

No. 34708-7-III

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

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STATE OF WASHINGTON, Respondent

v.

VINCENT G. FIGUEROA, Appellant

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APPEAL FROM THE SUPERIOR COURT  
OF BENTON COUNTY  
THE HONORABLE JUDGE VANDERSCHOOR

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BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. The court erroneously admitted evidence under ER 404(b).
- B. The trial court erred when it entered Finding of Fact 31: “The evidence is more probative than prejudicial.” CP 74.
- C. The trial court erred when it entered its Conclusion of Law: “Assuming the evidence at trial will be substantially consistent with the above findings of fact, the evidence from the Rosedalec(sic), California crimes specifically testimony from Donald Younger and Officer James Newell, will be admissible in the State’s case in chief to prove the identity of the perpetrator.” CP 75
- D. The trial court erred when it barred the defendant from arguing or suggesting in cross examination that the defendant’s brother committed the crimes.
- E. The evidence was insufficient to sustain the convictions.
- F. The trial court imposed mandatory consecutive sentences for firearm enhancements and mandatory consecutive sentences for counts 3, 4, and 5, sentence in violation of the Eighth Amendment ban on cruel and unusual punishment.

- G. The trial court imposed an incarceration time of 600 months, a de facto life sentence. The judgment and sentence should reflect that any time imposed runs concurrently with time imposed in California.
- H. The trial court erred when it imposed costs without making the required individualized inquiry of current and likely future ability to pay.
- I. This Court should decline to impose costs if the state substantially prevails on appeal and submits a cost bill.

*Issues Pertaining To Assignments of Error*

- A. Where the trial court fails to conduct the required on the record analysis for admissibility of evidence of prior wrongs and does not weigh the necessity for its admission against the prejudice it may engender in the minds of the jury, is the evidence not properly admitted?
- B. Did the trial court err when it determined, without an on the record analysis, that the evidence was more probative than prejudicial?
- C. Did the trial court err in admitting evidence of prior wrongs to prove identity where the circumstances did not amount to a unique signature crime?

- D. Did the trial court deny Mr. Figueroa his constitutional right to present a defense under the Sixth Amendment and Washington State Constitution Article 1 § 22 when it barred him from arguing or suggesting in cross-examination that his brother committed the crime?
- E. Was the evidence insufficient to sustain the convictions?
- F. Did the trial court violate the protections of the Eighth Amendment when it imposed mandatory sentences without exercising its discretion and considering the defendant's youth?
- G. Should the judgment and sentence reflect that the Washington sentence runs concurrent with the California sentence?
- H. Did the trial court err when it imposed discretionary legal financial obligations without making the required individualized inquiry into current and future ability to pay the costs?
- I. Where the appellant was found indigent on appeal, the Rules of Appellate Procedure presume continued indigency. If the state substantially prevails on appeal and submits a cost bill, this Court should deny appellate costs.

## II. STATEMENT OF FACTS

In 2015 Benton County prosecutors charged Vincente Figueroa for crimes he was alleged to have committed in 2011 when he was fifteen years old. CP 1-4. By second amended information the prosecutor charged four counts of first degree kidnapping with one count of a firearm enhancement allegation, two counts of burglary first degree, with a firearm enhancement allegation, one count of robbery in the first degree with a firearm enhancement allegation, and one count of theft of a motor vehicle. CP 37-41. At the time of charging, Vincente<sup>1</sup> was serving a 29-year criminal sentence in California. CP 5-6. The California crimes occurred when he was fifteen years old, but later in time than the alleged Washington crimes. CP 147-148.

### 1. Procedural Issues

#### a. ER 404(b) Ruling

The state sought to introduce evidence of Vincente's California convictions. Relying on common scheme or plan, identity, and modus operandi, the state argued the crimes met the

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<sup>1</sup> Vincente Figueroa and his older brother Umberto Figueroa share the same last name. For the sake of clarity, the individuals will be referred to by their first names. No disrespect is intended.

requirements for admission. CP 165-173. It “challenge[d] anyone to find a similar case –ever- in Benton County, Washington...we also challenge anyone to find any case in the nation –ever- involving all the similarities herein.” CP 170.

In a response brief defense counsel objected, referring to four almost identical crimes, over a two-year time period, in close geographical proximity to the Benton County crime. CP 14-17. The crimes, catalogued and presented in a police report to the prosecutor, listed 13 similarities between those crimes and the current matter<sup>2</sup>:

(1) On November 4, 2009, at 8:30 pm, three or four suspects, both black and white males, gained entry to the home of the man who owned Ari Diamonds in Beaverton, Oregon. The men pretended to be door to door preachers, pointed a handgun and a shot gun at the victims and gained entry to the home. They used zip ties and duct tape to restrain the occupants. Two suspects drove the victim’s car to the store. They stole

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<sup>2</sup> The robberies were categorized by: date/time of the incident, name of the jewelry store, number of suspects, suspect descriptions, method of entry, level of violence, types of restraints used, method of restraint, procedure for going to jewelry store, type of jewelry taken, procedure for departing from the home, if/how victim vehicle stolen or left and whether any suspects had been arrested or developed. CP 437.

diamonds and gold. They drove the victim back to his house and then left the car in a nearby neighborhood. The police had two composite sketches, but no fingerprints.

- (2) On March 25, 2010, between 6:15 pm and 8:30 pm, two or three while male suspects knocked on the door and forced entry into the home of the owner of LaRog's Jewelry in Clackamas, Oregon. They used a moderate level of violence and hands on threats. The victims were restrained with flex ties and duct-tape. One suspect stayed at the home with the owner's wife, and the other two drove the victim and his car back to the shop and stole gold, and a diamond wallet. They instructed the owner to reset the store alarm and then drove back to the home with the owner. The owner's vehicle was later found about ¼ mile away from the store. The suspects were not known.
- (3) On June 15, 2010 at 10p.m., three males in their 20's arrived at the home of the owner of Super Pawn in Yakima. They had a gun and threatened violence, but did not restrain the family. One male was chubby with painted on eyebrows. Two of the suspects drove the owner to his store. Stolen items were loaded into the trunk of the vehicle. The suspects were never identified.

