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No. 36223-0-III

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

STATE OF WASHINGTON,

Respondent,

v.

STAFONE NICHOLAS FUENTES,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court denied Mr. Fuentes's right to present a defense when it refused to allow him to present evidence that someone else committed the charged offenses.

2. The trial court improperly admitted propensity evidence when it allowed the State to admit evidence Mr. Fuentes was a pimp and Ms. White was a prostitute who worked for him.

3. The trial court violated Mr. Fuentes's right to confront and cross-examine the witnesses against him.

4. The trial court violated Mr. Fuentes's right to be present at trial and confront witnesses against him when it allowed the State to imply that he was tailoring his testimony.

5. In the absence of a colloquy regarding Mr. Fuentes's financial status, and in light of amendments to the statutes authorizing discretionary legal financial obligations, the trial court erred in imposing the \$200 filing fee.

6. The trial court's imposition of a sentence of life imprisonment without the possibility of parole after a judicial finding of a qualifying prior conviction violated Mr. Fuentes's right to equal protection.

7. The trial court's imposition of a sentence of life imprisonment without the possibility of parole after a judicial finding of a qualifying prior conviction violated Mr. Fuentes's rights to a jury trial and due process.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. As part of his constitutionally protected right to present a defense, a defendant may produce non-speculative evidence tending to connect someone other than the defendant with the crime, otherwise known as "other suspects" evidence. In a prosecution based upon circumstantial evidence, a defendant may present circumstantial evidence that another may have committed the offense.

The prosecution against Mr. Fuentes was based upon circumstantial evidence as no witness could identify him as the shooter. Mr. Fuentes provided circumstantial proof of another's motive, opportunity and prior history sufficient to enable him to point to the other person as the assailant. Did the trial court violate Mr. Fuentes's right to present a defense where it placed the bar for admission higher than the rule required?

2. Only relevant evidence is admissible. Evidence is not relevant if it fails to show any tendency to make the existence of any fact that is of consequence to the determination of the action more probable.

Over Mr. Fuentes's objection, in a prosecution for assault and attempted murder, the State was allowed to admit evidence Mr. Fuentes was a pimp and his girlfriend worked for him as a prostitute where the evidence had no bearing on whether he was the assailant. Did the trial court err in admitting irrelevant prejudicial evidence requiring reversal and remand for a new trial?

3. Otherwise relevant evidence may still be inadmissible if it is admitted to prove the defendant acted in conformity with the defendant's character or character trait. Evidence the defendant committed uncharged crimes is inadmissible unless admitted for one of the enumerated purposes in ER 404(b).

Evidence that Mr. Fuentes committed the uncharged offense of promoting prostitution was admitted over his objection despite the fact the evidence was admitted solely as propensity evidence - to show he was someone who flaunted the law and believed the laws did not apply to him. Is Mr. Fuentes entitled to reversal of his convictions and

remand for a new trial where the inadmissible evidence substantially prejudiced him?

4. A defendant has the constitutionally protected right to confront the witnesses against him. The primary method of ensuring this right is by cross-examination, especially when the witnesses are testifying because of benefits they received pursuant to plea agreements. The two primary State's witnesses against Mr. Fuentes received substantial benefits for agreeing to testify against him, yet the State failed to produce unredacted and unsealed copies of their plea agreements. To further compound the error, the trial court placed the burden on Mr. Fuentes to go to federal court to attempt to obtain unsealed unredacted copies of the plea agreements. Was Mr. Fuentes's right to cross-examine the witnesses against him violated, requiring reversal and remand for a new trial?

5. Mr. Fuentes had possessed a constitutionally protected right to be present and to confront the witnesses against him. Over his objection, the State was allowed to cross-examine him implying that he had tailored his testimony after observing the witnesses against him. Is Mr. Fuentes entitled to reversal and remand for a new trial for impermissible tailoring questioning by the State?

6. The Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and Article I, section 12 of the Washington Constitution require that similarly situated people be treated the same with regard to the legitimate purpose of the law. With the purpose of punishing more harshly recidivist criminals, the Legislature has enacted statutes authorizing greater penalties for specified offenses based on recidivism. In certain instances, the Legislature has labeled the prior convictions 'elements,' requiring they be proven to a jury beyond a reasonable doubt, and in other instances has termed them 'aggravators' or 'sentencing factors,' permitting a judge to find the prior convictions by a preponderance of the evidence. Where no rational basis exists for treating similarly-situated recidivist criminals differently, and where the effect of the classification is to deny some recidivists the Sixth and Fourteenth Amendment protections of a jury trial and proof beyond a reasonable doubt, does the arbitrary classification violate equal protection?

7. The Sixth and Fourteenth Amendment rights to a jury trial and due process of law guarantee an accused person the right to a jury determination beyond a reasonable doubt of any fact necessary to elevate the punishment for a crime above the otherwise-available

statutory maximum. Were Mr. Fuentes's Sixth and Fourteenth Amendment rights violated when a judge, not a jury, found by a preponderance of the evidence that he had two prior most serious offenses, thus elevating his punishment from the otherwise-available statutory maximum to life without the possibility of parole?

C. STATEMENT OF THE CASE

About 11:00 pm, on February 17, 2013, while parked near the Knitting Factory, a downtown Spokane music venue, Titus Davis and Lamont O'Neal were seated in a car when a person approached and fired gunshots into the car, striking Mr. Davis six times and Mr. O'Neal once. RP 810-14, 827-32. The shooter ran down a nearby alley. RP 832. Neither man could identify the shooter. RP 818, 848.

At around the same time, an unrelated federal narcotics investigation was being conducted in Spokane. RP 1053-54. As a result of this investigation, 38 people were arrested, including appellant Stafone Fuentes. RP 1054. A number of the charged individuals in this federal investigation gave information to the agents as part of plea agreements in federal court implicating Mr. Fuentes in the shooting of Mr. Davis and Mr. O'Neal.

Cierra White, Mr. Fuentes's girlfriend at the time, pleaded guilty in federal court and, as part of that agreement, she testified against Mr. Fuentes.¹ RP 864-65. Ms. White testified she was with Mr. Fuentes on September 17, 2013, in a car near the Knitting Factory. RP 869-73. They saw a fight going on and Mr. Fuentes got out of the car and walked in the direction of the fistcuffs. RP 873. Ms. White claimed she heard gunshots and everyone began running away. RP 873. She said Mr. Fuentes ran back to the car. RP 873. Ms. White claimed that the following day when she and Mr. Fuentes were watching a news report on television about the shooting and, upon hearing that Mr. Davis was expected to recover, Mr. Fuentes stated something to the effect that Mr. Davis should have been dead. RP 875.

Deandre Gaither, a business associate of Mr. Fuentes, also testified pursuant to a plea agreement in federal court, that Mr. Fuentes admitted shooting Mr. Davis and that he wanted to trade the gun he used in the shooting for another. RP 979-80. According to Mr. Gaither, Mr. Fuentes admitted he walked up to the driver's side of Mr. Davis's car and started shooting. RP 984.

