Chicas Carballo's case, the number of accomplices established by other evidence is not a factor in determining whether Ayala Reyes's statement obviously implicated Chicas Carballo. Had Ayala Reyes's statement been the first piece of evidence that the jury heard, his implicating others in the crime obviously included the only other codefendant on trial.

The Medina court's reasoning, meanwhile, does not comport with recent Supreme Court precedent. In Medina, the statement did not omit the existence of other codefendants but was found not to violate the Bruton rule. Fisher makes clear that such omission is a requirement under Marsh and Gray. Fisher, 185 Wn.2d at 847. So even if Medina is not distinguishable, its analysis is legally flawed in light of higher court precedent. Although Chicas Carballo's precise role in the killing could not be definitively pinned down based on Ayala Reyes's statement alone, that statement nonetheless provides an obvious inference that Chicas Carballo was one of the people involved in the killing.

The court instructed the jury: "You may consider the statement made out of court by Jose Jonael Reyes to law enforcement as evidence against him; but not as evidence against Cesar Chicas Carballo." CP 22 (Instruction 5(a)); see also 2RP 1344 (oral instruction before statement read to jury). Such a limiting instruction, however, does not alleviate a Bruton error. An appellate court cannot "accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination." Bruton, 391 U.S. at 137. Rather, "[t]he effect is the same as if there had been no instruction at all." Id. Where a statement implicates the defendant, a trial court's limiting instruction only serves to emphasize the inculpatory nature of the evidence against the accused. Gray, 523 U.S. at 193.

c. Reversal is required because this constitutional error is not harmless beyond a reasonable doubt.

Confrontation clause violations are harmless only if the reviewing court is persuaded beyond a reasonable doubt that the jury would have reached the same result. Fisher, 185 Wn.2d at 847. "The test is whether the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." Id.

Assuming Karina Flores's testimony is untainted (see section C.2., infra), it is not so overwhelming that it necessarily leads to guilt beyond a

reasonable doubt. Flores had credibility problems. She gave inconsistent statements and lied to police, claiming some things were true when she knew they were not. She was the only witness to identify Chicas Carballo as a participant in the crime and her credibility could be questioned. Aside from Flores's testimony, the evidence against Chicas Carballo was murky and allowed for different inferences. While Chicas Carballo told law enforcement that he went to Washington at some point, he did not admit to being involved in the killing. He claimed ignorance. Nothing he admitted pinned him down to the date, time and place of Cruces's death. The money receipts dated after the killing provided evidence of a link between Chicas Carballo and Ayala Reyes and a gang connection but do not necessarily show that Chicas Carballo was involved in the killing. No forensic evidence tied Chicas Carballo to the crime. Reversal of the convictions is required because the State cannot prove the constitutional error was harmless beyond a reasonable doubt.

2. THE COURT VIOLATED CHICAS CARBALLO'S RIGHT TO PRESENT A DEFENSE AND CROSS EXAMINE THE WITNESSES AGAINST HIM WHEN IT PREVENTED HIM FROM IMPEACHING THE STATE'S PRIMARY WITNESS WITH EVIDENCE OF BIAS.

Police threatened to send Flores back to El Salvador if she did not confess to what she knew about Cruces's death and who was involved.

Defense counsel wanted to examine Flores about this deportation threat to show she had a motive to fabricate. The trial court's denial of this request violated Chicas Carballo's right to present a defense and to confront the witnesses against him through cross examination.

- a. **Police threatened to send Flores back to El Salvador if she did not talk, and the court prohibited the defense from examining her about the threat.**

During police interrogation, Flores said she came from El Salvador about two years ago. Ex. 116, vol. I, at 31 (exhibit not admitted into evidence). There were gangs in El Salvador. Id. at 134. According to the interrogator, Ayala Reyes was in M-13. Id. at 135. He was afraid that he and his family would be killed. Id. at 135-40. Flores was asked "Wouldn't you be afraid that you would get hurt too?" Id. at 140.

The issue on appeal concerns the following passage from Flores's interrogation:

Unknown Male: This is murder Karina, this is serious.

PDO Lopez-Sanchez:⁶ This is a homicide.