(4) On January 11, 2011 at 7:45 pm, three male suspects in their 20's, of either Hispanic or Native American heritage, who spoke Spanish, entered the home of the First Choice Pawn owners in Wapato Washington through an unlocked door. They wore hooded sweatshirts, ski masks, shoes with red laces. They were tall, spoke Spanish and English. They restrained the home occupants with tape but did not threaten them. The owner of the shop drove them to the Pawn Shop in his car. They stole gold, silver and cash. The victim drove the men back to the house. The car was recovered in Wapato the same day. The suspects were later arrested; however, the arrest date is not in the record. CP 437-441.

Defense counsel asserted the prosecutor's own evidence substantiated that the facts were not unique or so unusual as to be categorized as a "signature" crime. Counsel argued the California convictions were irrelevant to establish identity. CP 20-21; 3/30/16 RP 6.

At the evidentiary hearing, Judge Vanderschoor stated he was not prepared, but thought he recalled having read the initial ER 404(b) briefing by the state, but not the response brief. 3/30/16 RP 3. The court heard a very brief oral argument and determined to

read the briefs and issue a ruling within a week. 3/30/16 RP 12.

The following day, he issued a memo:

Counsel:

Assuming that the four requirements for admission of other bad acts are appropriately addressed on the record, the Court will grant the State's motion to admit the proposed ER 404(b) evidence along with the appropriate limiting instructions.

CP 30.

On the morning of trial, the prosecutor submitted written findings of fact and conclusions of law on the ER 404(b) issue, for the court's signature. 1RP 15. The prosecutor told the court it believed the findings and conclusions were consistent with the court's memo. 1RP 16. Defense counsel objected, stating the findings of fact and conclusions of law were simply culled from the state's brief. Without an on the record analysis of the factors, or further discussion, Judge Vanderschoor signed the findings and conclusions allowing admission of the California crimes for the purpose of establishing identity. 1RP 16; CP 72-75.

b. Motion in Limine; Other Suspect Evidence

Defense counsel objected to the state's motion in limine:

The defendant should be barred from arguing or suggesting in cross examination that the defendant's brother committed the [Benton County] crimes.

CP 31.

Defense counsel asserted that if the court granted the state's motion, it would violate Vincente's right to present a defense.

Without analysis or explanation on the record, the court ruled the parties could talk about Umberto's involvement in the California case, but "cannot say that he was involved in this case." 1RP 12-13.

After the stated rested its case in chief and the defense was to present its case this exchange took place:

MR. BLOOR: Afternoon. Your Honor, just for the record, I think the defendant might be testifying, but we will actually withdraw our objection. If he wants to get on the witness stand and say that his brother was a perpetrator and he has some direct knowledge about that on our offense here in Kennewick. So, he can say that if he has some direct knowledge that his brother's a perpetrator, we'll withdraw our objection and he can so testify.

THE COURT: Okay.

MS. HARKINS: I obviously agree with that.

3RP 342.

## Trial Evidence

### California Crimes

Eighth grader Vincente lived in Modesto, California with his adopted brother Pedro and Pedro's family. RP 345-47. In May 2011, his mother came to visit him. RP 361. She drove him back to Grandview, Washington to visit and celebrate Mother's Day with her. RP 345-46. His other brother, 23-year old Umberto, lived in Washington and occasionally lived with their mother and her boyfriend in the Grandview home. RP 347.

When it was time for him to return to Modesto, Umberto and Umberto's acquaintance, Alex, drove him in Mrs. Figueroa's Cadillac Escalade. RP 287-288. Vincente testified Umberto and Alex discussed committing a crime. RP 348. He was initially afraid but, was talked into participating. RP 349.

On June 6, 2011, Vincente and Umberto, walked into the unlocked home of Don Younger and his family in Bakersfield, California. 2RP 273;291. Vincente and Umberto carried guns. RP 274;291. They did not wear masks. 2RP 352. They did not have or use zip ties. 2RP 293.

Mr. Younger said one of them spoke English to him, but they spoke Spanish to each other. 2RP 277. He described the English speaker, Vincente, as *short and chubby*. 2RP 277.

The entire time he was in the Younger home Vincente spoke to Alex in Spanish over the phone. 2RP 275, 282. Vincente said Alex gave him directions about what to do. RP 361-362. He believed Alex was in front of the house waiting for them. RP 353.

The plan was for Alex to hold the family hostage while Vincente and Umberto went to Younger's pawnshop to obtain money and gold. 2RP 275, 288, 290. Unbeknownst to Vincente and Umberto, Mr. Younger's in-laws went out the back of the house undetected and called the police. RP 275-276.

Vincente told police that his older brother and Alex told him they were copying something that had happened in Washington. RP 292. Vincente and Umberto both pleaded guilty to the crime. RP 354.

California detective Newell testified at the Washington trial that he contacted Washington law enforcement because he "initially...did some research on the internet and found out there was *a few robberies similar to...*" the California robbery. RP 286.

Newell later participated in a search warrant on Mrs. Figueroa's home in Grandview<sup>3</sup>. RP 290.

### Washington

On February 9, 2011<sup>4</sup>, shortly after 5 p.m., Hayley Welsh and her young son were at home. 1RP 30. Two men, wearing construction vests and hard hats, knocked on the door. 1RP 30. When she answered the door, they told her they were from the energy company and needed to enter the residence to check something. 1RP 30.

The men pushed their way into the home and pulled out guns. 1RP 31-32. They asked if anyone else was home, and learning no one was there, told them to sit on the couch. 1RP 33.