¹ As a result of her testimony, all pending state and federal narcotics charges were reduced and she was sentenced to time served and released. RP 890.

Jason Jones, an associate of Mr. Fuentes and Mr. Gaither, also testified as part of a plea agreement to pending federal charges. RP 950-55. Mr. Jones testified Mr. Fuentes came to his house and exchanged the firearm he allegedly used in the shooting for another identical firearm. RP 946, 961. According to Mr. Jones, Mr. Fuentes admitted shooting Mr. Davis. RP 948.²

Based primarily upon the testimony of those who had entered plea agreements in federal court, Mr. Fuentes was subsequently charged with two counts of attempted first degree murder, one count involving Mr. Davis and one count involving Mr. O'Neal. CP 2. In the alternative, Mr. Fuentes was charged with two counts of first degree assault involving the same victims. CP 2. The Information alleged a firearm enhancement only on those counts involving Mr. Davis. CP 2. Finally, Mr. Fuentes was charged with a count of conspiracy to commit first degree murder. CP 2.

² Mr. Jones and Mr. Gaither received substantial benefits for pleading guilty in federal court and testifying against Mr. Fuentes. Mr. Jones was charged in federal court with running a criminal enterprise with a mandatory minimum sentence of 20 years. RP 957. Mr. Jones pleaded guilty to substantially lesser offenses and was sentenced to time served of two and one-half years. RP 957-58.

Mr. Gaither was facing charges in both federal and state court and facing a potential life sentence. RP 986. Mr. Gaither reached a global resolution where no other charges would be filed and he would be sentenced to 51 months in custody and 15 years federal probation. RP 988.

At the conclusion of the first trial, the jury was deadlocked and the court declared a mistrial. CP 175-76; RP 637-38. On the State's motion, the court dismissed the conspiracy to commit first degree murder count with prejudice. CP 171-72.

At the conclusion of the second trial, the jury found Mr. Fuentes guilty of the attempted murder of Mr. Davis, but acquitted Mr. Fuentes of the attempted murder of Mr. O'Neal, finding him guilty of first degree assault instead. CP 270-73; RP 1320. The jury also found Mr. Fuentes used a firearm in the commission of both offenses. CP 276-77; RP 1324.

At sentencing, the court found Mr. Fuentes to be a persistent offender based upon two qualifying prior convictions, and sentenced him to a term of life imprisonment without the possibility of parole. CP 288; 1339. Because the State did not allege the firearm enhancement regarding the assault of Mr. O'Neal, the court imposed a firearm enhancement only on the attempted murder count of Mr. Davis. CP 288; RP 1336, 1339. The Court found that Mr. Fuentes's DNA had previously been collected, so it refused to impose the \$100 DNA collection fee. CP 289; RP 1339. The court did impose the mandatory

\$500 Victim Penalty Assessment and the discretionary \$200 Filing Fee.

CP 289; RP 1340.

D. ARGUMENT

1. The trial court violated Mr. Fuentes’s right to present a defense when it refused to allow “other suspects” evidence.

Prior to the second jury trial, in response to a State’s motion *in limine* asking the trial court to bar any mention of other suspects, Mr. Fuentes set out in specific and great detail the evidence that supported his intent to present evidence of a third party perpetrator. CP 185-93, 228-32. Specifically, he sought to show that Kenneth Budik or another member of the 8-Trey Crips Gang could have been Mr. Davis’s assailant. CP 186-87. Mr. Fuentes noted that Mr. Davis had been charged and tried for the murder and attempted murder of a Mr. Walton and Mr. Budik, but the jury failed to reach a verdict. CP 187, 194. Mr. Davis subsequently pleaded guilty to second degree manslaughter. CP 194. Further, Mr. Fuentes intended to show Mr. Budik was also present at the Knitting Factory on the night of the shooting. *Id.* Finally, several witnesses, including Mr. O’Neal, described the shooter as a light-skinned African-American; Mr. Budik is a light-skinned African-American. CP 187.

The trial court barred Mr. Fuentes from presenting evidence that some other person committed the assaults, ruling that Mr. Fuentes had failed to show the third party was present at the scene the night of the shooting and had taken steps to commit the crime:

In this case, and I read all the cases, it says motive alone is not enough to establish a nexus for the defendant to be allowed to present third-party evidence without other evidence, hearsay evidence, speculation, inadmissible evidence. There has to be something more . . .

The witness says I'm speculating that these are things that I may have seen, may have done, but he didn't see Kenneth Budik there. He didn't know Kenneth Budik was there, and you're trying to make that leap without some solid evidence.

You can ask Mr. Davis on the stand you had other people. You gave out lots of names, but as far as what they were or all of that, unless you can tie something because it says admissible evidence, not speculation, not speculative.

5/25/2018RP 23.

Mr. Fuentes sought reconsideration of that ruling, which the trial court denied. CP 228-32. In his motion, Mr. Fuentes provided an even more detailed proffer of the evidence supporting his defense:

During his cross-examination of Mr. Davis, Mr. Fuentes sought to show that Mr. Davis had not only implied Mr. Fuentes may have

been the shooter when talking to the police, but had also indicated other potential suspects who could have been the shooter:

Q (By Mr. Wall) Didn't you call Detective Hill to tell him you wanted to find who shot you?

A When I called or talked with Detective Hill, I wanted to know if he was making any progress because I was very concerned with who tried to killed me, shot me six times and shot my friend. I didn't get a chance at that moment to look the person in the eyes, and that's why I'm here today to look the person in the eyes.

Q And do you remember during that phone call, you mentioned possible suspects.

A Well, you keep saying phone calls.

Q Other than Mr. Fuentes?

MR. TREECE: That is a direct violation of pretrial rules.

THE COURT: I will sustain it and ask that be stricken from the record at this time.

...

Q When you and Detective Hill were discussing possible suspects, isn't it true that you mentioned people other than Mr. Fuentes?

MR. TREECE: Your Honor.

THE COURT: I'm going to sustain it and strike that question again from the record under pretrial rulings, previous pretrial rulings.

MR. WALL: Your Honor, I don't believe this violates your ruling.

THE COURT: It does.

RP 858-59.

a. *Mr. Fuentes had the constitutionally protected right to present a defense.*

“Few rights are more fundamental than that of an accused to present witnesses in his own defense.” *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment require that criminal defendants be afforded a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

b. *The trial court applied an incorrect more stringent standard for the admission of “other suspect” evidence than is required.*

There is no special test for the admission of “other suspect” evidence. Defendants have a right to present relevant evidence. *State v. Gregory*, 158 Wn.2d 759, 786 n. 6, 147 P.3d 1201 (2006); *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). In the classic other suspects case, the defendant blames the specific crime for which he has been charged on someone else. *State v. Hawkins*, 157 Wn.App. 739, 751, 238 P.3d 1226 (2010), *review denied*, 171 Wn.2d 1013 (2011).