Unknown Male: We just go [sic] done with a . . .

PDO Lopez-Sanchez: [unintelligible]

Unknown Male: . . . kid younger than you who is gonna go to jail for twenty-one years.

PDO Lopez-Sanchez: We just finished an investigation with someone younger than you, he/she will go to jail for twenty-one years.

⁶ Lopez-Sanchez was the Spanish interpreter that converted the other interrogators' English statements into Spanish for Flores.

Unknown Male: In twenty-one years you will be older than us.

PDO Lopez-Sanchez: In twenty-one years, you will have more years than all of us.

Det. Jennifer Quilio: And then you will have to go back to El Salvador.

PDO Lopez-Sanchez: And then they will they will [sic] take you to El Salvador again.

Unknown Male: So if you, if you want to help . . .

Flores: But I don't know anything.

Unknown Male: If you want to help Jose, you need to help yourself now.

PDO Lopez-Sanchez: If you want to help Jose, you have to help yourself first. You cannot help him if you are not first.

Ex. 116, vol. I, at 166-68.

Ayala Reyes's counsel moved pre-trial to examine Flores about her immigration status in relation to possible interest in a U-Visa. 2RP 17, 39, 66, 106-11. The court denied the motion subject to further argument, "if something comes up that seems to make it relevant." 2RP 111. The court's pre-trial order provided "Defendant Ayala Reyes' motion to allow testimony of the witness Karina Flores' immigration status under ER 413 is denied, without prejudice should additional evidence be provided." CP 12.

At trial, during a break in Flores's direct examination, Chicas Carballo's counsel told the court "if this is a good time to ask, in her transcribed statement to police one of the things the police arguably threatened her with was deportation, immigration issues. Am I allowed to

go into that? I don't want to violate an order of the Court." 2RP 1476. The court responded: "I think we included no immigration issues." 2RP 1476. Ayala Reyes's counsel said, "If that's the case, unless there is further information about that's somehow relevant." 2RP 1476. Chicas Carballo's counsel argued it was relevant that Flores denied knowing anything "for 234 pages" and "after threats of jail and immigration issues and leading questions she finally remembers something." 2RP 1476-77.

The court ruled: "Well, the order that we previously entered in response to Mr. Ayala Reyes' motion to limit her testimony -- actually to limit questioning of that defendant regarding her immigration status. I denied a motion to allow that testimony without prejudice should additional evidence be provided. I'm not hearing any additional evidence. It sounds like the same issue as was already provided." 2RP 1477.

Counsel said, "It's in her statement." The court responded, "Unless she says something different today, or the reason I made this up is because I was threatened by deportation, that wouldn't appear to be new information." 2RP 1477. The court was concerned about additional information "she may now claim exists out there," to which the State responded that counsel had information about officer threats to Flores since the interrogation was transcribed and "it's not timely to bring it up at this point." 2RP 1477-78. Flores was not likely to say anything about

"those issues" and was "told that's not going to be a part of this case." 2RP 1478. The court said "Well, let's go forward with this, and we may need to address Karina in a little more detail." 2RP 1478.⁷ The issue was not further addressed, except that when the prosecutor wanted to explore Flores's background in more detail, the court cautioned that doing so would open up "the potential for cross-examination on bias regarding the fear of being deported." 2RP 1936. The prosecutor decided not to proceed to avoid opening the door. 2RP 1936-37.

Following the verdicts, defense counsel filed a motion for new trial on the ground that the court prohibited the defense from cross-examining Flores about the fact that police threatened her with deportation during her interrogation. CP 70-71; 2RP 2333-34. The court denied the motion, stating it was supposed to be made before trial under ER 413 and the probative value of Flores's "status" did not outweigh its prejudicial effect. 2RP 2334-35.

b. The right to present a defense and the right to confront adverse witnesses through cross-examination are fundamental to the integrity of the criminal justice system.

The Sixth Amendment and due process require an accused be given a meaningful opportunity to present a complete defense. State v.

⁷ The prosecutor later reported that Flores had nothing new to report, though she added a few details to her account. 2RP 1543.