Ms. Welsh said the man who did all the talking spoke English. She described him as in his *mid-twenties*, *a thinner build*, short dark hair, and brown eyes, with *freckles*, or a prominent freckle under his eye. 1RP 34, 49-50. She called him a "smooth talker", said he appeared to be in charge, and was very reassuring and "knew how to talk to people." 1RP 55,185. She described the

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<sup>3</sup> The record does not contain any information about the search warrant, when it was executed, or its scope.

<sup>4</sup> The crimes charged in Washington occurred four months before the California crimes.

English-speaking man as five feet, nine inches, 180 pounds. 1RP 182.

The second man, who appeared older and taller, only spoke Spanish. He appeared to be a year or two older than the English-speaking man. 1RP 34,131. Ms. Welch told police he was taller, heavier set, and had a “gut”. 1RP 183. The men put on ski masks after their entry. 1RP 33.

Shortly after 6 p.m., Ms. Welch’s mother and sister arrived at the home. 1RP 35,93. She was instructed to call them to the living room; the men told them to sit on the couch. 1RP 36, 63. The men used zip ties on everyone. 1RP 36. Ms. Welch’s mother opened the home safe at their direction. 1RP 36, 76. The man said they had been watching the family and knew their schedule. 1RP 68. They intended to have Mr. Welch drive back to his jewelry store with them and they would take the jewelry. 1RP 36-37, 68.

At 7 p.m., Mr. Welch arrived home. 1RP 36. As he came through the front door the men put a gun to his head and led him to where the others were sitting. 1RP 75. Mr. Welch described the English-speaking man as in his *mid to late twenties*, approximately *five-eight to five feet ten inches* tall. 1RP 29, 107, 128-129. He

said the man seemed *educated, very composed and calm*. 1RP 159.

The English-speaker told Mr. Welsh that while they went with him, in his truck, to the family-owned jewelry store another man would come and stand guard over the family. 1RP 37. It took about 45 minutes for the third man to arrive. 1RP 37,123.

Mr. Welsh drove the men to his jewelry store. 1RP 127. They directed him to go inside and turn off the alarm. 1RP 135. Mr. Welsh opened the safes and over the next 20 minutes the men took the jewelry and put it into bags. 1RP 140. The English-speaking man said they also wanted the “repair” jewelry. 1RP 158. At Mr. Welch’s request, however, the men returned the jewelry that had been brought into the shop for repair. 1RP 141-143. They took none of the over half-dozen guns from the safe. 1RP 159.

They returned to the Welsh home and instructed the family to remain on the couch for 30 minutes. 1RP 145. They took Mr. Welsh’s truck and drove away. Mr. Welsh contacted the police. 1RP 145.

The police found the truck nearby. 1RP 180. Inside of the truck they found a clipboard, backpacks, Welsh’s jacket, and racquetball gear. 1RP 151-52. The clipboard had a paper with

information about the number of people in the home, the name Mark Welsh, and the Welsh home address. 1RP 191. The Washington State Patrol crime lab later analyzed fingerprints on three pieces of school notebook paper from the clipboard and found fingerprints that matched Vincente. 2RP 310-19.

Months later, Washington State officers and a California sheriff executed a search warrant on the Grandview home belonging to Mrs. Figueroa. RP 329. Officers photographed a piece of paper they found which had standards information about gold purity and the percentage of pure gold to alloy. RP 152, 330. In a back area of Ms. Figueroa's garage, they located and photographed two ski masks<sup>5</sup>, a black and blue backpack, and orange jackets. RP 329-334.

Five years after the home invasion and the day before trial, Hayley Welsh told prosecutors the backpack found in the garage looked like one that belonged to her son. RP 39, 53. She testified there was a pin on his backpack, but could not describe it. RP 54. Officers confirmed, however, that the backpack did *not* have a pin attached to it. RP 331-335.

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<sup>5</sup> The state did not present any DNA evidence from the ski masks or the orange jackets. The lead detective's report says he did not see the masks as connected to the case. RP 18.

Officers showed Hayley Welsh a photo line-up of six suspects. RP 339-340. She was the only family member who saw the faces of the intruders before they put on masks. Although Vincente's picture was included, she did not identify him as the person who entered her home that evening. RP 339-340.

### Closing Argument

During closing argument, the prosecutor referenced the California crimes introduced under ER 404(b):

Now you've got -- you've got a lot of evidence about the defendant speaking English, and there might be a lot of inferences that maybe the defendant was Suspect Number 1 in our case, the case in Kennewick; because, you know, he actually had that role in California. He was the one that came in with his brother and he was the English speaker. So, you know, that's very similar to our case. But there is nothing, there is nothing that we're saying that absolutely has to require you to think that he is Suspect Number 1 in our case...

Maybe the defendant in our case, in our case was Number 3, was the person who came in after one and two took Mark back to the store; and possibly, maybe, maybe he just became bolder with that stretch of time between February 9th, 2011 and June 6th of 2011. Maybe he just felt more comfortable in actually knocking on the door and going in guns drawn. We don't know. We don't know. But we do know, without question, that he was a participant in this. And, you know, we do know that he at least had the role, he at least had the same role in California as Suspect Number 1 in our case. RP 392-393.

Okay, California evidence... these two crimes are so unusual and so alike that it's basically a signature. It's basically like somebody painting a portrait and then signing it. It's so close that you should be aware of it it (sic) because

it will -- it should help you decide now, hey, this defendant that we have committed this crime in California. It's such an unusual crime, and it was committed in virtually exactly the same way, that that really resolves any issue about whether or not he was involved in it.

RP 396-397.

### Sentencing Hearing

Vincente was found guilty on all counts. CP 127-139.

