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NO. 53165-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CESAR CHICAS CARBALLO,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Jerry Costello, Judge

No. 17-1-00874-7

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant Chicas Carballo was involved in a conspiracy that ultimately led to his participation in the brutal murder of Samuel Cruces. He was convicted of conspiracy to commit first degree murder and first-degree murder and the trial court sentenced him to a total of 608 months in prison.

On appeal, Chicas Carballo claims that the admission of certain out-of-court statements by codefendant Ayala Reyes referring to other individuals involved in the murder of Cruces violated his Sixth Amendment right to confrontation. This claim should be denied because as the evidence showed that at least three individuals other than Chicas Carballo were involved in the planning and killing of Cruces, the admission of Ayala Reyes' statements implicating "others" in the murder was proper and did not violate Chicas Carballo's constitutional rights. In any event, even if these statements were improperly admitted, any error was harmless beyond a reasonable doubt.

Chicas Carballo also claims that the trial court violated his right to present a defense and cross-examine witness Karina Flores when it denied his request to impeach her with evidence that law enforcement "threatened" to send Flores back to El Salvador if she did not confess to what she knew about Cruces' death and who was involved. This Court should deny this

claim because Chicas Carballo failed to follow the proper procedure set forth in ER 413 regarding the examination of a witness's immigration status and because any evidence that law enforcement "threatened" Flores with deportation is either not relevant or it was of minimal probative value substantially outweighed by the potential of prejudice of introducing a witness's immigration status at trial. In any event, even if the trial court erred in preventing the defense from examining Flores on this issue, any error was harmless.

Chicas Carballo further claims that cumulative error violated his constitutional right to present a defense. This claim should be rejected because Chicas Carballo fails to demonstrate any error to cumulate.

Chicas Carballo also claims that the trial court erred in failing to treat the conspiracy and the murder as same criminal conduct at sentencing. This Court should deny this claim because the trial court properly concluded that these crimes did not involve the same criminal conduct.

As to Chicas Carballo's claims that the discretionary legal financial obligations imposed by the trial court should be stricken, as their imposition was either the result of a clerical error or because he is indigent, and that imposition of interest on non-restitution legal financial obligations should be stricken, the State agrees that these cost should be stricken.

This Court should strike the discretionary legal financial obligations and otherwise deny Chicas Carballo's claims and affirm his judgment and sentence.

II. RESTATEMENT OF THE ISSUES

- A. Whether the trial court properly admitted statements from codefendant Ayala Reyes regarding other individuals who were involved in the murder of Cruces.
- B. Whether any error in admitting statements from codefendant Ayala Reyes regarding other individuals who were involved in the murder of Cruces was harmless beyond a reasonable doubt.
- C. Whether the trial court violated Chicas Carballo's right to present a defense and cross-examine Flores when it denied his request to impeach her with an alleged "threat of deportation" as potential evidence of her bias.
- D. Whether any error in denying Chicas Carballo's request to impeach Flores with an alleged "threat of deportation" as potential evidence of her bias was harmless beyond a reasonable doubt.
- E. Whether cumulative error violated Chicas Carballo's constitutional right to a fair trial.
- F. Whether the trial court properly found that Chicas Carballo's convictions for conspiracy to commit first degree murder and first-degree murder did not constitute the same criminal conduct.
- G. Whether the discretionary legal financial obligations imposed by the trial court should be stricken as the result of a clerical error or because Chicas Carballo is indigent.
- H. Whether interest on non-restitution legal financial obligations should be stricken.

III. STATEMENT OF THE CASE

In his opening brief, Chicas Carballo sets forth the factual and procedural history of this case. The State agrees that this statement of the case accurately reflects the record. For brevity and judicial economy, the State will not unnecessarily repeat the factual and procedural history here. Any additional pertinent facts will be set forth and addressed in the argument section.