Cayetano-Jaimes, 190 Wn. App. 286, 295-98, 359 P.3d 919 (2015); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. VI, XIV; Wash. Const. art. 1, § 3, 22. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Defendants have the right to present evidence that might influence the determination of guilt before a jury. Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

In conjunction with the right to present a defense, defendants have the constitutional right to confront the witnesses against them. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983); U.S. Const. amend. VI; Wash. Const. art. 1, § 22. Defense counsel exercises the right to confrontation primarily through the cross-examination of the State's witnesses, "the principle means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). An important function of the constitutional right to cross-examination is to expose a witness's motivation for testifying. Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

c. Standard of review

Trial court limitations on the scope of cross-examination are reviewed for abuse of discretion. State v. Lee, 188 Wn.2d 473, 486, 396 P.3d 316 (2017). On the other hand, a claimed violation of the Sixth Amendment right to present a defense is reviewed de novo. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

There is a split in Division Two on the standard of review. Compare State v. Horn, 3 Wn. App. 2d 302, 311, 415 P.3d 1225 (2018) (determination of minimal relevancy reviewed for abuse of discretion, whether prejudice outweighs probative value and the State's interest in exclusion outweighs the defendant's need for evidence reviewed de novo) with State v. Blair, 3 Wn. App. 2d 343, 351, 415 P.3d 1232 (2018) (exclusion of evidence reviewed for abuse of discretion; if discretion abused, defendant's right to present a defense reviewed de novo).

d. The right to present a defense and to confront witnesses required that Chicas Carballo be allowed to cross-examine the State's witness about the deportation threat because the threat was relevant to show bias.

Defense evidence need only be relevant to be admissible. State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). "All facts tending to establish a theory of a party, or to qualify or disprove the testimony of his adversary, are relevant." State v. Perez-Valdez, 172 Wn.2d 808, 824-25, 265 P.3d 853 (2011) (quoting Fenimore v. Donald M. Drake Constr. Co.,

87 Wn.2d 85, 89, 549 P.2d 483 (1976)). The defense theory was that Flores fabricated Chicas Carballo's involvement in the conspiracy and murder. As her credibility was a significant part of the State's case, any evidence impeaching her claim that Chicas Carballo helped plan and carry out the murder was highly relevant.

A core value of the Confrontation Clause "is the ability to expose a witness's motivation for testifying." United States v. Recendiz, 557 F.3d 511, 530 (7th Cir. 2009). The Confrontation Clause is violated when a defendant is prevented "from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" Van Arsdall, 475 U.S. at 680 (quoting Davis, 415 U.S. at 316).

The accused has the constitutional right to present relevant evidence in support of a defense. Jones, 168 Wn.2d at 720. "Generally, evidence is relevant to attack a witness' credibility or to show bias or prejudice." Lee, 188 Wn.2d at 488. "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." United States v. Abel, 469 U.S. 45, 52, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984). That the accused

must be given a full and fair opportunity to cross-examine adverse witnesses for bias is an immutable principle. Brinson v. Walker, 547 F.3d 387, 393 (2d Cir. 2008).

Bias comes in different forms. One form of bias is a witness's self-interest. Abel, 469 U.S. at 52. A particular form of bias — self-interest in avoiding deportation — does not cease to be probative of witness credibility simply because it pertains to immigration status. "A defendant has a right to cross examine the State's witness concerning possible self-interest in cooperating with the authorities." State v. Pickens, 27 Wn. App. 97, 100, 615 P.2d 537, review denied, 94 Wn.2d 1021 (1980). A defendant has the right to put "specific reasons motivating the witness' bias before the jury." State v. Fisher, 165 Wn.2d 727, 752-53, 202 P.3d 937 (2009). A "specific bias or motive to lie" is "highly probative." Lee, 188 Wn.2d at 488. The threat of deportation shows Flores had a specific bias. It provided a basis to argue that Flores told authorities what they wanted to hear, despite it being inaccurate, to avoid the harsh fate of being sent back to a country where gang violence loomed.

"The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony." Davis, 415 U.S. at 316. Chicas Carballo therefore had the constitutional right to confront Flores about whether the deportation threat

affected her statements to police and her testimony. Through effective cross-examination, the defense would have been able to show Flores had a motive to falsify or embellish her account of Chicas Carballo's involvement in Cruces's death.