Defense counsel requested the court to impose an exceptional downward sentence based on *State v. O'Dell*, which instructs superior courts to consider youth at the time of sentencing.

Sentencing Hearing RP 2-5. The court did not address or comment on defense counsel's argument for consideration of the downward exceptional sentence. Sentencing Hearing RP 5-10.

Instead, the court imposed what it believed was a mandatory 50-year sentence: mandatory consecutive sentencing on four counts totaling 204 months; 240 months of "flat time" on four counts for firearm enhancements. CP 151-152; Sentencing Hearing RP 15. The remaining counts were concurrent to a 156-month sentence. Without inclusion of the community custody time the total sentence was 600 months. Sentencing Hearing RP 15.

The court imposed discretionary legal financial obligations, saying "I'm going to assess the costs. That might be excess (sic) in

futility, but I'm going to assess them anyway. They can be looked at when and if he's released from prison." Sentencing hearing RP 15; CP 150, 157. The court made no individualized inquiry into Vincente's current or future ability to pay. Along with the mandatory legal financial obligations, the court imposed a \$250 jury demand fee and \$700 in attorney fees, totaling \$1,487.12. RP 15; CP 149, 157. The court found Vincente indigent for his appeal. CP 161. Vincente makes this timely appeal. CP 159.

### III. ARGUMENT

#### A. The Court's Admission Of ER 404(b) Evidence Was Error And Unfairly Influenced The Outcome Of This Case.

The jury heard evidence that Vincente had participated in a crime in California. Reversal is required because (1) the trial court did not conduct the required on the record analysis; (2) the crimes were not so unique as to form a "signature" crime for purposes of identity, and (3) any probative value was significantly outweighed by its prejudicial effect.

Evidence of prior bad acts is presumed inadmissible at trial, and any doubts as to admissibility are resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). A trial court's error in admitting inadmissible ER 404(b)

evidence is not of constitutional magnitude and is reviewed to determine whether it was harmless. *State v. Thach*, 126 Wn.App. 297, 311, 106 P.3d 782 (2005). It is not harmless if the outcome of the trial would have been different if the error had not occurred. *Id.* Where the state's evidence is not overwhelming, wrongful admission of evidence under ER 404 (b) deprives the defendant of the right to a fair trial and requires reversal. *State v. Wilson*, 144 Wn.App. 166, 177-178, 181 P.3d 887 (2008).

A trial court's decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion. *State v. Dennison*, 115 Wn.2d 609, 627-28, 801 P.2d 193 (1990). Where the trial court applies the wrong legal standard, bases its ruling on an erroneous view of the law, or *otherwise fails to adhere to the requirements of an evidentiary rule*, it abuses its discretion. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

ER 404(b) provides:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

To admit prior misconduct the court must (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for which the evidence is offered; (3) determine if the evidence is *relevant* to prove an element of the crime charged; and (4) *weigh* the probative value of the evidence against its prejudicial effect. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). ER 403 requires the exclusion of evidence, even if relevant, whose probative value is substantially outweighed by the danger of unfair prejudice. *Wilson*, 144 Wn.App. at 177.

The Court Failed To Conduct An On The Record Analysis.

The Washington Supreme Court requires an “on the record” balancing under ER 404(b). *State v. Tharp*, 96 Wn.2d 591, 597, 637 P.2d 961 (1981). Where the trial court does not perform the required analysis on the record, it is an abuse of discretion. *Foxhoven*, 161 Wn.2d at 174.

Here, the court issued a memo to the parties indicating that *if* the requirements for admission were addressed *on the record*, the Court would grant the state’s motion to admit the proposed ER 404(b) evidence. CP 30. The court did not conduct an “on the record” analysis. Rather, over defense objection, Judge

Vanderschoor simply signed the findings of fact and conclusions of law prepared by the state, admitting the evidence from the California crime.

Without a careful record of the court's reasons for admitting evidence of prior crimes, along with failure to conduct an analysis "precludes the trial court's thoughtful consideration of the issue and frustrates effective appellate review." *State v. Jackson*, 102 Wn.2d 689, 694, 689 P.2d 76 (1984). The court here abused its discretion when it failed to follow the requirements and conduct the analysis on the record.

The Crimes Were Not So Unique As To Form A "Signature" Crime  
For Purposes Of Establishing Identity.

Admission of the evidence here to establish identity was error. "ER 404(b) is only the starting point for an inquiry into the admissibility of evidence of other crimes; it should not be read in isolation, but in conjunction with other rules of evidence, in particular, ER 402 and 403." *State v. Saltarelli*, 98 Wn.2d 358 361, 655 P.2d 697 (1982). The Washington Supreme Court has held:

When evidence of other bad acts is introduced to show identity by establishing a unique modus operandi, *the evidence is relevant* to the current charge *'only if* the method employed in the commission of both crimes is *so unique* that

proof that an accused committed one of these crimes creates a high probability that he also committed the other crimes with which he is charged.

*Thang*, 145 Wn. 2d at 643. (emphasis added). The prior crime “must be so unusual and distinctive as to be like a signature.”  
*Foxhoven*, 161 Wn.2d at 176. (internal citations omitted).

Here, despite the prosecutor’s assertion that no similar crimes had occurred in the area or the nation, its own memorandum to the court listed four strikingly similar crimes that occurred in close geographical proximity to the current crime, beginning in 2009. CP 437-441. The police listed 13 similarities between those crimes and the 2011 Benton County crime: the victims identified the suspects as males in their 20<sup>6</sup>’s; two individuals came into the homes of pawnshop or jewelry store owners and held the family hostage; a third individual guarded the family while the other two had the owner drive them to the shop; they sought gold and cash; and in at least one instance, spoke Spanish to one another. The fact of the 2009-2011 robberies

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<sup>6</sup> Vincente was 12 or 13 years old in 2009, at the first of the recorded crimes of this nature.

demonstrates the state did not meet the test for uniqueness, distinctiveness, or unusualness.