The standard for the relevance of other suspect evidence is whether it tends to connect someone other than the defendant with the crime. *State v. Franklin*, 180 Wn.2d 371, 381, 325 P.3d 159 (2014); *State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932). The inquiry focuses on whether the evidence tends to create a reasonable doubt as to the defendant's guilt, and not on whether it establishes the third party's guilt beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 381. Before the trial court admits “other suspect” evidence, the defendant must present a combination of facts or circumstances pointing to a nonspeculative link between the other suspect and the crime. *Franklin*, 180 Wn.2d at 381.

Properly conducted, this inquiry “focuse[s] upon whether the evidence offered tends to create a reasonable doubt as to the *defendant’s* guilt, not whether it establishes the guilt of the *third party* beyond a reasonable doubt.” *Franklin*, 180 Wn.2d at 381, quoting *Smithart v. State*, 988 P.2d 583, 588 & n. 21 (Alaska 1999) (emphasis in original). The probative value of the evidence is not based upon the strength of the State’s case, only on whether the evidence has a logical connection to the crime. *Franklin*, 180 Wn.2d at 381-82. When the State’s case is entirely circumstantial, the *Downs* rule is relaxed: the

“defendant may neutralize or overcome such evidence by presenting evidence of the same character tending to identify some other person as the perpetrator of the crime.” *State v. Clark*, 78 Wn.App. 471, 479, 898 P.2d 854, *review denied*, 128 Wn.2d 1004 (1995).

c. Mr. Fuentes met his burden for presenting evidence that another may have been the assailant.

Mr. Fuentes produced more than sufficient evidence to meet the requirements of *Franklin* for the admission of evidence that Mr. Budik was responsible for the assaults on Mr. Davis and Mr. O’Neal. The trial court seemingly ignored this evidence, focusing solely on whether there was specific evidence Mr. Budik was at the scene of the shooting. The court raised the bar for admission above that required by *Franklin* and overlooked the fact that in a circumstantial case such as this, the evidence that another was the shooter also may be proven by circumstantial evidence.

For instance, in *Franklin*, the trial court excluded evidence that Mr. Franklin’s live-in girlfriend had sent threatening e-mails to his new girlfriend. 180 Wn.2d at 372. The Supreme Court reversed, finding that the girlfriend had the motive (jealousy), the means (access to the computer and e-mail accounts at issue), and the prior history (of sending threatening e-mails to Mr. Franklin’s new girlfriend regarding

her relationship with Mr. Franklin to support his theory of the case. *Id.* at 372-73. And, it stated, “[T]he excluded evidence, taken together, amounts to a chain of circumstances that tends to create reasonable doubt as to Franklin’s guilt.” *Id.* at 382.

In *Clark*, the defendant presented evidence of the other suspect’s motive, opportunity, and ability to commit the arson for which Clark had been charged. 78 Wn.App. at 474-76. The fire occurred in a house Clark rented for business purposes. *Id.* at 473. The other suspect believed Clark had an affair with his wife and had molested his daughter and was obsessed with damaging Clark. *Id.* at 474. The other suspect had warned his former spouse (Clark’s girlfriend) to “watch it” because he knew how to start fires without detection. *Id.* at 475. He also told her it was “too bad” Clark was in jail for something he did not do. *Id.* The court in *Clark* concluded the other suspect evidence was admissible because it clearly pointed to someone other than the defendant as the guilty party. *Id.* at 480.

Here, Mr. Fuentes not only provided proof of motive, as the trial court found, but provided the prior history between Mr. Budik and Mr. Davis, and circumstantial proof of Mr. Budik’s opportunity based on his presence at the Knitting Factory the night of the shooting. This was

more than ample proof under the facts of *Clark* and *Franklin* for the trial court to have allowed Mr. Fuentes to present evidence to the jury that Mr. Budik could have been the shooter. The trial court violated Mr. Fuentes's right to present a defense when it denied him the opportunity.

d. The State cannot show beyond a reasonable doubt that the error in refusing "other suspect" evidence was harmless.

The trial court's exclusion of Mr. Fuentes's other suspect evidence violated his constitutionally protected right to present witnesses on his own behalf. "Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The State must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). "An error is harmless only if we cannot reasonably doubt that the jury would have arrived at the same verdict in its absence." *Jones*, 168 Wn.2d at 724.

The State did not present any witnesses that directly observed Mr. Fuentes shooting Messrs. Davis and O'Neal. Neither victim identified Mr. Fuentes as the shooter. The focus of Mr. Fuentes's

defense was that another person had the motive and had shot Mr. Davis and Mr. O'Neal. By refusing to allow Mr. Fuentes to produce this evidence to cast doubt on the State's theory, the trial court eviscerated the "other suspects" defense, thus denying Mr. Fuentes his right to present a defense. This Court should reverse Mr. Fuentes's convictions and remand for a new trial.

2. Evidence that Mr. Fuentes was a pimp and Ms. White was his prostitute was not relevant, was solely propensity evidence in violation of ER 404(b), and was unduly prejudicial.

Also prior to the second trial, Mr. Fuentes moved to bar any reference to him being a pimp or pimping for Ms. White during their relationship. RP 783-84. Mr. Fuentes pointed out that Ms. White was a fact witness to the shooting and would testify Mr. Fuentes had a controlling personality, but to use the pejorative term "pimp" was unduly prejudicial. RP 784. The court refused to bar the evidence, finding it relevant to motive and to why Ms. White did not report what she saw sooner. RP 784. The court did urge the State not to go into any depth in admitting the testimony. RP 785.

In addition, as part of this testimony by Ms. White, and over Mr. Fuentes's objection, the State was allowed to introduce a letter Mr. Fuentes sent to Ms. White while both were in jail pending trial. RP

880-82. According to the State, this letter contained threats to Ms.

White from Mr. Fuentes. RP 881-82.

Ms. White subsequently testified on direct examination:

Q Okay. And how old were you when you met Mr. Fuentes?

A 16.

Q Okay. And can you please tell the jury the nature of your relationship with Mr. Fuentes?

A He's my ex-boyfriend.

Q Okay. Was he anything else? Was the nature of the relationship besides boyfriend was that all?

A And he was my pimp.

Q When you say he was your pimp, what does that mean?

A I was a prostitute.

Q Okay. And did you -- when you say he was your pimp, what did he get from the relationship? You gave your body up for money, correct?

A Yes.

Q And who kept the money?

A We both did.

Q Okay. Can you please tell the jury how Mr. Fuentes treated you during this relationship?

A Can you describe what you want me to say?

Q Well, I'm asking you how did Mr. Fuentes treat you during your relationship in order to prostitute you out?

A He was abusive.

Q You say he's abusive. What does that mean?

A We fought all the time.

Q Okay. And was it a physical confrontation?

A Yes.

Q Okay. And about how long did this relationship with Mr. Fuentes last?

A Until I went to jail.

Q Okay. When was that?

A 2013, 2014.

Q Okay. And then throughout that period of time from 16 to sometime when you were 18, you were prostituting yourself with Mr. Fuentes, correct?

A Yes.

Q He controlled your life, correct?

A He controls or did?

Q Did he control your life at that time?

A Yes.

Q Okay. Besides physically assaulting you, what else did he do in order to control your -- control you? Did he make threats to you?