If evidence is relevant, the burden is on the State to show the evidence is so prejudicial or inflammatory that its admission would disrupt the fairness of the fact-finding process at trial. Hudlow, 99 Wn.2d at 15-16. That is, the State must demonstrate a compelling state interest to exclude a defendant's relevant evidence. Darden, 145 Wn.2d at 621. "[F]or evidence of *high* probative value 'it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22.'" Jones, 168 Wn.2d at 720 (quoting Hudlow, 99 Wn.2d at 16). A specific bias or motive to lie is highly probative. Lee, 188 Wn.2d at 488.

Neither the State nor the trial court identified a compelling interest in keeping the jury from hearing about Flores's motive to lie. The impeachment evidence was relevant to the defense and was of high probative value in relation to the witness's credibility. Cross-examination is designed to expose a witness's motivation in testifying and thereby "expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." Olden v.

Kentucky, 488 U.S. 227, 231, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988) (quoting Davis, 415 U.S. at 316-17). Confrontation helps assure the accuracy of the fact-finding process; thus, whenever the right to confront is denied, the ultimate integrity of the fact-finding process is called into question. Darden, 145 Wn.2d at 620. As sole judges of witness credibility, jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment regarding the believability of Flores's accusation. The court erred in excluding probative defense evidence without a compelling interest.

e. ER 413 did not bar evidence of witness bias.

ER 413 expressly allows evidence of a witness's immigration status "to show bias . . . of a witness" in a criminal case. ER 413(a). The rule incorporates a standard consistent with the common law standard applicable to the admissibility of defense evidence: "The court may admit evidence of immigration status to show bias or prejudice if it finds the evidence is reliable and relevant, and that its probative value outweighs the prejudicial nature of evidence of immigration status." ER 413(a)(4).

The rule requires a written pre-trial motion. ER 413 (a)(1). Here, although Chicas Carballo did not file a written pre-trial motion, his codefendant did. Although that motion specifically concerned inquiry into Flores's possible interest into a U-Visa, the general issue of Flores's

immigration status was brought to the trial court's attention in this manner. Indeed, when counsel sought permission to inquire about the matter during trial, the court denied the request on the ground that it had already dispensed with the immigration issue before trial and saw no reason to revisit the issue absent new information. 2RP 1477.

In denying the post-trial motion, the court suggested the argument should have been made before trial pursuant to ER 413. 2RP 2334-35. This doesn't make sense, since the court had earlier ruled the issue raised by Chicas Carballo was no different than the one raised by Ayala Reyes pre-trial in accord with ER 413. 2RP 1477. Moreover, the rule expressly provides that nothing in the rule "shall be construed to exclude evidence that would result in the violation of a defendant's constitutional rights." ER 413(a)(5). The rule reflects the standard developed in case law over the years for when evidence relevant to present a defense is admissible. If, as argued by Chicas Carballo, the evidence of bias was relevant, any prejudice did not outweigh its probative value, and any government interest in exclusion did not outweigh Chicas Carballo's need for the evidence, then the prohibition on the defense presenting the evidence in cross examination violated Chicas Carballo's constitutional right. Court rules cannot diminish constitutional rights. City of Auburn v. Brooke, 119 Wn.2d 623, 632-33, 836 P.2d 212 (1992). The ruled-based procedural

requirement of a pre-trial motion does not override constitutional rights, as the rule itself recognizes. ER 413(a)(5).

f. Reversal is required because this constitutional error is not harmless beyond a reasonable doubt.

Violation of the right to present a defense and to confront witnesses is constitutional error. Jones, 168 Wn.2d at 724; State v. McDaniel, 83 Wn. App. 179, 187, 920 P.2d 1218 (1996), review denied, 131 Wn.2d 1011, 932 P.2d 1255 (1997). "Constitutional error is presumed prejudicial and the State bears the burden of showing the error was harmless beyond a reasonable doubt." State v. Chambers, 197 Wn. App. 96, 128, 387 P.3d 1108 (2016), review denied, 188 Wn.2d 1010, 394 P.3d 1004 (2017). For confrontation errors, the reviewing court must assess whether the error is harmless beyond a reasonable doubt by "assuming the damaging potential of the cross-examination were fully realized." Van Arsdall, 475 U.S. at 684.