Detective Newell from the Kern County California Sheriff's Department testified he had found similar robberies by conducting a simple internet search. RP 286.

A prior act is not admissible or relevant merely because it is similar. To be relevant, it must be so unique and so distinctive, the court can conclude there is a high degree of probability they were committed by the same individual. *Thang*, 145 Wn.2d at 643. (emphasis added). The California robbery evidence should have been excluded as irrelevant to establish identity.

The Prejudicial Effect Of Introduction Of The ER 404(b) Evidence Far Outweighed Its Probative Value.

Only after a court has identified the purpose and relevance of the offered 404(b) evidence can it weigh the necessity for its admission against the prejudice it may create in the minds of the jury. *Saltarelli*, 98 Wn.2d at 362; *State v. Goebel*, 36 Wn.2d 367, 218 P.2d 300 (1950).

Without conceding this evidence had any probative value beyond its propensity use, the prejudicial effect greatly outweighed any purported probative value and unfairly prejudiced Vincente.

The state's evidence of this alleged crime consisted of Vincente's fingerprints on three sheets of notebook paper, and items found in his mother's Grandview home, where he did not live, but his brother did. Absent the California evidence, the state's case was very weak. Had the jury been tasked with deciding whether Vincente committed the Welsh robbery without considering the California evidence, the outcome would have been different.

The prosecutor told the jury not to consider the California crime as propensity evidence. Nevertheless, the state used the California evidence as proof of identity for its prejudicial effect:

Okay, California evidence.... these two crimes are so unusual and so alike that it's basically a signature. It's basically like somebody painting a portrait and then signing it. It's so close that you should be aware of it (sic) because it will -- *it should help you decide now, hey, this defendant that we have committed this crime in California.* It's such an unusual crime, and it was committed in virtually exactly the same way, that that really resolves any issue about whether or not he was involved in it.

RP 396-97.

The state knew there were at least four crimes in Washington with an extremely similar fact pattern, which began two years

*before* the Welsh crime. Proposing that the California and Welsh robberies were a ‘signature’ crime which could only have been committed by Vincente was inaccurate, misleading, and unfairly prejudicial. The prejudicial effect of the evidence outweighed any relevance.

“Although evidence may be sufficient to find [a defendant] guilty, it is reasonably probable that absent the highly prejudicial effect of [prior bad acts] the jury would have reached a different verdict.” *State v. Gunderson*, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014).

The erroneous admission of the ER 404(b) evidence requires reversal. The court did not conduct an on the record analysis, the alleged crime was not so unique or distinctive to be admissible for the purpose of identification, and its introduction was unfairly prejudicial, depriving Vincente of a fair trial.

**B. The Trial Court Erred When It Denied Relevant Other Suspect Evidence.**

A criminal defendant has a right to present evidence in defense of the charged crimes. Const. amend. VI; Wash. Const. art. 1 §22; *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). Whether a trial court has prohibited a defendant from

raising a defense is a question of law reviewed *de novo*. *State v. Brown*, 166 Wn.App. 99, 104, 269 P.3d 359 (2012). Where a trial court makes a discretionary decision, but the error is alleged to violate a constitutional right, review is *de novo*. *State v. Iniguez*, 167 Wn.2d 273, 281, 217 P.3d 768 (2009); *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

“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). In *Jones*, the defendant sought to introduce evidence of the alleged victim’s participation in consensual sex to defend against a rape charge. The trial court denied Jones the opportunity to present testimony or *cross-examine* the alleged victim about the testimony. *Id.* at 721. Once all the witnesses had testified, the trial court “attempted to say that Jones had not been precluded from testifying to the issue of consent alone.” *Id.* On review, the Court found that by precluding Jones from cross-examining witnesses on the question of consent, but allowing *him* to testify to the facts, he had been effectively barred from presenting a meaningful defense. It violated the Sixth Amendment. *Id.*

The Court held that a defendant has a right to present relevant evidence, and the “burden is on the State to show the evidence is so prejudicial that it would disrupt the fairness of the fact-finding process at trial.” *Jones*, 168 Wn.2d at 720. The state’s interest in excluding marginal prejudicial evidence must be weighed against the defendant’s need for the information. *Id.* However, for evidence of high probative value, “it appears *no* state interest can be compelling enough to preclude its introduction” consistent with state and federal constitutional rights. *Id.*

Where a defendant can show “a train of facts or circumstances as tend clearly to point out someone besides the accused is the guilty party”, the evidence is admissible. *State v. Downs*, 168 Wash. 664, 13 P.2d 1 (1932). If there is an adequate nexus between the alleged other suspect and the crime, such evidence should be admitted. *State v. Giles*, 196 Wn.App. 745, 755, 385 P.3d 204 (2016).(internal citation omitted).

Where, as here, the state’s case is entirely circumstantial, the test of the ‘train of facts of circumstances’ that tend to clearly point to someone other than the defendant as the guilty party is relaxed. *State v. Starbuck*, 189 Wn.App. 740, 750, 355 P.3d 1167 (2015). The defendant is allowed to reply “in kind” and afforded the

opportunity to “neutralize or overcome such evidence by presenting sufficient evidence of the same character tending to identify some other person as the perpetrator of the crime. *Id.* (internal citation omitted.)

The defense in this case could show the train of facts and circumstances pointed to Umberto not Vincente. Umberto had an adequate nexus to the crime that created reasonable doubt as to Vincente’s guilt. Umberto lived at his mother’s home. RP 349. Vincente lived in California until he returned for a visit with his mother in May 2011. The Welsh family described the suspects as in their 20’s or 30’s: Umberto was 23. One of the suspects spoke only Spanish, Umberto spoke only Spanish. The Welsh family described the 20 to 30-year-old English-speaking intruder (presumably Vincente) as “calm”, “educated” “knew how to talk to people” and seemed to have command of the room. Vincente was only 15 years old. Umberto had been convicted in the California crime.