IV. ARGUMENT

A. THE TRIAL COURT PROPERLY ADMITTED STATEMENTS FROM CODEFENDANT AYALA REYES REGARDING OTHER INDIVIDUALS WHO WERE INVOLVED IN THE MURDER OF CRUCES BECAUSE THESE STATEMENTS DID NOT IDENTIFY ONE OF THESE OTHERS AS CHICAS CARBALLO

Chicas Carballo claims that the admission of certain out-of-court statements by codefendant Ayala Reyes referring to other individuals involved in the murder of Cruces violated his Sixth Amendment right to confrontation. Chicas Carballo acknowledges that these statements did not refer to him by name but argues that the jury could infer from the references to other individuals that he was one of these individuals. Brief of Appellant at 11-24. Chicas Carballo's claim should be denied. Because the evidence showed that at least three individuals other than Chicas Carballo were

involved in the planning and killing of Cruces, the admission of Ayala Reyes' statements implicating "others" in the murder was proper and did not violate Chicas Carballo's constitutional rights. In any event, even if these statements were improperly admitted, any error was harmless beyond a reasonable doubt.

- 1. Although Ayala Reyes' statements to police implicated other individuals in the murder of Cruces, these statements did not obviously indicate Chicas Carballo as a participant and thus did not violate the *Bruton*¹ rule.**

Prior to trial, Chicas Carballo's counsel identified certain statements made by codefendant Ayala Reyes to law enforcement as potentially raising a *Bruton* issue and made a motion to sever his trial from that of Ayala Reyes. 1RP 15-16.² The trial court denied Chicas Carballo's motion to sever his trial without prejudice until the *Bruton* issue was resolved. 1RP 19, 31; CP 13.

When the trial court was ready to address the *Bruton* issue, the State set forth its position that the statements made by Ayala Reyes to law enforcement were admissible and did not violate *Bruton* because they did not identify Chicas Carballo by name:

¹ *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

² Respondent will follow appellant's format for citing to the record: 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.

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 [defense counsel] 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 trial court examined the statements of Ayala Reyes at issue and found that because he "didn't necessarily say anything about [] Chicas Carballo being a participant," any *Bruton* issue could be resolved by properly excising any part of the statements that could identify Chicas Carballo as a party. 2RP 73-74, 76-77.

At trial, over Chicas Carballo's objection, Ayala Reyes' statements to law enforcement were read to the jury. 2RP 1344-1345. The statements where Ayala Reyes stated that individuals other than himself were involved in the murder are as follows:

- When asked who he was afraid would kill him if he talked, Ayala Reyes said he did not know "who the people are" (2RP 1409) and "I'll only tell you that I'm afraid of them." 2RP 1416.
- When questioned regarding why Cruces stopped the car, Ayala Reyes said, "I will only tell you that I don't know who the people are" (2RP 1213) "But I'm not protecting anyone. I simply don't know who they are." 2RP 1415

- Ayala Reyes said that Cruces “was hiding from those people” (2RP 1433) and “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 1415-1416.
- When asked who else was in the car, Ayala Reyes said, “No one else. Just him and me, but I don’t know who those people were.” 2RP 1416. When asked who was outside the car, he said, “Just one person, but I don’t know what he had/what was going on with him.” 2RP 1416.
- When asked why he left his shoe behind at the scene, Ayala Reyes said, “Because I was fleeing because of what they were doing there” (2RP 1423) and that as he fled, he saw “the person who was doing that to him.” 2RP 1426.
- Ayala Reyes answered “yes” to the question of whether “... they said to you, ‘if you don’t do that, we’ll kill you.’” 2RP 1491.
- When asked who he was with, Ayala Reyes responded, “I don’t know who they are” (2RP 1417) and “I don’t know how they ended up with the plan, but I don’t know. They didn’t tell me anything about that.” 2RP 1494.
- Ayala Reyes said both that “These people, they’re here in Tacoma” (2RP 1488) and that the people were in Los Angeles. 2RP 1488. He

said that he was being threatened and that “they” made him go to California. 2RP 1489.

- Ayala Reyes was afraid that if he talked, “they will find out you have me locked up here, and they are going to say I talked” (2RP 1489) and “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 further stated that “I did not kill him, but I was an accomplice. But if I tell you 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.
- As to his involvement, Ayala Reyes said, “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.

The admission of Ayala Reyes’ statements implicating others in the murder did not violate *Bruton* because these statements did not obviously implicate Chicas Carballo as a participant in the killing.

Under the Confrontation Clause, out-of-court testimonial statements by non-testifying witnesses are barred because of their prejudicial impact

unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the witnesses. *Crawford v. Washington*, 541 U.S. 36, 54-55, 124 S.Ct. 1354, 158 L. Ed. 2d 177 (2004). *Bruton*, 391 U.S. at 126, held that a criminal defendant is denied his right of confrontation when a nontestifying codefendant's confession that names the defendant as a participant in the crime is admitted at a joint trial, even where the court instructs the jury to consider the confession only against the codefendant.