Assuming as we must that "the damaging potential of the cross-examination" were "fully realized," the result is that Flores's credibility is undermined because she had a motive to fabricate her account. Aside from her testimony, the evidence is not so overwhelming as to necessarily lead to a finding of guilt on any of the three charged counts. Chicas Carballo, in his statement to police, denied involvement. Ayala Reyes, in

his statement to police, did not expressly identify Chicas Carballo as being involved in the killing. Flores's testimony provided clear evidence against Chicas Carballo, but her testimony is tainted by the constitutional error. The State cannot meet its burden of showing no prejudice beyond a reasonable doubt. The convictions should therefore be reversed.

g. The court erred in denying the post-trial motion.

As referenced above, the trial court denied a motion for new trial based on the court's prohibition on cross-examination regarding the deportation threat. CP 70-71; 2RP 2333-35. Under CrR 7.5, "[t]he court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected," such as an "abuse of discretion, by which the defendant was prevented from having a fair trial," an "[e]rror of law occurring at the trial and objected to at the time by the defendant" and "[t]hat substantial justice has not been done." CrR 7.5(a)(5), (6), (8). A trial court's decision on a new trial motion is generally reviewed for abuse of discretion but won't be if it is predicated on an error of law. State v. Carlson, 61 Wn. App. 865, 871, 812 P.2d 536 (1991).

The argument that the trial court here committed an error of law or abused its discretion is articulated in section C.2.d./e, supra and need not be repeated here. There is, however, no need to reach the CrR 7.5 issue if

this Court agrees that the trial court erred in the first instance by prohibiting the defense from cross-examining Flores about the deportation threat during trial. In that case, the initial error establishes the grounds for relief. Conversely, if this Court disagrees that error occurred in the first instance, then it will necessarily reject the CrR 7.5 argument predicated on the same claimed error. Chicas Carballo assigns error to the CrR 7.5 ruling only to avoid suggestion that he has waived any error associated with the trial court's refusal to permit cross-examination of the topic.

3. CUMULATIVE ERROR VIOLATED CHICAS CARBALLO'S DUE PROCESS RIGHT TO A FAIR TRIAL.

Defendant have the due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007). As discussed above, an accumulation of errors affected the outcome and produced an unfair trial here. These errors include (1) the Bruton error (section C.1., supra); and (2) violation of the right to present a defense and to confrontation in prohibiting cross

examination of Flores regarding the threat of deportation, and the associated error in denying the motion for new trial based on this ground (section C.2., supra).

4. THE COURT ERRED IN FAILING TO TREAT THE OFFENSES AS SAME CRIMINAL CONDUCT AT SENTENCING.

The conspiracy to commit murder is the same criminal conduct as the murder offense because they occurred at the same time and place, involved the same victim, and share the same objective intent. Although the argument was raised at sentencing, the court did not address it. Even if it implicitly ruled on the matter, the court misapplied the law or abused its discretion in so ruling. Remand for resentencing is required.

Offenses that encompass "the same criminal conduct" are counted as one crime for sentencing purposes. RCW 9.94A.589(1)(a). "Same criminal conduct" is defined as two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a).

Chicas Carballo's counsel argued the two offenses should be considered same criminal conduct. 2RP 2342-43. Ayala Reyes's counsel also made this argument. 2RP 2345-46. The State did not address the same criminal conduct issue in its sentencing memo or at the sentencing hearing. CP 129-37. At sentencing, the trial court did not explain why the

same criminal conduct standard was unmet. It did not affirmatively make a same criminal conduct determination. It simply sentenced Chicas to consecutive terms. 2RP 2349-50. "A trial court abuses its discretion when it fails to exercise its discretion, such as when it fails to make a necessary decision." State v. Stearman, 187 Wn. App. 257, 265, 348 P.3d 394 (2015). "Trial courts should make a finding on same criminal conduct at sentencing when requested to do so." State v. Salinas, 169 Wn. App. 210, 225, 279 P.2d 917 (2012). The trial court therefore abused its discretion in failing to address Chicas Carballo's same criminal conduct argument.