Precluding Vincente from cross-examining witnesses about other suspect evidence effectively prevented Vincente from presenting a meaningful defense that would raise reasonable doubt about his guilt. An erroneous evidentiary ruling that violates a

defendant's constitutional rights is presumed prejudicial unless the state can show the error was harmless beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007).

An error is harmless only if the court cannot reasonably doubt that the jury would have arrived at the same verdict in its absence. *State v. Franklin*, 180 Wn.2d 371, 383, 325 P.3d 159 (2014). Here, the circumstantial evidence of his age, language, geographical location, and living situation pointed as much or more against Umberto than Vincente. Because Vincente could not question or cross examine witnesses on this point, the jury could not consider the other suspect evidence and may well have reached a different outcome. The error was not harmless.

If this Court were to review this issue solely under an abuse of discretion standard, the result is the same. Discretion is abused when, considering the purposes of the trial court's discretion, it is exercised on untenable grounds or for untenable reasons, or *otherwise fails to adhere to the requirements of an evidentiary rule*, *State v. Clark*, 78 Wn.App. 471, 477, 898 P.2d 854 (1995); *Foxhoven*, 161 Wn.2d at 174.

The court abused its discretion in two ways: first, it failed to conduct any analysis under ER 401, 402, or 403, so appellate review is naturally frustrated. *Jackson*, 102 Wn.2d 694.

The evidence was relevant, as it encompassed facts that presented circumstantial evidence of a defense. *Tegland*, Wash. Prac. § 403:9, at 194 (2013-2014 ed.). Facts that tend to establish a party's theory of the case will generally be found to be relevant. *Maicke v. RDH Inc.*, 37 Wn.App. 750, 752, 683 P.2d 227 (1984).

Second, evidence is only properly excluded if its probative value is outweighed by factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. *Franklin*, 180 Wn.2d at 378. Here, allowing questioning and cross-examining witnesses about Umberto's involvement was not outweighed by any unfair prejudice to the state. The state conceded it did not have sufficient evidence to charge Umberto in the Welsh robbery; however, the state's dearth of evidence against Umberto should not control whether the defendant can point to another suspect and raise reasonable doubt on his own guilt.

Once the state concluded its case in chief, it promptly withdrew its granted motion in limine preventing Vincente from

questioning and cross-examining witnesses about other suspect evidence. The prosecutor told the court that were Vincente going to testify, he could offer up any information he had on his brother. The state was willing to cross-examine Vincente on his brother's involvement, but only after the court had already precluded him from questioning the state's witnesses.

As in *Jones*, precluding a defendant from cross-examining witnesses on a central question of his defense, but allowing him to testify to the facts, effectively bars him from presenting a meaningful defense. It violates the Sixth Amendment. *Jones*, 168 Wn.2d at 721. The convictions must be reversed.

#### C. The Evidence Was Insufficient To Sustain The Convictions.

Due process requires the state to prove beyond a reasonable doubt all the necessary facts of the crime charged. *State v. Colquitt*, 133 Wn.App. 789, 796, 137 P.3d 892 (2006). The test for determining sufficiency of the evidence is whether after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 192 Wn.2d 192, 201, 829 P.2d 1068 (1992). In a sufficiency of the challenge in a criminal case, all

reasonable inferences from the evidence must be drawn in favor of the state. *Id.* Circumstantial evidence and direct evidence are equally reliable; however, inferences based on circumstantial evidence must be reasonable and cannot be based on speculation. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004); *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). A conviction must be reversed for insufficient evidence where no rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Chouinard*, 169 Wn.App. 895, 899, 282 P.3d 117 (2012)(*rev. denied*, 176 Wn.2d 1003, 297 P.3d 67 (2013)).

The identity of a criminal defendant and his presence at the scene of the crimes charged must be proved beyond a reasonable doubt. *State v. Thomson*, 70 Wn.App. 200, 211, 852 P.2d 1104 (1993). The offenses with which the state charged Vincente required proof he was the individual who forced his way into the Welsh home in February 2011. The state's evidence could not prove beyond a reasonable doubt that Vincente was that individual.

1. The State Did Not Prove Vincente Was In Washington In February 2011.

First, the state never proved that Vincente was in Washington state in February 2011. Umberto lived with their

mother in Grandview. RP 359. Vincente lived in California until May 2011 when he came to visit his mother in Grandview for about a month. Ms. Figueroa lent her car to Umberto to drive Vincente back home to California. RP 346.

2. Witness Descriptions Did Not Match Vincente.

Second, the description of the intruder did not match Vincente. Hayley Welsh saw the intruders without ski masks. When shown a photo montage, she did not identify Vincente, but rather identified someone else. RP 339-340; CP 314. She described the English speaker's face as having freckles, and a large freckle under one of his eyes. RP 49-50; 346. Vincente does not have freckles.

Each witness in the Welsh family described the intruder as in his late 20's or early 30's. In 2011, Vincente was 15 years old.

The California store owner described Vincente as "short and chubby". 2RP 277. The Welsh family described the intruder as between five feet eight and five feet ten inches tall, and having a slimmer build. 1RP 34; 49-50; 2RP 182. At age 21 Vincente was five-seven. RP 344.

Mr. Welsh described the intruder as educated, very composed and calm. 1RP 159. Ms. Welsh described him as a

“smooth talker”, said he appeared to be in control, was very reassuring and “knew how to talk to people.” 1RP 55,185.

Vincente was a 15-year-old eighth grader.