CrR 4.4(c) ensures compliance with *Bruton*. It provides,

(1) A defendant's motion for severance on the ground that an out-of-court statement of a codefendant referring to him is inadmissible against him shall be granted unless:

...

(ii) deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement.

The United States Supreme Court held in *Bruton* that the defendant was deprived of his confrontation rights under the Sixth Amendment when he was incriminated by a pretrial statement of a codefendant who did not take the stand at trial. *See State v. Hoffman*, 116 Wn.2d 51, 75, 804 P.2d 577 (1991). However, in *Richardson v. Marsh*, 481 U.S. 200, 208, 107 S.Ct. 1702, 95 L. Ed. 2d 176 (1987), the United States Supreme Court held that a confession redacted to omit all reference to the codefendant fell outside *Bruton's* prohibition because the statement was "not incriminating

on its face” and became incriminating “only when linked with evidence introduced later at trial.”

The Court in *Bruton* recognized the “powerfully incriminating” effect of the extrajudicial statements of a codefendant “who stands accused side-by-side with the defendant.” *Bruton*, 391 U.S. at 135–36. “Not only are the statements ‘devastating to the defendant, but their credibility is inevitably suspect.’” *Id.* However, “[s]tatements that do not incriminate a codefendant are not subject to the Bruton rule.” *State v. Moses*, 193 Wn. App. 341, 357, 372 P.3d 147 (2016).

Although the statements from Ayala Reyes do not involve “redacted” statements, as Ayala Reyes’ statements themselves did not refer to Chicas Carballo by name, a review of how courts have evaluated redacted statements is helpful to determine whether Ayala Reyes’ vague statements regarding other individuals involved in the murder obviously refer to Chicas Carballo.

“[A] non-testifying codefendant’s statement violates the confrontation clause unless certain criteria are met when redacting the statement.” *Moses*, 193 Wn. App. at 357. “Redacted statements must be (1) facially neutral, i.e., not identify the non-testifying defendant by name (*Bruton*[, 391 U.S. 123]); (2) free of obvious deletions such as ‘blanks’ or ‘X’ (*Gray [v. Maryland]*, 523 U.S. 185, 118 S.Ct. 1151, 140 L .Ed. 2d 294

(1998)]); and (3) accompanied by a limiting instruction (*Richardson*[, 481 U.S. 200]).” *Moses*, 193 Wn. App. at 357 (internal quotation marks omitted).

Although the use of an “other guy” redaction where only two accomplices committed the crime and only two defendants were on trial was found improper (*State v. Vincent*, 131 Wn. App. 147, 154, 120 P.3d 120 (2005)), *State v. Medina* approved the admission of the codefendant’s statement because the redactions were so varied among six possible accomplices (“‘other guys,’ ‘the guy,’ ‘a guy,’ ‘one guy,’ and ‘they’”) that the redactions did not clearly imply whether the codefendant’s statement referred to either the appellant or the other codefendant. *State v. Medina*, 112 Wn. App. 40, 51, 48 P.3d 1005 (2002).³

The Washington Supreme Court recently addressed an issue similar to the instant issue in *Fisher*, 185 Wn.2d 836. In *Fisher*, two defendants—Fisher and Trosclair—were tried together, with Fisher having made out-of-court statements incriminating both herself and Trosclair. *Id.* at 839. The Court found that that the admission of Trosclair’s statements was done in error because there were only two participants in the crime, the co-

³ Although Chicas Carballo cites to *State v. Fisher*, 185 Wn.2d 836, 374 P.3d 1185 (2016), in support of his argument that *Medina* does not comport with recent Washington State Supreme Court authority (Appellant’s Opening Brief at 22), the Court in *Fisher* cited with approval to *Medina*. *Fisher*, 185 Wn.2d at 845.

defendant's first name was not redacted on two separate occasions, and that the only other possible person that "the other guy" could be referring to was the co-defendant. *Id.* at 846. The Court held:

[T]he exact form of the redaction is not dispositive. Rather, under [*Richardson*] and *Gray*, the question is whether the redaction obviously refers to the defendant. We decline to adopt the bright line rule of some circuit courts that a neutral pronoun always satisfies *Bruton* and instead hold that whatever the form of the redaction, it must be clear that the redaction does not obviously refer to the defendant.