Alternatively, assuming the trial court is deemed to have implicitly rejected the argument, then the court's decision is reviewed for abuse of discretion or misapplication of law. State v. Graciano, 176 Wn.2d 531, 535-36, 295 P.3d 219 (2013). The court abused its discretion because each element of the same criminal conduct test is met here.

Cruces is the victim of both the murder and the conspiracy to commit that murder. The two offenses occurred on April 28, 2016 in Tacoma. Although the conspiracy started before the murder, it also encompassed the time and place of the murder because conspiracy is an ongoing crime that does not end until its objectives are met. "Conspiracy is an inchoate crime, not a completed crime." State v. Williams, 131 Wn.

App. 488, 497, 128 P.3d 98, review granted, cause remanded on other grounds, 158 Wn.2d 1006, 143 P.3d 596 (2006). To obtain a conviction for conspiracy, the State need only prove the conspirators agreed to undertake a criminal scheme and took a substantial step in furtherance of the conspiracy. State v. Bobic, 140 Wn.2d 250, 265, 996 P.2d 610 (2000). No underlying crime need actually be committed. Id.

But that does not mean the crime of conspiracy ends when a substantial step is taken. Conspiracy is a course of conduct crime, not a single act. State v. Jensen, 164 Wn.2d 943, 957, 195 P.3d 512 (2008) (citing Braverman v. United States, 317 U.S. 49, 53-54, 63 S. Ct. 99, 87 L. Ed. 23 (1942)). "A conspiracy ends when its objectives have either failed or been achieved." State v. Bernard, 197 Wn. App. 1040 (2017) (unpublished),⁸ review denied, 188 Wn.2d 1007, 393 P.3d 347 (2017). As a continuing crime, conspiracy is deemed to encompass the last overt act. State v. Carroll, 81 Wn.2d 95, 110, 500 P.2d 115 (1972); see also Bobic, 140 Wn.2d at 264 (Washington statute defining criminal offense of conspiracy "carries the same construction as the federal law and the same interpretation as federal case law").

⁸ GR 14.1(a) permits citation to unpublished cases for their non-binding, persuasive value.

Here, the conspiracy was carried out when the victim was killed. The time and place of the murder overlapped with the ongoing conspiracy. Those two elements are therefore satisfied.

Notably, the State charged Chicas Carballo with committing the conspiracy to commit murder and the murder "[o]n or about April 28, 2016." CP 104-05. The to-convict instruction for both charges uses the same date. CP 33, 37. The charging period for both crimes renders any potential objection to the time and place elements circumspect.

The same intent element is also satisfied here. Multiple factors inform the objective intent determination, including: (1) how intimately related the crimes are; (2) whether the criminal objective substantially changed between the crimes; (3) whether one crime furthered another; and (4) whether both crimes were part of the same scheme or plan. State v. Burns, 114 Wn.2d 314, 318-19, 788 P.2d 531 (1990); State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005, 914 P.2d 65 (1996).

A single intent includes more than one offense "committed as part of a scheme or plan, with no substantial change in the nature of the criminal objective." State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990). The objective intent underlying both charges against Chicas Carballo was the death of Cruces. The conspiracy was made to accomplish the objective of

murder. The offenses were intimately connected. Further, objective intent may be determined by examining whether one crime furthered the other. State v. Wilson, 136 Wn. App. 596, 613, 150 P.3d 144 (2007). The crime of conspiracy to commit murder furthered the murder offense. It was the agreement to commit the murder that led the men to commit murder.

The objective intent of the murder and the murder conspiracy was to kill Cruces, from the moment the agreement was made until the murder was committed, thus fulfilling the agreement. The jury instructions confirm this conclusion. The accomplice liability instruction defined an accomplice as someone who "(1) solicits, commands, encourages, or requests another person to commit the crime; or (2) aids or agrees to aid another person in the commission of the crime." CP 25. Under the instruction defining conspiracy to commit first degree murder, the person "agrees with one or more persons to engage in or cause the performance of such conduct," i.e., the murder. CP 34. The criminal objective of a person who "agrees to aid" another person in the murder and "agrees . . . to engage" with another person to commit a murder is identical. Chicas Carballo's complicity in both the conspiracy and the murder encompassed the same criminal conduct.