A Yes.

Q What types of threats?

MR. WALL: Your Honor, I'm going to object.

THE COURT: I'm going to sustain at this time.

RP 862-64.

- a. *The evidence was not relevant and only relevant evidence is admissible.*

Fundamental to our system of justice is the principle that an individual will be tried for the crime he is accused of committing, not for crimes allegedly committed in the past. Const. art. I, § 22; *State v. Goebel*, 36 Wn.2d 367, 368, 218 P.2d 300 (1950). “[T]he accused’s entire life should not be searched in an effort to convict him.” *State v. Heine* 169 Mont. 25, 29, 544 P.2d 1212 (1976).

ER 402 prohibits the admission of evidence that is not relevant. *State v. Wilson*, 144 Wn.App. 166, 176, 181 P.3d 887 (2008). Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401.

“Evidence is relevant if a logical nexus exists between the evidence and the fact to be established.” *State v. Burkins*, 94 Wn.App. 677, 692, 973 P.2d 15 (1999). “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by

considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” ER 403.

Thus, to be relevant, evidence must meet two requirements: (1) the evidence must have a tendency to prove or disprove a fact (probative value), and (2) that fact must be of consequence in the context of the other facts and the applicable substantive law (materiality). *Davidson v. Metropolitan Seattle*, 43 Wn.App. 569, 573, 719 P.2d 569 (1986). Further, the State must prove the evidence is “relevant and necessary to prove an essential ingredient of the crime charged.” *State v. Powell*, 126 Wn.2d 244, 258-59, 893 P.2d 615 (1995). The fact to be proved must “be of consequence to the outcome of the action.” *State v. Saltarelli*, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982).

Ms. White was a fact witness to the shooting. The only evidence she provided was what she heard immediately after the shooting and what she heard Mr. Fuentes say the day following the shooting. Thus, the dynamics of the relationship between Mr. Fuentes and Ms. White was completely irrelevant. This evidence did not have a tendency to prove or disprove a fact that was of consequence at trial. ER 401; *Davidson*, 43 Wn.App. at 573.

This lack of relevance was essentially admitted by the prosecutor during his rebuttal closing argument:

But anyway, the point being, and I'm not going to belabor this, you heard Ms. White talk about *things that make no difference in this case, has nothing to do with this case*. She talked about demeaning things that she did *which made no difference on the testimony on the shooting of Titus Davis*. She talked to you about a really interesting lifestyle. I don't think it's interesting. I think it's kind of sad. She talked about the lifestyle she was in with Mr. Fuentes.

RP 1310-11 (emphasis added).

Since it was not relevant, the trial court erred in admitting this prejudicial evidence.

b. *To the extent the evidence was relevant, it was not admissible under ER 404(b) as it was solely propensity evidence.*

To the extent the proffered uncharged offense evidence was marginally relevant, the trial court erred in admitting the evidence as a prior bad act where it failed to identify the purpose for which it was admitted under ER 404(b), failed to find under a preponderance of the evidence the allegations were true, and failed to balance the probative value against the overwhelming prejudice that would be suffered by Mr. Fuentes. In addition, the court failed to issue a limiting instruction to the jury.

“A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible.” *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). 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.

Evidence of a defendant’s prior bad acts is categorically excluded under ER 404(b) if it is relevant only to prove the defendant’s character and show he acted in conformity with that character. *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). The evidence is

admissible only if it is logically relevant to a material issue other than propensity. *Saltarelli*, 98 Wn.2d at 361-62. The State's burden to show that prior bad act evidence is admissible for a proper purpose is "substantial." *DeVincentis*, 150 Wn.2d at 17.

The evidence rules strictly confine the use of a defendant's prior bad acts because such evidence has a great capacity to arouse prejudice. The jury might find the defendant guilty "because they believe the defendant deserves to be punished for a series of immoral actions." *State v. Bowen*, 48 Wn. App. 187, 195, 738 P.2d 316 (1987), *abrogated on other grounds by State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995). The restrictions on the use of a defendant's prior bad acts are "a recognition of the axiom that a defendant should be tried only for the offense charged." *State v. Kelly*, 102 Wn.2d 188, 199-200, 685 P.2d 564 (1984). Evidence of a defendant's prior bad acts are generally excluded not because they are deemed irrelevant, but because it may carry *too much* weight with the jury. *Id.* 199-200.

Even if the State establishes the evidence is relevant for a proper purpose, it must also show the probative value outweighs the potential for prejudice. *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). In determining whether the probative value outweighs the

potential for prejudice, the court should consider the availability of other means of proof and other factors. *Powell*, 126 Wn.2d at 264.

Any doubt as to admissibility of prior bad act evidence must be resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). If the evidence is admitted, the trial court must also give a limiting instruction to the jury explaining how the evidence is to be used. *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014). However, if prior bad act evidence is admitted for an improper purpose, a limiting instruction will not cure the error. That is because “[i]t is difficult for the jury to erase the notion that a person who has once committed a crime is more likely to do it again.” *State v. Jones*, 101 Wn.2d 113, 120, 677 P.2d 131 (1984), *overruled on other grounds* by *State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989).

c. The trial court failed to properly analyze the evidence prior to its admission and erred in admitting evidence that was only offered to prove propensity.

In analyzing whether to admit evidence under ER 404(b), a trial court must “(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative

value against the prejudicial effect.” *Thang*, 145 Wn.2d at 642. “This analysis must be conducted on the record.” *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). The trial court failed to analyze the proffered evidence using this required test.

The trial court purported to admit the evidence for “motive,” but failed to identify what element of the offense the evidence was relevant to prove. Courts must guard against using motive as a magic password “whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names.” *Saltarelli*, 98 Wn.2d at 364.

Further, the question becomes motive for what? Ms. White testified against Mr. Fuentes at trial. The State alleged her testimony was the true version of what occurred that night at the Knitting Factory. The fact Ms. White may have given other versions of what may have happened does not change the analysis. The evidence was irrelevant to her motive to testify truthfully. In addition, the evidence was relevant to any alleged motive for the crimes.

Finally, the court failed to balance the evidence’s probative value against its prejudicial effect. The prejudicial effect of this evidence was substantial. What little probative value the evidence

possessed was vastly outweighed by the fact the evidence was sheer propensity evidence. Evidence that he was a pimp for Ms. White proved solely that he was an immoral person who assaulted others, thus allowing the jury to use that fact to find him guilty of trying to kill Mr. Davis and assaulting Mr. O'Neal.

Lastly, the court failed to provide a limiting instruction as required. *Foxhoven*, 161 Wn.2d at 175 (a limiting instruction must be given where evidence admitted under ER 404(b)). The court erred in admitting the evidence of the uncharged offense of promoting prostitution by Mr. Fuentes.

d. The error in admitting the propensity evidence was not a harmless error.

In analyzing the erroneous admission of evidence in violation of ER 404(b), courts apply the nonconstitutional harmless error standard. *Gresham*, 173 Wn.2d at 433. Under this test, the court decides whether “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Id.* (internal quotation marks omitted).