Id. at 845.

Based on the above authority, the references Ayala Reyes made to other individuals involved in the murder of Cruces, which include "the people," "them," "they," "those people," "we," "these people," and "the people who did it," did not obviously refer to Chicas Carballo and were almost identical to the "redactions" approved of by Washington courts.

In this case, unlike *Fisher*, there were at least four participants in the crime – appellant Chicas Carballo, codefendant Ayala Reyes, Juan Jose Gaitan Vasquez, and Edenilson Misael Alfaro. The statements from codefendant Ayala Reyes could easily have been referencing Vasquez or Alfaro, not Chicas Carballo. Again, in *Medina*, 112 Wn. App. 40, cited with approval by the Court in *Fisher*, the court approved the admission of a co-defendant's statement where the redactions were varied (i.e. "other guys," "the guy," "a guy," "one guy," and "they"). The court held that

because there were six possible participants, it would be impossible for the jury to clearly infer that the statements referenced one specific person. *Id.* at 51. In this case, it would also be difficult, if not impossible, for a jury to infer that codefendant Ayala Reyes was referring exclusively to Chicas Carballo. Because there were so many participants in this crime, it would have been impossible for the jurors to determine that the statements of Ayala Reyes could have only referenced Chicas Carballo. The statements never implicate Chicas Carballo in any way. Because they were all neutral and, unlike *Fisher*, did not reference Chicas Carballo directly or indirectly, his claim fails.

2. Even if the trial court erred in admitting the statements of Ayala Reyes, any such error was harmless beyond a reasonable doubt

In *Fisher*, 185 Wn.2d 836, the Court specifically held that any confrontation clause violation was rendered harmless by overwhelming evidence. *Id.* at 847-848. Specifically, the Court held:

Confrontation clause violations are subject to harmless error analysis. *State v. Lui*, 179 Wash.2d 457, 495, 315 P.3d 493, cert. denied, ___ U.S. ___, 134 S.Ct. 2842, 189 L.Ed.2d 810 (2014). An error is harmless if we are persuaded beyond a reasonable doubt that the jury would have reached the same result in the absence of the error. *State v. Watt*, 160 Wash.2d 626, 635, 160 P.3d 640 (2007). The test is whether the untainted evidence was so overwhelming that it necessarily leads to a finding of guilt. *Lui*, 179 Wash.2d at 495, 315 P.3d 493.

Id. at 847-848.

Here, any error in admitting the statements of Ayala Reyes vaguely referring to other individuals who were involved in the murder was harmless beyond a doubt for at least two reasons. First, despite Chicas Carballo's assertion, the "untainted evidence" against Chicas Carballo was overwhelming.

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 June and July of 2016. 2RP 1219, 1241-43.

Flores further testified that she was at an apartment when Ayala Reyes, Chicas Carballo, 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.

According to Flores, the three men, including Chicas Carballo, 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.

The five of them left the apartment and drove to the location where the killing was to happen. 2RP 1547-48. Chicas Carballo 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 Chicas Carballo, Sombra and Sicario leave in their vehicle. 2RP 1558-59. There was blood on the passenger side door. 2RP 1559.

Based on the above, overwhelming evidence supported the jury's verdicts.

Secondly, any error in admitting these statements was harmless beyond a reasonable doubt because, even if their admission was in error, the statements themselves implicating other individuals were so vague as to who was involved in the murder, and neither mentioned, referred to, or alluded to Chicas Carballo in any way, that these statements were highly unlikely to have swayed the jury to convict Chicas Carballo.⁴

⁴ In addition, the trial 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). Although such a limiting instruction does not in and of itself alleviate a *Bruton* error (*Bruton*, 391 U.S. at 137), it is an accurate statement of the law. Given the overwhelming evidence of Chicas Carballo's guilt, and the nature of the statements by Ayala Reyes vaguely referring to other individuals involved in the murder and not Chicas Carballo specifically, this instruction provides an additional protection against any potential misuse of this evidence. See *State v. Emery*, 174 Wn.2d 741, 766, 278 P.3d 653 (2012) (The jury is presumed to follow the court's instructions).