The same criminal conduct determination has significant sentencing consequences for Chicas Carballo. RCW 9.94A.589(1)(b)

authorizes the court to run the sentences for two or more "serious violent" offenses consecutive to one another when they "separate and distinct." The court relied on this provision to run the sentences consecutive. But courts look to the "same criminal conduct" standard articulated in RCW 9.94A.589(1)(a) to determine whether crimes are "separate and distinct" under RCW 9.94A.589(1)(b). State v. Tili, 139 Wn.2d 107, 122, 985 P.2d 365 (1999). "Crimes that do not constitute the same criminal conduct are necessarily separate and distinct offenses." State v. Kloepper, 179 Wn. App. 343, 356, 317 P.3d 1088 (2014). The court's failure to treat the offenses as same criminal conduct thus caused the court to erroneously impose consecutive sentences under RCW 9.94A.589(1)(b). Resentencing is required.

5. THE COURT DID NOT INTEND TO IMPOSE DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS AND OTHERWISE LACKED STATUTORY AUTHORITY TO IMPOSE DISCRETIONARY COSTS DUE TO INDIGENCY.

The court imposed a supervision cost and the cost of legal financial obligation (LFO) collection. The imposition of these costs represents a clerical error in need of correction. Alternatively, because Chicas Carballo is indigent, these discretionary costs must be stricken. Recent statutory amendments addressing LFOs prohibit the imposition of discretionary costs on indigent defendants.

a. Chicas Carballo is indigent and discretionary costs cannot be imposed on those who are indigent.

RCW 10.01.160(1) authorizes the court to impose costs on a convicted defendant. This general authority is discretionary. The statute states the court "*may* require the defendant to pay costs." RCW 10.01.160(1) (emphasis added). Recent amendments to the LFO statute prohibit the imposition of costs on indigent defendants. "The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c)." RCW 10.01.160(3).

The statute defines "indigent" as a person (a) who receives certain forms of public assistance, (b) is involuntarily committed to a public mental health facility, or (c) whose annual after-tax income is 125% or less than the federally established poverty guidelines. RCW 10.101.010(3).

Chicas Carballo's indigency is established in the record. The trial court found Chicas indigent and allowed this appeal at public expense. 2RP 2350; CP 98-99. According to the declaration in support of his indigency motion, Chicas has no money. CP 96; see State v. Ramirez, 191 Wn.2d 732, 747, 426 P.3d 714 (2018) (relying on financial statement in declaration of indigency as evidence of indigency at time of sentencing).

He did not have an income at or above 125 percent of the federal poverty level.⁹

- b. The cost of community supervision must be stricken because it is a clerical error or because it is discretionary.**

The court imposed 36 months of community custody as part of the sentence. CP 79. The judgment and sentence states: "[w]hile on . . . community custody, the defendant shall: . . . (7) pay supervision fees as determined by DOC." CP 79.

RCW 9.94A.703(2)(d) states "*Unless waived by the court, . . . the court shall order an offender to: . . . Pay supervision fees as determined by the Department.*" (emphasis added). Given the language authorizing the court to waive the cost, the Court of Appeals recently noted the cost of community custody is a discretionary LFO. *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018), review denied, 193 Wn.2d 1007, 443 P.3d 800 (2019). Discretionary costs cannot be imposed on indigent defendants. RCW 10.01.160(3). The cost of supervision must be stricken from the judgment and sentence because Chicas is indigent.

⁹ The current federal poverty level for a family of one is \$12,490. See U.S. Dep't Of Health & Human Servs., Office Of The Asst. Sec'y For Planning & Evaluation, *Poverty Guidelines* (2019), available at <https://aspe.hhs.gov/poverty-guidelines> (last visited October 24, 2019).

In light of the court's remarks at sentencing, it did not intend to impose the discretionary community supervision cost. In pronouncing sentence, the court stated "I will impose a \$500 crime victim penalty assessment, \$100 DNA. both defendants are indigent. *I will not impose any other legal financial obligations*, other than restitution that can be set by later court order." 2RP 2350 (emphasis added). This shows the court's intention to only impose the mandatory LFOs it specified.