When the evidence is highly prejudicial, as here, the trial court needs to reasonably determine that the probative value of the evidence is similarly high. *State v. Arredondo*, 188 Wn.2d 244, 263, 394 P.3d

348 (2017). No instruction can “remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself on the minds of the jurors.” *State v. Miles*, 73 Wn.2d 67, 71, 436 P.2d 198 (1968).

The evidence here had nothing to do with whether Mr. Fuentes committed the offenses and was plainly admitted as propensity evidence. The State was able to portray Mr. Fuentes as a law breaking individual who was happy to take advantage of defenseless people such as Ms. White. This substantially prejudiced Mr. Fuentes because, within reasonable probabilities, this evidence not been admitted, the outcome could have been materially different. The trial court erred in admitting the conduct between Ms. White and Mr. Fuentes.

3. Mr. Fuentes’s rights to present a defense and to meaningfully cross-examine witnesses was denied when the State failed to produce copies the unsealed and unredacted plea agreements.

Prior to the first trial, Mr. Fuentes sought to enter the plea agreements of Mr. Jones and Mr. Gaither into evidence, but they were sealed under a protective order in federal court. RP 66. Mr. Fuentes renewed his objection to the court’s ruling barring him from entering the plea agreements into evidence, especially in light of the fact the only copies of the plea agreements the parties possessed were redacted

versions of the sealed agreements. RP 247-58. The trial court shifted the burden to Mr. Fuentes to move to unseal the agreements by motion in federal district court. RP 249. The court ultimately refused to allow the plea agreements to be admitted, citing the decision in *State v. Farnsworth*.³ RP 250-51.

Mr. Fuentes noted that without the unsealed plea agreements, he could not effectively cross-exam Mr. Jones or Mr. Gaither:

I need the sealed plea agreement because that's the one that requires him to give cooperation in this case. What [the prosecutor] says is he doesn't have it, but certainly they can't be allowed to put a witness on who has a plea agreement to give his testimony and I don't even get to see the plea agreement, let alone cross examine him on it. I don't see how that can be allowed.

Now, I don't know why they don't have it or why I don't have it. I know it exists, and I know that I'm entitled to it if they're going to have this person testify.

RP 252. Mr. Fuentes noted the State bore the burden of providing the defense with the unsealed plea agreements prior to the witnesses testifying: "This is part of their obligation because this is *Brady* material." RP 256. The court refused to revisit its decision. RP 258.

³185 Wn.2d 768, 783, 374 P.3d 1152 (2016) (as long as jury is informed of the contents of plea agreement, not error to refuse to admit it).

Prior to their testimony, Mr. Fuentes noted he still did not have unredacted unsealed copies of the plea agreements of Mr. Jones and Mr. Gaither, which infringed his right to effectively cross-examine them. RP 974. Upon completion of Mr. Jones's testimony but prior to Mr. Gaither's, Mr. Fuentes again noted his inability to effectively cross-exam because of the sealed federal plea agreements. RP 974-75.

The issue arose again following the cross-examination of Jason Jones. During cross-examination the question arose about what Mr. Jones understood language in the agreement to mean. RP 974. Defense counsel noted that in a normal situation, he would merely show the witness the plea agreement, then depending on the answer, move to admit the agreement as impeachment evidence. *Id.* Since the plea agreements were sealed, the latter course of action was not open to him. *Id.* The trial court again stated that the defense bore the burden of moving in federal court for unsealing of the plea agreements. RP 976-77.

a. Cross-examination is essential to ensuring the right to confrontation is protected.

The Sixth Amendment to the United States Constitution and Const. art. 1, § 22 grant criminal defendants two separate rights: (1) the right to present testimony in one's defense, *Washington v. Texas*, 388

U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019 (1967); and (2) the right to confront and cross-examine adverse witnesses, *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

The right of cross-examination allows more than the asking of general questions concerning bias; it guarantees an opportunity to show specific reasons why a witness might be biased in a particular case. *Davis*, 415 U.S. at 316. A court may violate the defendant's right to confrontation if it prevents the defense from placing facts before the jury from which such bias or prejudice may be inferred. *Id.*

The primary and most important aspect is the right to conduct a meaningful cross-examination of adverse witnesses. *State v. Foster*, 135 Wash.2d 441, 455–56, 957 P.2d 712 (1998). The purpose is to test the perception, memory, and credibility of the witnesses. *State v. Parris*, 98 Wn.2d 140, 144, 654 P.2d 77 (1982). Confrontation therefore helps assure the accuracy of the fact-finding process. *Chambers*, 410 U.S. at 295. Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question. *Id.* As such, the right to confront must be zealously guarded. *State v. Kilgore*, 107 Wn.App. 160, 184–85, 26 P.3d 308 (2001).

b. Without copies of the unsealed unredacted plea agreements, Mr. Fuentes could not effectively cross-examine Messrs. Jones and Gaither.

Mr. Fuentes argued on more than one occasion that the failure of the State to provide unsealed unredacted copies of the plea agreements prior to the testimony of Mr. Gaither and Mr. Jones denied him the opportunity to effectively cross-examine these witnesses. By placing the burden on Mr. Fuentes to move in federal court for an order unsealing the plea agreements the court impermissibly shifted the burden to Mr. Fuentes when it was the State's obligation to provide unsealed unredacted copies of the agreements if they wished to admit the testimony of Messrs. Jones and Gaither.

The jury needs to have full information about a witness's guilty plea in order to intelligently evaluate his testimony about the crimes allegedly committed with the defendant. Unfair prejudice is avoided by this opportunity for full cross-examination. *State v. Redden*, 71 Wn.2d 147, 149–50, 426 P.2d 854 (1967); *State v. Portnoy*, 43 Wn.App. 455, 461, 718 P.2d 805, 809 (1986). By now it is axiomatic that inquiry into a witness's motivation to testify - especially a cooperating witness testifying pursuant to a plea agreement with the Government-“is the

principal means by which the believability of [the] witness and the truth of his testimony are tested.” *Davis*, 415 U.S. at 316.

When a witness testifies pursuant to a plea agreement, he is subject to cross-examination about the benefits he expects to receive as well as his obligations under its terms. *Mills v. Singletary*, 161 F.3d 1273, 1288–89 (11th Cir.1998); *United States v. Edwards*, 211 F.3d 1355, 1359 (11th Cir. 2000). A defendant has the right to cross-examine an accomplice regarding the nature of and benefits, including unprosecuted crimes, afforded under the plea agreement. *United States v. Mulinelli-Navas*, 111 F.3d 983, 987 (1st Cir. 1997); *United States v. Barrett*, 766 F.2d 609, 614 (1st Cir.1985). *Accord Farnsworth*, 185 Wn.2d at 781-82 (evidence of plea agreement admissible to show bias of testifying witness). Relevant to Mr. Fuentes’s matter, under the decision in *Brady v. Maryland*,⁴ the prosecution has a duty to seek out exculpatory and impeaching evidence held by other government actors. *Kyles v. Whitley*, 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

Here, the trial court refused to place the burden on the State to produce the unsealed unredacted copies of the agreements despite the

⁴373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

obligation placed squarely on the State in *Kyles*. The importance of effectively cross-examining these witnesses cannot be understated.