Accordingly, even if the trial court erred in admitting these statements by Ayala Reyes, any such error was harmless beyond a reasonable doubt and Chicas Carballo's claim to the contrary should be denied.

B. THE TRIAL COURT PROPERLY DENIED DEFENSE COUNSEL'S REQUEST TO IMPEACH FLORES WITH EVIDENCE OF HER IMMIGRATION STATUS BECAUSE COUNSEL FAILED TO FOLLOW THE PROCEDURE SET FORTH IN ER 413 AND BECAUSE THIS EVIDENCE WAS EITHER IRRELEVANT OR ITS LIMITED PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY ITS POTENTIAL FOR PREJUDICE

Chicas Carballo claims that the trial court violated his right to present a defense and cross-examine Flores when it denied his request to impeach her with evidence of bias. Specifically, Chicas Carballo argues that law enforcement threatened to send Flores back to El Salvador if she did not confess to what she knew about Cruces' death and who was involved and that his counsel should have been able to examine her about this "threat" to show she had motive to fabricate her testimony. Opening Brief of Appellant at 24-38. This Court should deny this claim. Chicas Carballo failed to follow the proper procedure set forth in ER 413 regarding the examination of a witness's immigration status. Furthermore, any evidence that law enforcement "threatened" Flores with deportation is either not relevant, as such a "threat" did not appear to impact Flores' testimony, or it was of minimal probative value substantially outweighed by the potential

of prejudice of introducing a witness's immigration status at trial. In any event, even if the trial court erred in preventing the defense from examining Flores on this issue, any error was harmless.

During questioning by police, Flores was asked to tell law enforcement what she knew about the murder of Cruces. Law enforcement told her about a person younger than her that was sentenced to 21 years in prison and noted that in 21 years, Flores would be older than the law enforcement personnel questioning her. One of the detectives then said, "And then you will have to go back to El Salvador." This was translated for Flores into Spanish as "And then they will they will [sic] take you to El Salvador again." Flores continued to insist that she didn't "know anything." Ex. 116, vol. I, at 166-68.⁵

Prior to trial, Ayala Reyes's counsel moved to examine Flores about her immigration status, in particular as it related to her possible interest in a U-Visa. 2RP 17, 39, 66, 106-11. The trial 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

⁵ As Flores testified at trial, this exhibit was not introduced into evidence.

provided.” CP 12. Chicas Carballo did not make a motion under ER 413, nor did he join in his codefendant’s motion.

During Flores’ examination at trial, counsel for Chicas Carballo asked the court if he could “go into” law enforcement’s “arguably threaten[ing] her with deportation, immigration issues.” Counsel indicated that he did not “want to violate and order of the court.” 2RP 1476.

The court responded:

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.

After counsel for Chicas Carballo 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 State added that counsel for Chicas Carballo 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. The prosecutor noted that 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.

Following the verdicts, counsel for Chicas Carballo filed a motion for a 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 that such a request was supposed to be made before trial under ER 413 and the probative value of Flores’s immigration status did not outweigh its prejudicial effect. 2RP 2334-35.

1. Chicas Carballo failed to follow the procedure set forth in ER 413

ER 413 governs the admissibility of evidence of immigration status. It provides that in criminal cases, a party proposing to offer evidence of immigration status for an impeachment purpose must make a written pretrial motion that includes an offer of proof supported by affidavit, and that following a hearing the trial court may admit the evidence “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)(1)-(4). Elsewhere the rule provides, “Nothing in this section shall be construed to exclude evidence that would result in the violation of a defendant’s constitutional rights.” ER 413(a)(5).

Here, Chicas Carballo failed to make a pretrial motion under ER 413 to examine Flores regarding her immigration status. Although codefendant Ayala Reyes made such a motion, regarding Flores potential obtaining a U-

Visa, Chicas Carballo did not join in such a motion. In any event, although the trial court denied Ayala Reyes' motion, it did so without prejudice to revisiting the issue if new information arose.

During trial, when counsel for Chicas Carballo made his request to examine Flores on her immigration status to explore any potential bias based on her interview with law enforcement, he identified no new information to cause the trial court to reexamine its denial of codefendant's motion. The exhibit containing law enforcement's interview with Flores was not admitted as Flores testified, and the jury thus had no knowledge of it. Therefore, all of the pertinent information was available to the defense before trial and defense counsel made no motion as it should have under ER 413. Even though the "importance" may have become apparent to counsel during trial, no additional evidence was introduced or proffered to change the trial court's ruling.