"In deciding whether an error is 'judicial' or 'clerical,' a reviewing court must ask itself whether the judgment, as amended, embodies the trial court's intention, as expressed in the record at trial." State v. Hendrickson, 165 Wn.2d 474, 479, 198 P.3d 1029 (2009) (quoting Presidential Estates Apartment Assocs. v. Barrett, 129 Wn.2d 320, 326, 917 P.2d 100 (1996)). An error is clerical if language in the judgment "did not correctly convey the intention of the court." Presidential, 129 Wn.2d at 326. "[W]here the record demonstrates that the court intended to take, and believed it was taking, a particular action only to have that action thwarted by inartful drafting, a nunc pro tunc order stands as a means of translating the court's intention into an order." Hendrickson, 165 Wn.2d at 479. "The remedy for clerical or scrivener's errors in judgment and sentence forms is remand to the trial court for correction." State v. Sullivan, 3 Wn. App. 2d 376, 381, 415 P.3d 1261 (2018).

c. The cost of collection must be stricken because it is a clerical error or because it is discretionary.

The judgment and sentence provides: "The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.56.500." CP 77. Again, this is a clerical error because the court expressed its intention to not impose any LFOs other than the ones it specified at sentencing. 2RP 2350; Hendrickson, 165 Wn.2d at 479; see RCW 9.94A.030(31) (LFO includes "any other financial obligation that is assessed to the offender as a result of a felony conviction").

But even if it weren't a clerical error, the costs should still be stricken. Each of the three statutes cited in the judgment and sentence provide discretionary authority.

RCW 36.18.190 states "The superior court *may*, at sentencing or at any time within ten years, assess as court costs the moneys paid for remuneration for services or charges paid to collection agencies or for collection services." (emphasis added). Collection costs are discretionary. State v. Clark, 191 Wn. App. 369, 374, 362 P.3d 309 (2015).

RCW 9.94A.780(7) states that if a county clerk assumes responsibility for community custody fees assessed by the Department of Correction, "the clerk may impose a monthly or annual assessment for the

cost of collections." This subsection provides discretionary authority to another party, here a county clerk, to assess collection costs. The court has no authority to require the clerk to impose collection costs.

RCW 19.16.500(1) provides general authority to government entities, including counties, to retain private collection agencies. RCW 19.16.500(1)(a). Government entities "may add a reasonable fee" for collections. RCW 19.16.500(1)(b) (emphasis added). Thus, this statute also provides only discretionary authority to impose collection costs.

The court's general authority to impose costs, and the specific authority cited by the written order, all provide discretionary authority to impose collection costs. Discretionary costs imposed on indigent defendants are prohibited by RCW 10.01.160(3). The remedy is to strike this cost provision. Ramirez, 191 Wn.2d at 749-50.

6. THE COURT LACKED AUTHORITY TO IMPOSE INTEREST ON NON-RESTITUTION LEGAL FINANCIAL OBLIGATIONS

The judgment and sentence states: "The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090." CP 77. This mandate does not comply with current law.

The current version of RCW 10.82.090(1), effective June 7, 2018, provides in relevant part that "restitution imposed in a judgment shall bear

interest from the date of the judgment until payment, at the rate applicable to civil judgments. As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations."

This statute was amended as part of HB 1783's overhaul of the LFO system. State v. Catling, 193 Wn.2d 252, 259 n.5, 438 P.3d 1174 (2019); Laws of 2018, ch. 269 § 1. The judgment and sentence must be modified to reflect that no interest shall accrue on non-restitution legal financial obligations in accordance with RCW 10.82.090(1). Catling, 193 Wn.2d at 259 n.5. Imposition of unauthorized interest must be stricken. State v. Houck, 9 Wn. App. 2d 636, 651, 446 P.3d 646 (2019).

D. CONCLUSION

For the reasons stated, Chicas Carballo requests (1) reversal of the convictions; (2) remand for resentencing; (3) deletion of the supervision and collection costs; and (4) modification of the interest provision, and the striking of non-restitution interest.

DATED this 6th day of November 2019

Respectfully Submitted,

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