For instance, in *Davis v. Alaska*, a critical prosecution witness was on probation as a juvenile offender. Defense counsel sought to argue at trial that the witness's testimony was motivated by fear of possible probation revocation if he did not cooperate with the prosecution. The trial court barred any reference to the witness's juvenile record, and the defendant was convicted. The United States Supreme Court held that the defendant's confrontation rights had been violated: "We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis*, 415 U.S. at 316–17. The Court explained that: "The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.'" *Davis*, 415 U.S. at 316, quoting 3A J. Wigmore, Evidence sec. 940, p. 775 (Chadbourn rev. 1970).

Merely asking the witnesses questions without the unredacted copies of the plea agreements was meaningless and violated Mr. Fuentes's right to cross-examination. If the witness denied or

contradicted portions of the plea agreement, Mr. Fuentes's counsel was without the tools necessary to confront the witness, a necessary component of cross-examination. *See e.g.* ER 613.⁵ In the scenario where the witness denies making a statement in the plea agreement, then that portion of the plea agreement is admissible as substantive evidence. ER 613(b).

As repeatedly stated by the defense, the ability to effectively cross-examine these witnesses who entered guilty pleas in federal court was inhibited, which was illustrated during the cross-examination of Mr. Jones. As a result, Mr. Fuentes's constitutionally protected rights to

⁵ ER 613 provides:

(a) Examining Witness Concerning Prior Statement. In the examination of a witness concerning a prior statement made by the witness, whether written or not, the court may require that the statement be shown or its contents disclosed to the witness at that time, and on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

present a defense and conduct a meaningful cross-examination were violated.

c. The court's limitation on the cross-examination of Mr. Gaither, Mr. Jones, and Ms. White was not harmless.

Confrontation clause violations are reviewed for constitutional harmless error. *State v. Koslowski*, 166 Wn.2d 409, 431, 209 P.3d 479 (2009). As noted *infra*, an error of constitutional magnitude is harmless only if the State can prove beyond a reasonable doubt that the jury would have reached the same result in the absence of the error. *Chapman*, 386 U.S. at 21-24. A trial court that limits cross-examination violates a defendant's Sixth Amendment rights where the restrictions on cross-examination "effectively ... emasculate the right of cross-examination itself." *Smith v. Illinois*, 390 U.S. 129, 131, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968).

Cross-examination of Mr. Jones and Mr. Gaither was critical to the defense. There were no witnesses that observed the shooting and no one identified Mr. Fuentes as the assailant. The evidence of guilt was obtained from witnesses who received a substantial benefit in order to testify against Mr. Fuentes. Without unsealed unredacted copies of the federal plea agreements, Mr. Fuentes' attempt to effectively cross-examine was essentially emasculated. *Smith*, 390 U.S. at 131.

4. The State's allegation before the jury that Mr. Fuentes tailored his testimony violated his right to be present and right to confront witnesses against him.

Mr. Fuentes testified in his own behalf and denied shooting Mr. Davis and Mr. O'Neal or being at or near the Knitting Factory when Mr. Davis and Mr. O'Neal were shot. While cross-examining Mr. Fuentes, the prosecutor asked him if he was tailoring his testimony after viewing the testimony of the State's witnesses:

Q Okay. I just misunderstood you when you first said that. Now, you and Ms. White had a relationship basically romance and drugs and same with your wife. Was there anybody else you were involved with at the time?

A No.

Q Okay. *Now, you, also, had opportunities numerous times to watch Mr. Gaither and Mr. Jones and Ms. White testify, correct?*

A Yes.

Q And you've had numerous opportunities to tailor your testimony today; have you not?

MR. WALL: Objection, Your Honor.

THE COURT: I'm going to sustain it to the form of the question.

Q (By Mr. Cipolla) You've watched them testify numerous times, correct?

A Yeah.

Q And you actually had opportunities to testify before, haven't you?

A In this case?

Q Yeah.

A Yes, retrial.

Q Okay. And your testimony today is different than your first testimony; is it not?

A In what respect?

Q I'm asking you a question.

A I'm -- in what respect? That's what I'm wondering.

Q You testified to a lot more things last time you testified; did you not?

A You guys asked me different things.

RP 1254-55 (emphasis added).

a. *Mr. Fuentes has the right to be present at trial and confront the witnesses against him.*

Under the Sixth Amendment and article I, section 22, the defendant has the right to appear and confront the witnesses against him. *Illinois v. Allen*, 397 U.S. 337, 338, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); *State v. Martin*, 171 Wn.2d 521, 537, 252 P.3d 872 (2011). The State may not “unnecessarily ‘chill’ or penalize the assertion of a [defendant’s] constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right.” *State v. Rupe*, 101 Wn.2d 664, 705, 683 P.2d 571 (1984) (citations omitted). Article I, section 22 provides greater protection than the Sixth Amendment. *Martin*, 171 Wn.2d at 533.

In *Martin*, the defendant answered a question during direct examination by referring to testimony he had heard during trial. 171 Wn.2d at 524. He also answered a cross-examination question in the same manner. *Id.* The prosecutor then addressed the point in further cross-examination, asking the defendant if he had heard the trial testimony and also asked about his access to the police reports while the case was pending. *Id.* at 524-525. There was no indication whether the prosecutor discussed the issue during closing argument.

The Supreme Court held it was proper for a prosecutor to suggest a defendant tailored his testimony during cross-examination. *Martin*, 171 Wn.2d at 535-36. In so holding, the court noted this was because “it is *during cross-examination, not closing argument*, when the jury has the opportunity to determine whether the defendant is exhibiting untrustworthiness.” *Id.* at 535-36 (emphasis added). The *Martin* majority had noted the defendant’s answer to a question had referenced “prior testimony” in the trial and stated: “In our judgment, this testimony opened the door to questions on cross-examination about whether he tailored his testimony to evidence presented by other witnesses.” *Martin*, 171 Wn.2d at 536. *See also State v. Hilton*, 164 Wn.App. 81, 96, 261 P.3d 683, 689 (2011) (State’s suggestion that a defendant tailored his testimony did not violate article I, section 22 where the defendant “opened the door” to cross-examination about tailoring during a second trial because he changed his alibi after sitting through his prior trial).

b. The State's cross-examination of Mr. Fuentes alleging he tailored his testimony violated his constitutionally protected rights.

The prosecutor's significant cross-examination of Mr. Fuentes alleging his presence at trial and ability to hear the witnesses against him had allowed him to tailor his testimony violated his rights to be present at trial and confront the witnesses against him.