The trial court properly denied Chicas Carballo's request under ER 413.

2. **The trial court properly prohibited any evidence that law enforcement “threatened” Flores with deportation because any such evidence was either not relevant, as such a “threat” did not appear to impact Flores’ testimony, or it was of minimal probative value substantially outweighed by the potential of prejudice of introducing a witness’s immigration status at trial**

As set forth above, ER 413 should not be construed to exclude evidence that would result in the violation of a defendant’s constitutional rights. ER 413(a)(5). Here, the trial court’s denial of Chicas Carballo’s belated request to examine Flores as to her immigration status was proper because the exclusion of such evidence did not result in a violation of Chicas Carballo’s constitutional right.

Criminal defendants have a constitutional right under both the United States Constitution and the Washington Constitution to present a defense. United States Constitution, Amendment VI; Washington Constitution, Article I, §22. That right does not, however, include the right to introduce inadmissible evidence. *State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010). The right to defend means simply that “[a] defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible.” *State v. Rafay*, 168 Wn. App. 734, 794-95, 285 P.3d 83 (2012), quoting *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992).

Criminal defendants also have a constitutional right to confront witnesses. Sixth Amendment; Washington Constitution, Art. I, § 22. “The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions.” *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). The right of confrontation, like the right to present a defense, does not obviate the rules of evidence. *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004). “In keeping with the right to establish a defense and its attendant limits, ‘a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense.’” *Id.*, quoting *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

A trial court has considerable discretion regarding the admissibility of evidence. *State v. Stumpf*, 64 Wn. App. 522, 527, 827 P.2d 294 (1992). A trial court's ruling concerning admissibility of evidence is reviewed for an abuse of discretion. *Aguirre*, 168 Wn.2d at 361. Abuse of discretion occurs when a trial court’s decision to admit or not admit evidence is “manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). 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).⁶

Evidence offered to impeach is relevant only if: (1) it tends to cast doubt on the credibility of the person being impeached, and (2) the credibility of the person being impeached is a fact of consequence to the action. ER 401, 607. Here, the potential evidence offered to impeach Flores' testimony was actually a statement from a law enforcement officer: "And then you will have to go back to El Salvador," which was translated for Flores into Spanish as "And then they will they will [sic] take you to El Salvador again." Ex. 116, vol. I, at 166-68. However, after this statement was made, Flores continued to insist that she didn't "know anything." Ex. 116, vol. I, at 166-68. As Flores did not change her responses based on this alleged "threat," any evidence of her immigration status would simply not

⁶ Chicas Carballo notes that there is a split in Division Two on the standard of review. Opening Brief of Appellant at 30: "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). For the foregoing reasons, the trial court properly denied Chicas Carballo's request under either standard of review.

cast doubt on her credibility.⁷ Accordingly, this evidence was not relevant and was thus properly excluded by the trial court.

However, even if this “evidence” had minimal relevance, it was minimally probative when balanced against a well-documented potential for prejudice. Washington courts have long recognized that evidence of a witness’s undocumented status can be prejudicial and distract jurors from the important matters submitted for their determination. In *State v. Avendano-Lopez*, the court held that “appeals to nationality or other prejudices are highly improper in a court of justice, and evidence as to the race, color, or nationality of a person whose act is in question is generally irrelevant and inadmissible if introduced for such a purpose.” *State v. Avendano-Lopez*, 79 Wn. App. 706, 718, 904 P.2d 324 (1995). In 2010, the Washington State Supreme Court agreed that a plaintiff’s undocumented status was relevant to his claim for lost earnings even given his low risk of being deported, given that ER 401 requires minimal relevance. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 670, 230 P.3d 583 (2010). It nonetheless recognized that “[i]ssues involving immigration can inspire passionate responses that carry a significant danger of interfering with the fact finder’s

⁷ From defense counsel’s cross-examination of Flores, it appears that Flores was still denying that she “knew anything” more than eight pages of transcript after the alleged “threat” and continued to deny any such knowledge well into the second volume of Exhibit 116. 2RP 1837-1851.

duty to engage in reasoned deliberation,” and, “[i]n light of the low probative value of immigration status with regard to lost future earnings, the risk of unfair prejudice brought about by the admission of a plaintiff’s immigration status is too great.” *Id.* at 672.