3. The State Did Not Produce Any Evidence That Vincente Ever Touched Or Saw The Items Found In The Garage.

The state presented pictures of items found in Ms. Figueroa’s garage: orange jackets, and ski masks<sup>7</sup>. RP 331. In closing argument, the state conceded it could not say the ski masks found in the home were those worn by the perpetrators; rather it could only say they were similar. RP 405. The state presented no evidence to substantiate that Vincente had ever seen, touched, or worn the ski masks or the orange jackets.

4. Fingerprint Evidence Alone Is Insufficient To Sustain A Conviction.

A reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt, but it requires that *substantial* evidence supports the state’s case. *State v. Fiser*, 99 Wn.App. 714, 718, 995 P.2d 107 (2000). The fingerprints on the school notebook paper is the only evidence the state could produce to even remotely tie Vincente to the crimes.

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<sup>7</sup> Although Ms. Welsh thought the backpack found in the garage belonged to her child it did not have the identifying pin on it. It was a generic backpack.

In *State v. Bridge*, 91 Wn.App. 98, 955 P.2d 418 (1998), the defendant was charged with and convicted of burglary of a barn. The only evidence connecting the defendant to the crime was a fingerprint found on the price tag of a newly purchased tool found near the barn entrance. On review, the Court found the evidence insufficient to support the verdict and reversed.

The Court reasoned that fingerprint evidence will support a conviction if the trier of fact could conclude from the circumstances that “*the fingerprint could only have been impressed at the time of the crime.*” *Id.* at 101. Where the object is a moveable object, such as paper, the state must make a showing, reflected in the record, that the object on which the fingerprint was found was *inaccessible to the defendant prior to the time of the commission of the crime.* *Id.* at 101. (Internal citation omitted, emphasis in the original).

Here, the paper was accessible to Vincente because it was conceivably his school notebook paper. The state could not and did not establish when the fingerprints were impressed. As the *Bridge* Court reasoned, “to allow this conviction to stand would be to hold that anyone who touches anything which is found later at the scene of a crime may be convicted.” *Bridge*, 91 Wn.App. at 101.

The evidence here was insufficient to sustain the convictions. The remedy for failure of the state to present sufficient evidence of the crime charged is reversal and dismissal with prejudice. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

D. The Trial Court Violated The Protections of The Eighth Amendment When It Imposed Mandatory Consecutive Sentences And Firearm Enhancements Without Exercising Its Discretion As Required Under *Houston-Sconiers*.

“Children are different than adults.” *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2010). Those differences are constitutional in nature and implicate the Eighth Amendment and sentencing practices. *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

In 2015, the Washington Supreme Court reversed its previous rulings, and held that trial courts must be allowed to consider a defendant’s youth and immaturity as a mitigating factor justifying an exceptional sentence below the standard range. *State v. O’Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015)<sup>8</sup>. In its opinion, the

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<sup>8</sup> At the time of his charged crime, O’Dell was over eighteen years old. Nevertheless, the Court held the trial court could consider whether youth diminished his culpability. *Id.* at 683.

Court found persuasive the scientific and technical advances in understanding the adolescent brain which served as the foundation for the U.S. Supreme Court decisions in *Graham, Miller, and Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.ED.2d 1 (2005).

Two years later, in *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), it found “[a]n offender's age is relevant to the Eighth Amendment, and [so] criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.” *Id.* at 20.

We hold that sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system, regardless of whether the juvenile is there following a decline hearing or not. ... Trial courts *must consider* mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements.

Relying on *Miller*, the Court held that in exercising its discretion, the court *must* consider circumstances related to the defendant's youth—such as age and its “hallmark features,” of “immaturity, impetuosity, and failure to appreciate risks and consequences.” *Id.* at 23. “It *must* also consider factors like the

nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, and “the way familial and peer pressures may have affected him [or her].” *Id.* And it must consider how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated. *Id.* at 23.

Vincente Figueroa was 15 years old at the time of the alleged crime. He was sentenced to 50 years of incarceration. Of those 600 months, 240 months were consecutive firearm enhancement “flat time”; 204 months were consecutive to other counts of 156 months. CP 152. This is a de facto life sentence; he will be almost 70 years old at the time of release. Imposition of a state's most severe penalties on juvenile offenders cannot proceed as though they were not children.” *Miller*, 132 S.Ct. at 2466. *Miller* requires the trial court to consider the mitigating qualities of youth at sentencing and exercise its discretion to impose any sentence below the otherwise applicable SRA standard range, *including sentence enhancements*. *Houston-Sconiers*, 188 Wn.2d at 20-21.

Here, the trial court literally never addressed defense counsel’s argument that the court could and should consider his

youth as a mitigating factor<sup>9</sup>. The failure to exercise discretion with respect to an exceptional downward sentence violates Vincente's Eighth Amendment rights and is contrary to Washington case law.

#### FIREARM ENHANCEMENTS

Like Vincente, the teens in *Houston-Sconiers* received very lengthy sentences in non-homicide crimes, although far less than Vincente's 600 months. There, the trial court imposed no time on the substantive crimes, but imposed all of the mandatory "flat time"<sup>10</sup> triggered by the enhancements: 312 months for Roberts and 372 months for Houston-Sconiers. *Houston-Sconiers*, 188 Wn.2d at 13. The trial court believed it was precluded from exercising its discretion about the appropriateness of the mandatory sentence increase outlined in RCW 9.94.

The Court held that imposing the mandatory "enhancement" portion of the sentences violated the Eighth Amendment protections. *Id.* at 25-26. When sentencing individuals in adult court for crimes committed as juveniles, the trial court must be vested with full discretion to depart from the sentencing guidelines

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<sup>9</sup> The state's sentencing memo argued against any mitigation. However, the record is devoid of any sign the court read the memo or considered the required factors.

<sup>10</sup> "flat time," means "in total confinement" without possibility of early release. RCW 9.94A.533(3)(e).

and *any otherwise mandatory sentence*. *Id.* at 34. (emphasis added).