This Court's decision in *State v. Wallin* provides the analysis and answer to this issue. 166 Wn.App. 364, 367, 377, 269 P.3d 1072 (2012). In *Wallin*, the prosecutor asked, during cross-examination, whether the defendant had the advantage of hearing the testimony in the courtroom before taking the stand. This Court held that those questions generically suggested tailoring, and violated the defendant's right "to appear and defend in person" and "to testify in his own behalf." *Wallin*, 166 Wn.App. at 367. The Court noted the questions were improper because they undermined the defendant's right to be in the courtroom during his trial, by implying that he was listening to the witness's testimony, and conforming his own testimony accordingly. *Id.* at 376. A prosecutor may ask similar questions during cross-examination, however, without violating the defendant's constitutional rights when the question is "based upon something that the defendant

voluntarily puts into evidence.” *Id.* at 376, *citing Martin*, 171 Wn.2d at 536 (holding the defendant opened the door on cross-examination by stating, “I’m saying this time, because of prior testimony, that I heard”). The Court found Mr. Wallin did not “open the door” to such cross-examination as he did not testify that he had based any of his answers on what he learned from the evidence, nor was it a fair inference. *Id.* at 372.

The same analysis applies here. The prosecutor’s questions directly alleged Mr. Fuentes had sat throughout the trial and used that opportunity to conform his testimony to what he had already heard. As *Wallin* finds, this violated Mr. Fuentes’s right to be present. 166 Wn.App. at 376. Further, there is nothing in Mr. Fuentes’s testimony which opened the door to this questioning. As in *Wallin*, Mr. Fuentes never stated he was basing his answer on testimony he heard.

The prosecutor’s cross-examination violated Mr. Fuentes’s right to confrontation and right to be present at trial. He is entitled to reversal and remand for a new trial. *Wallin*, 166 Wn.App. at 377.

5. Amendments to the statutes authorizing legal financial obligations requires that the \$200 in legal financial obligations against Mr. Fuentes be stricken.

In 2018, the law on legal financial obligations changed. Laws of 2018, ch. 269. Now, it is categorically impermissible to impose discretionary costs on indigent defendants. RCW 10.01.160(3). The previously mandatory \$200 filing fee cannot be imposed on indigent defendants. RCW 36.18.020(2)(h).

The Washington Supreme Court has determined that these changes apply prospectively to cases on appeal. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714, (2018). In other words, that the statute was not in effect at the time of the trial court's decision to impose legal financial obligations does not matter. *Id.* at 747-48. Applying the change in the law, the Supreme Court in *Ramirez* ruled the trial court impermissibly imposed discretionary legal financial obligations, including the \$200 criminal filing fee. *Id.*

Here, Mr. Fuentes was found to be indigent for trial and the trial court subsequently found him indigent for the purpose of appeal. CP 278-79. Despite Mr. Fuentes's indigency, the trial court imposed the \$200 filing fee. CP 1340. In light of Mr. Fuentes's indigency, this Court should strike the \$200 filing fee. *Ramirez*, 191 Wn.2d at 747-48.

6. The classification of the Persistent Offender finding as an “aggravator” or “sentencing factor,” rather than as an “element,” deprived Mr. Fuentes of the equal protection of the law.

Even though under the Sixth and Fourteenth Amendments, all facts necessary to increase the maximum punishment must be proven to a jury beyond a reasonable doubt, Washington courts have declined to require that the prior convictions necessary to impose a persistent offender sentence of life without the possibility of parole be proven to a jury. *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003), *cert. denied*, *Smith v. Washington*, 124 S.Ct. 1616 (2004); *State v. Wheeler*, 145 Wn.2d 116, 123-24, 34 P.2d 799 (2001).

However, the Washington Supreme Court has held that where a prior conviction “alters the crime that may be charged,” the prior conviction “is an essential element that must be proved beyond a reasonable doubt.” *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). While conceding that the distinction between a prior-conviction-as-aggravator and a prior-conviction-as-element is the source of “much confusion,” the Court concluded that because the recidivist fact in *Roswell* elevated the offense from a misdemeanor to a felony, it “actually alters the crime that may be charged,” and therefore the prior conviction is an element and must be proven to the jury

beyond a reasonable doubt. *Id.* While *Roswell* correctly concludes the recidivist fact in that case was an element, its effort to distinguish recidivist facts in other settings, which *Roswell* termed “sentencing factors,” is neither persuasive nor correct.

First, in addressing arguments that one act is an element and another merely a sentencing fact the United States Supreme Court has said “merely using the label ‘sentence enhancement’ to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently.” *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The Court has also noted:

Apprendi makes clear that “[a]ny possible distinction between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding.” 530 U.S. at 478 (footnote omitted).

Washington v. Recuenco, 548 U.S. 212, 220, 126 S.Ct. 2546, 165 L. Ed.2d 466 (2006). Beyond its failure to abide by the logic of *Apprendi*, the distinction *Roswell* draws does not accurately reflect the impact of the recidivist fact in either *Roswell* or the cases the Court attempts to distinguish.

In *Roswell*, the Court considered the crime of communication with a minor for immoral purposes (CMIP). *Id.* at 191. The Court

found that in the context of this and related offenses,⁶ proof of a prior conviction functions as an “elevating element,” i.e., it elevates the offense from a misdemeanor to a felony, thereby altering the substantive crime from a misdemeanor to a felony. *Id.* at 191-92. Thus, *Roswell* found it significant that the fact altered the maximum possible penalty from one year to five. *See* RCW 9.68.090 (providing communicating with a minor for an immoral purpose is a gross misdemeanor unless the person has a prior conviction, in which case it is a Class C felony); and RCW 9A.20.021 (establishing maximum penalties for crimes). Of course, pursuant to *Blakely*, the “maximum punishment” is five years only if the person has an offender score of 9, or an exceptional sentence is imposed consistent with the dictates of the Sixth Amendment. *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In all other circumstances “maximum penalty” is the top of the standard range. Indeed, a person sentenced for felony CMIP with an offender score of 3⁷ would actually

⁶ Another example of this type of offense is violation of a no-contact order, which is a misdemeanor unless the defendant has two or more prior convictions for the same crime. *Roswell*, 165 Wn.2d at 196, *discussing State v. Oster*, 147 Wn.2d 141, 142-43, 52 P.3d 26 (2002).

⁷ Because the offense is elevated to a felony based upon a conviction of a prior sex offense, and because prior sex offenses score as 3 points in the offender score, a person convicted of felony CMIP could not have a score lower than 3.

have a maximum punishment (9-12 months) equal to that of a person convicted of a gross misdemeanor. *See* Washington Sentencing Guidelines Commission, *Adult Sentencing Manual 2008*, III-76. The “elevation” in punishment on which *Roswell* pins its analysis is not in all circumstances real. And in any event, in each of these circumstances, the “elements” of the substantive crime remain the same, save for the prior conviction “element.” A recidivist fact which potentially alters the maximum permissible punishment from one year to five, is not fundamentally different from a recidivist element which actually alters the maximum punishment from 171 months to life without the possibility of parole.

In fact, the Legislature has expressly provided that the purpose of the additional conviction “element” is to elevate the *penalty* for the substantive crime. *See* RCW 9.68.090 (“Communication with a minor for immoral purposes – Penalties”). But there is no rational basis for classifying the punishment for recidivist criminals as an ‘element’ in certain circumstances and an ‘aggravator’ in others. The difference in classification, therefore, violates the equal protection clauses of the Fourteenth Amendment and Washington Constitution.