Here, too, the proffered evidence was of low probative value. As set forth above, any alleged or veiled “threat” of deportation made by law enforcement to Flores during her interview did not appear to have an impact on Flores – she continued to deny that she knew anything about the crimes Ayala Reyes was accused of committing. Even though Flores did, eventually, admit to law enforcement and later testify as to what she knew about the circumstances of these crimes, it is unclear and highly speculative to credit any “threat of deportation” with Flores’ change in her story. It is unclear from the record on appeal when Flores’ story changed or whether a myriad of other potential motivators actually prompted this change. Given the minimal probative value of this evidence balanced against the great potential for prejudice in branding Flores an illegal immigrant, the trial court’s finding and denial of Chicas Carballo’s request was proper under any standard of review. *See* ER 401, 402, 403.

3. Even if the trial court erred in denying Chicas Carballo’s request to introduce evidence of Flores’ immigration status, any such error was harmless beyond a reasonable doubt

The foregoing discussion of the probative value of the purported immigration evidence also supports a harmless error analysis. Confrontation claims are subject to harmless error. *Harrington v. California*, 395 U.S. 250, 251–52, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969); *Chapman v. California*, 386 U.S. 18, 21, 87 S. Ct. 824, 17 L. Ed. 2d (1967). “[T]he constitutionally improper denial of a defendant’s opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman* harmless-error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.” *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 1438, 89 L. Ed. 2d 674 (1986); *see also State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997); *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). The State satisfies its harmless error burden if it shows beyond a reasonable doubt that any reasonable jury would have reached the same result with or without the evidence. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); *State v. Damon*, 144 Wn.2d 686, 693, 25 P.3d 418 (2001).

As set forth above, the proffered evidence was of, at most, low probative value. Any “threat” of deportation made by law enforcement to Flores during her interview did not appear to have an impact on Flores – she continued to deny that she knew anything about the crimes Ayala Reyes was accused of committing. Even though Flores did, eventually, admit to law enforcement and later testify as to what she knew about the circumstances of these crimes, it is unclear and highly speculative to credit any “threat of deportation” with Flores’ change in her story. It is unclear from the record on appeal when Flores’ story changed or whether a myriad of other potential motivators prompted this change.

During his cross-examination of Flores, counsel for Chicas Carballo thoroughly and extensively examined and challenged the credibility of Flores. 2RP 1819-1922. During this examination, Flores admitted numerous times that she did not always tell the truth to the law enforcement officers who interviewed her. *See, e.g.,* 2RP 1844.

Therefore, given the low probative value of evidence of Flores’ immigration status and the thorough challenge to Flores’ credibility during cross-examination, any error in denying Chicas Carballo’s request to introduce evidence of a purported “threat” to deport Flores was harmless as a jury would have reached the same conclusions with or without this evidence. Accordingly, any potential error was harmless beyond a

reasonable doubt. *Guloy*, 104 Wn.2d at 425; *Damon*, 144 Wn.2d at 693.

Chicas Carballo's claim to the contrary should be denied.

4. The trial court properly denied Chicas Carballo's post-trial motion for a new trial

Chicas Carballo claims that the trial court erred when it denied his motion for new trial based on the court's prohibition on cross-examination regarding the "deportation threat." Appellant's Opening Brief at 37-38. For the same reasons as set forth above, Chicas Carballo's claim should be denied.

C. THERE IS NO "CUMULATIVE ERROR" THAT VIOLATED CHICAS CARBALLO'S RIGHT TO A FAIR TRIAL

Chicas Carballo claims that cumulative error violated his constitutional rights. Specifically, Chicas Carballo argues that the "*Bruton* error" and the "violation of the right to present a defense and to confrontation in prohibiting cross examination of Flores regarding the threat of deportation" violated his right to a fair trial. Appellant's Opening Brief at 38-39. This claim 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) (“although none of the errors discussed above alone mandate reversal....”). 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 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

Chicas Carballo has failed to show that any error occurred, much less an accumulation of errors which deprived him of a fair trial. He is not entitled to relief under the cumulative error doctrine. Chicas Carballo has failed to show that any error, alone or in conjunction with others, impacted the outcome of his trial. This Court should deny this claim.