The 50- year sentence imposed on *Vincente* triggers the protections afforded by *Miller*. “Before imposing a term-of-years sentence which amounts to a life sentence for crimes committed when the offender was a juvenile, the court must ‘take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.’” *State v. Ronquillo*, 190 Wn.App. 765, 784,361 P.3d 779 (2015). (quoting *Miller*, 132 S.Ct. at 2469). If this Court does not reverse on appellant’s other arguments, this sentence should be reversed.

E. The Judgment And Sentence Should Reflect That The Washington Sentence Runs Concurrent With Time Imposed On The California Sentence.

RCW 9.94A.589(3) provides:

Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

Under the plain language of the statute, a sentencing judge is authorized to impose either a concurrent or consecutive sentence for a crime that the defendant committed *before* he started to serve a felony sentence for a different crime. *State v. King*, 149 Wn.App. 96, 101, 202 P.3d 351 (2009). Where the court pronouncing the current sentence does not order that it be served consecutive it is to be served concurrent to that sentence.

Here, Vincente was sentenced in Benton County for felonies he committed before the California sentencing. He was not under any felony sentence at the time of the earlier crimes. The court did not expressly impose a consecutive sentence; his sentence should be served concurrent with any remaining time on the California sentence.

The sentence in California is a 30-year sentence. Vincente will then be brought to Washington to serve out the remaining years on his Washington sentence. In the interest of not wasting judicial resources at some later date because there is confusion or a change in the law over the next 30 years, Vincente respectfully asks this Court to have the concurrence of the sentences documented on his Washington judgment and sentence.

F. The Trial Court Erred When It Imposed Discretionary Legal Financial Obligations Upon An Indigent Defendant Without Making An Individualized Inquiry Of Current And Likely Future Ability To Pay.

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court may order the payment of a legal financial obligation. RCW 10.01.160(1) authorizes the superior court to require a defendant to pay costs; these costs must be limited to expenses specially incurred by the state in prosecuting the defendant. RCW 10.01.160(2). A court may order an indigent defendant to reimburse the state for costs *only if* the defendant has the financial ability to do so. RCW 10.01.160(3); RCW 9.94A.760(2).

The authorizing statute requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay. RCW 10.01.160(3). In *Blazina*, the Washington Supreme Court held that the authorizing statute means "that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry." *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 685 (2015). Where the trial court has failed to conduct this inquiry, the remedy is remand for a new sentencing hearing. *Id.*

Here, at the sentencing hearing the court made no inquiry into Vincente's current or future ability to pay discretionary legal financial obligations. Rather, the court simply said it was an exercise in futility to order the obligations, but Vincente could figure it out "if and when" he was ever released from prison. Sentencing Hearing RP 15.

Similarly, the judgment and sentence section containing boilerplate language that the trial court "has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change" was left unchecked. CP 149. The court made no findings as required by *Blazina*.

The inquiry regarding ability to pay requires the court to also consider factors such as incarceration and defendant's other debts. *Blazina*, 344 P.3d at 685. Vincente entered the California state prison system at age 15 and was sentenced to 29 years. While there is nothing in the record to show any financial debt he owes for California, he likely will not be earning money sufficient to pay his LFOs in Washington after 50 years has passed.

The *Blazina* court directed trial courts to look to the comments in court rule GR 34 for guidance. Id. GR 34 allows a waiver of filing fees and surcharges based on indigent status, providing a list of ways a person may prove their indigent status. *Id.* Specifically, the court may look to existing compelling circumstances that demonstrate an inability to pay fees. Incarceration for 29 years in another state qualifies an existing compelling circumstance. The trial court recognized as much when he referred to imposing the costs as “an exercise in futility.”

The judgment and sentence provides:

**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. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.**

CP 151. The costs of the prosecution will be subject to a 12% interest rate, per annum, for the next 50 years. This results in an extraordinary sum to be paid by an indigent individual. This matter should be remanded for the sentencing court to make an individualized inquiry into Vincente’s current and future ability to pay before imposing LFO’s. *Blazina*, 344 P.3d at 685.

G. This Court Should Decline To Impose Appellate Costs If The State Substantially Prevails on Appeal And Submits A Cost Bill.

Under Rule of Appellate Procedure (RAP) 14.2, a commissioner or clerk of the appellate court will award costs to the party that substantially prevails on appeal, unless the appellate court directs otherwise in its decision terminating review, or the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs.

Where the trial court has entered an order that a criminal defendant is indigent for appeal, the finding of indigency remains in effect, under RAP 15.2(f), unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved.

Under RAP 15.2(f), "the appellate court will give a party the benefits of an order of indigency throughout the review unless the appellate court finds the party's financial condition has improved to the extent that the party is no longer indigent."

Here, the trial court found Vincente qualified for an indigent defense at trial and on appeal. CP 160-161. Under the rules of appellate procedure, this Court presumes continued indigency. Even if the state were to substantially prevail on appeal, this Court

should continue to give Vincente the benefits of the order of indigency and deny any cost bill submitted by the state.

The report of continued indigency required by this Court's general order issued on June 10, 2016, will be filed with the Court and served on the respondent within 60 days following filing the appellant's brief.

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Vincente asks this Court to reverse his convictions and dismiss with prejudice, based on insufficiency of the evidence. In the alternative, he asks this Court to order a new trial, directing the superior court to conduct an on the record analysis of potential ER 404(b) evidence; or remand with instructions for the trial court to consider and place an on the record analysis of the mitigating circumstances based on his youth at the time of the crime.

Respectfully submitted this 22<sup>nd</sup> day of September 2017.

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## CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on September 22, 2017, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Benton County Prosecuting Attorney at prosecuting@co.benton.wa.us and to Vincent Figueroa at # AT7917, A3-240, PO Box 5004, Calipatria, CA 92233-500.

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