Under the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. *Bush v. Gore*, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *State v. Thorne*, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994), *abrogated by, Apprendi*, 530 U.S. at 476-77. A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless the classification also affects a semi-suspect class. *Thorne*, 129 Wn.2d at 771. The Washington Supreme Court has held that “recidivist criminals are not a semi-suspect class,” and therefore where an equal protection challenge is raised, the court will apply a “rational basis” test. *Id.*

Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation. The classification must be “purely arbitrary” to overcome the strong presumption of constitutionality applicable here.

State v. Smith, 117 Wn.2d 117, 263, 279, 814 P.2d 652 (1991).

The Washington Supreme Court has described the purpose of the Persistent Offender Accountability Act (POAA) as follows:

to improve public safety by placing the most dangerous criminals in prison; reduce the number of serious, repeat offenders by tougher sentencing; set proper and simplified sentencing practices that both the victims and persistent offenders can understand; and restore public trust in our criminal justice system by directly involving the people in the process.

Thorne, 129 Wn.2d at 772.

The use of a prior conviction to elevate a substantive crime from a misdemeanor to a felony and the use of the same conviction to elevate a felony to an offense requiring a sentence of life without the possibility of parole share the purpose of punishing the recidivist criminal more harshly. But in the former instance, the prior conviction is called an “element” and must be proven to a jury beyond a reasonable doubt. In the latter circumstance, the prior conviction is called an “aggravator” and need only be found by a judge by a preponderance of the evidence.

So, for example, where a person previously convicted of rape in the first degree communicates with a minor for immoral purposes, in order to punish that person more harshly based on his recidivism, the State must prove the prior conviction to the jury beyond a reasonable

doubt, even if the prior rape conviction is the person's only felony and thus results in a "maximum sentence" of only 12 months. But if the same individual commits the crime of rape of a child in the first degree, both the quantum of proof and to whom this proof must be submitted are altered – even though the purpose of imposing harsher punishment remains the same.

The legislative classification that permits this result is wholly arbitrary. *Roswell* concluded the recidivist fact in that case was an element because it defined the very illegality, reasoning, "if Roswell had had no prior felony sex offense convictions, he could not have been charged or convicted of *felony* communication with a minor for immoral purposes." 165 Wn.2d at 192 (italics in original). But as the Court recognized in the very next sentence, communicating with a minor for immoral purposes is a crime regardless of whether one has a prior sex conviction - the prior offense merely alters the maximum punishment to which the person is subject. *Id.* So, too, first degree assault is a crime whether one has two prior convictions for most serious offenses or not.

Because the recidivist fact here operates in the precise fashion as in *Roswell*, this Court should hold there is no basis for treating the

prior conviction as an “element” in one instance – with the attendant due process safeguards afforded “elements” of a crime – and as an aggravator in another. The trial court violated Mr. Fuentes’s right to equal protection.

7. The judicial finding that Mr. Fuentes had suffered a qualifying conviction which rendered him a Persistent Offender violated his rights to a jury trial and to due process.

The Due Process Clause of the Fourteenth Amendment ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. XIV. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amend. VI. A criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 111-15, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013); *Blakely*, 542 U.S. at 300-01; *Apprendi*, 530 U.S. at 476-77; *State v. Allen*, 192 Wn.2d 526, 534, 431 P.3d 117 (2018).

The Supreme Court has recognized this principle applies equally to facts labeled “sentencing factors” if the facts increase the maximum penalty faced by the defendant or the mandatory minimum. *Alleyne*, 570 U.S. at 112-15; *Blakely*, 542 U.S. at 304. *Blakely* held that an

exceptional sentence imposed under Washington's Sentencing Reform Act (SRA) was unconstitutional because it permitted the judge to impose a sentence over the standard sentence range based upon facts that were not found by the jury beyond a reasonable doubt. *Id.* at 304-05; see *Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (invalidating death penalty scheme where jury did not find aggravating factors). In *Apprendi*, the Court found a statute unconstitutional because it permitted the court to give a sentence above the statutory maximum after making a factual finding by only the preponderance of the evidence. 530 U.S. at 492-93.

In *Alleyne*, the Supreme Court ruled the facts underlying the imposition of a mandatory minimum sentence must be found beyond a reasonable doubt by a jury, ruling that "the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum." 570 U.S. at 111.

Finally, the Supreme Court has recognized that the jury's traditional role in determining the degree of punishment included setting fines, and concluded that under *Apprendi*, the jury must find beyond a reasonable doubt the facts that determine the maximum fine

permissible. *Southern Union Co. v. United States*, 567 U.S. 343, 359, 132 S.Ct. 2344, 183 L.Ed.2d 318 (2012).

In these cases, the Court rejected the notion that arbitrarily labeling facts as “sentencing factors” or “elements” was meaningful. “Merely using the label ‘sentence enhancement’ to describe the [one act] surely does not provide a principled basis for treating [the two acts] differently.” *Apprendi*, 530 U.S. at 476. A judge may not impose punishment based on judicial findings. *Alleyne*, 570 U.S. at 112-15; *Blakely*, 542 U.S. at 304-05.

As noted above, the Washington Supreme Court has embraced this principle in *Roswell*: where a prior conviction “alters the crime that may be charged,” the prior conviction “is an essential element that must be proved beyond a reasonable doubt.” *Roswell*, 165 Wn.2d at 192; *see also Allen*, 192 Wn.2d at 534. And since the prior convictions are elements of the crime rather than aggravating factors, *Roswell* states that the prior conviction exception in *Apprendi* does not apply. *Id.* at 193 n.5. Thus, under *Alleyne*, *Blakely*, *Apprendi* and *Roswell*, the judicial finding of Mr. Fuentes’s prior conviction and the fact he

qualified as a persistent offender violated his right to due process and right to a jury trial.⁸

E. CONCLUSION

For the reasons stated, Mr. Fuentes asks this Court to reverse his convictions and remand for a new trial. Alternatively, Mr. Fuentes asks that his sentence be reversed and remanded for imposition of a sentence within the standard range and/or striking the \$200 filing fee.

DATED this 14th day of June 2019.

Respectfully submitted,

s/Thomas M. Kummerow

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⁸ *But see Allen*, 192 Wn.2d at 537 (“It remains true that proof of a prior conviction does not require trial-like procedures or proof beyond a reasonable doubt.”); *State v. Witherspoon*, 180 Wn.2d 875, 892, 329 P.3d 888 (2014) (“Like *Blakely*, nowhere in *Alleyne* did the Court question *Apprendi*’s exception for prior convictions. It is improper for us to read this exception out of Sixth Amendment doctrine unless and until the United States Supreme Court says otherwise. Accordingly, *Witherspoon*’s argument that recent United States Supreme Court precedent dictates that his prior convictions must be proved to a jury beyond a reasonable doubt is unsupported.”).

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 36223-0-III
)	
STAFONE FUENTES,)	
)	
APPELLANT.)	

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