D. AT SENTENCING, THE TRIAL COURT PROPERLY FOUND THAT CHICAS CARBALLO’S CONVICTIONS FOR CONSPIRACY TO COMMIT MURDER AND MURDER DID NOT CONSTITUTE THE SAME CRIMINAL CONDUCT

Chicas Carballo claims that the trial court erred in failing to treat the conspiracy and the murder as the same criminal conduct at sentencing. Specifically, Chicas Carballo argues that because these offenses “occurred at the same time and place, involved the same victim, and share[d] the same objective intent,” remand for resentencing is required. Appellant’s Opening Brief at 39-44. This Court should deny this claim. The trial court properly concluded that these crimes did not involve the same criminal conduct.

At sentencing, Chicas Carballo's counsel argued that his convictions for conspiracy to commit first degree murder and first-degree murder 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, although the trial court did not articulate why it found that the same criminal conduct standard was unmet, it implicitly denied these arguments by sentencing Chicas Carballo to consecutive terms for these crimes. 2RP 2349-50.

Under the Sentencing Reform Act, the trial court must enter consecutive sentences for "two or more serious violent offenses arising from separate and distinct criminal conduct." RCW 9.94A.589(1)(b). Here, Chicas Carballo completed substantial steps for the conspiracy in Los Angeles and the murder took place on a Tacoma street. Furthermore, Chicas Carballo's intent to participate in the conspiracy - to initiate Ayala Reyes into MS-13 - was different from his intent to kill Mr. Cruces.

The trial court did not abuse its discretion by concluding these were separate and distinct crimes, not the same criminal conduct. A trial court's ruling with respect to "same criminal conduct" is reviewed for an abuse of discretion. *State v. Elliott*, 114 Wn.2d 6, 17, 785 P.2d 440, *cert. denied*, 498 U.S. 838, 111 S.Ct. 110, 112 L.Ed.2d 80 (1990). A court abuses its

discretion if it is exercised on untenable grounds or for untenable reasons. *Lord*, 161 Wn.2d at 283–84.

Here, the trial court heard all the evidence presented at trial and exercised its discretion in determining that for sentencing purposes, the conspiracy and first-degree murder counts did not constitute the same criminal conduct. That implicit determination that there were separate intents for each of the crimes was reasonable as the conspiracy could have occurred without the murder occurring; all that was required for the conspiracy was that there be an agreement between the principals to undertake the murder. At any point, Chicas Carballo (or any of the other principals) could have lawfully ended that portion of their involvement and they chose not to do it.

The trial court acted within its discretion in choosing not to characterize the charges as same criminal conduct. As the trial court did not exercise its discretion on untenable grounds or for untenable reasons, it did not abuse its discretion. *See Lord*, 161 Wn.2d at 283–84.

E. THE STATE AGREES THAT THE DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS IMPOSED SHOULD BE STRICKEN

Chicas Carballo claims that the discretionary legal financial obligations imposed by the trial court should be stricken as their imposition was either the result of a clerical error or because he is indigent. Appellant's

Opening Brief at 44-49. For the reasons set forth in Chicas Carballo's briefing, the State agrees that the discretionary legal financial obligations, including the costs of community supervision and collections, should be stricken.

F. THE STATE AGREES THAT INTEREST ON NON-RESTITUTION LEGAL FINANCIAL OBLIGATIONS SHOULD BE STRICKEN

Chicas Carballo claims that the imposition of interest on non-restitution legal financial obligations should be stricken. Appellant's Opening Brief at 49-50. For the reasons set forth in Chicas Carballo's briefing, the State agrees that the judgment and sentence should be modified to reflect that no interest shall accrue on non-restitution legal financial obligations.

V. CONCLUSION

The State agrees that the discretionary legal financial obligations, including the costs of community supervision and collections, should be stricken and that the judgment and sentence should be modified to reflect that no interest shall accrue on non-restitution legal financial obligations.

The State respectfully requests that Chicas Carballo's other claims be denied and that his convictions and sentence be affirmed.

RESPECTFULLY SUBMITTED this 10th day of April, 2020.

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Certificate of Service:

The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her 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.

4-10-20 s/Therese Kahn
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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