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Division III  
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No. 36396-1-III

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

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STATE OF WASHINGTON,

Respondent,

v.

THOMAS L. BRAMBLEE,

Appellant.

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

The Honorable Timothy B. Fennessy

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APPELLANT'S REPLY BRIEF

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## **A. INTRODUCTION**

Appellant Thomas L. Bramblee accepts this opportunity to reply to the State's brief. Mr. Bramblee requests that the Court refer to his opening brief for issues not addressed in this reply.

## **B. COUNTERSTATEMENT OF THE FACTS**

Mr. Bramblee offers the following counterstatement of the case, in response to the State's comments on the evidence. (State's Response Brief, pgs. 25, 29-30).

The State asserts Mr. Bramblee was caught twice "prowling Craigslist for sexual encounters with minors." (State's Response Brief, pgs. 29-30). However, the two ads posted by Mr. Bramblee—which were exactly the same ad—state nothing about searching for minors. (1RP 85, 112-113 State's Exs. 8 & 13). Rather, it was the undercover officer who responded to both ads in search of someone to have a sexual relationship with her daughter. (1RP 91, 114-117; State's Exs. 9 & 14).

Second, the State claims the jury reached its verdict because "even if Mr. Bramblee asked Kay to join him and Anna, the majority of the communications focused on the subject of Mr. Bramblee having sexual intercourse with Anna." (State's Response, pg. 25). However, the numerous communications between the undercover officer and Mr. Bramblee indicate otherwise. (Appellant's Opening Brief, pg. 13). Mr. Bramblee shared personal details of his life with the undercover officer, such as camping, fishing, hunting, auto pros, racing, hiking, traveling, car troubles, family health issues; and he also attempted conversation about physical romance with "Kay." (1RP 162-168). The majority of the communications did not focus on "Anna."

### C. ARGUMENT IN REPLY

#### 1. Whether the trial court erred in denying the admission of Mr. Bramblee's exculpatory statement when such statement was an excited utterance and failure to allow admission was a violation of his constitutional right to present a defense.

This argument pertains to Issue 1, raised in Mr. Bramblee's opening brief. (Appellant's Opening Brief, pgs. 10-17).

The State concedes the trial court erred and used the wrong standard for analyzing the admissibility of Mr. Bramblee's statement. (State's Response, pg. 17). However, the State asserts the evidence was cumulative and that at trial, defense counsel only argued the error was purely evidentiary, never asserting the right to present a defense. (State's Response, pgs. 18-20).

"Evidence is [cumulative] if it adds little to the determination of the defendant's guilt and is repeated by other, admissible evidence." *State v. Smith*, 165 Wn. App. 296, 316, 266 P.3d 250 (2011). While Mr. Bramblee may have been able to argue some of his theory during closing argument, he was not able to argue all of the available evidence due to the trial court's erroneous ruling to exclude the excited utterance. (Appellant's Opening Brief, pgs. 16-17). The statement was not cumulative—nowhere else in the record does that statement come in. (1RP 26-208). Missing from the record is any other evidence of this direct statement of Mr. Bramblee's intentions. (1RP 26-208). For evidence to be cumulative, it has to be duplicative and already admitted in evidence. *See Smith*, 165 Wn. App. at 316. There was no duplication because nothing like the excited utterance statement ever reached the jury's ears. (1RP 26-208).

And while defense counsel may not have raised the argument at trial that exclusion of the excited utterance statement would hamper Mr. Bramblee's right to

present a defense, that does not preclude Mr. Bramblee from addressing the issue in this appeal as of right. “The right to present a defense guarantees that the defendant may present relevant, admissible evidence in her own defense....” *State v. Phillips*, 160 Wn. App. 36, 48, 246 P.3d 589 (2011). And a defendant’s right to present a defense is a constitutional state and federal right, which may be raised for the first time on appeal as a manifest error. *Id.* at 47-48 (citing RAP 2.5(a)). The issue of whether Mr. Bramblee’s constitutional right to present a defense was violated is not precluded from review in this Court.

**2. Whether the court erred by entering a community custody condition (#12) that was not directly crime-related, was overbroad, and violates Mr. Bramblee’s First Amendment rights**

This argument pertains to Issue 2 raised in Mr. Bramblee’s opening brief. (Appellant’s Opening Brief, pgs. 18-22). Mr. Bramblee argued the trial court erred by imposing a lifetime community custody condition requiring he “not access social media sites to include chat forums, dating sites, or solicit sex on the Internet.” (CP 170).

The State argues that Mr. Bramblee waived his right to challenge the crime-relatedness of the community custody condition because he did not object at sentencing, citing the recent decision of *State v. Peters*, No. 31755-2-III, 2019 WL 4419800, \*2-5 (Wash. Ct. App. Sept. 17, 2019) (State’s Response, pgs. 27-32).

Mr. Bramblee asks this Court not to follow the decision in *Peters*. *State v. Peters*, No. 31755-2-III, 2019 WL 4419800, \*2-5 (Wash. Ct. App. Sept. 17, 2019). The *Peters*’ decision states:

[W]here there is no objection to community custody conditions in the trial court, there is no reason for the parties or the court to create a record on the relationship between the crime and the conditions imposed . . . and [this Court] is not required to consider an argument that a sentencing

condition is not crime-related when the offender had the opportunity to raise the contention in the trial court, creating a record, and failed to do so. *Peters*, No. 31755-2-III, 2019 WL 4419800, \*7 (Wash. Ct. App. Sept. 17, 2019) (citing *State v. Casimiro*, 8 Wn. App. 2d 245, 438 P.3d 137, review denied, 193 Wn.2d 1029 (2019)). While *Peters* is a Division III decision, a different panel of this same Court need not follow *Peters*. See *Grisby v. Herzog*, 190 Wn. App. 786, 808-11, 362 P.3d 763 (2015) (doctrine of stare decisis does not preclude one panel from the court of appeals from stating a holding that is inconsistent with another panel within the same division).

Further, the *Peters*' Court appears to have relied upon the decision in *State v. Casimiro*, determining it need not consider whether a community-custody condition is crime-related when no objection is lodged in the trial court. *Id.* at \*7 (citing *Casimiro*, 8 Wn. App.2d 245). But *Casimiro* involved a different factual scenario because in that case the defendant pleaded guilty and agreed to the community custody conditions. *Casimiro*, 8 Wn. App. 2d at 248-249. The *Peters*' Court does not recognize this significant distinction. *Peters*, 2019 WL 4419800 at \*7. A defendant who agrees to community custody conditions is different from an individual who is unwillingly sentenced after a trial, as occurred here for Mr. Bramblee. And most importantly, illegal or erroneous sentences can be challenged the first time on appeal. See *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); see also *State v. McCorkle*, 137 Wn.2d 490, 495-496, 973 P.2d 461 (1999).

Moreover, in *State v. Johnson*, 4 Wn. App. 2d 352, 357, 421 P.3d 969 (2018), this same Court considered whether a community custody condition was overbroad and crime-related, despite the defendant's failure to object in the trial court. *Id.* at 357-359.

Mr. Bramblee's case is similar to *Johnson*, and is distinguished from *Peters*, as in *Peters* the Court only addressed whether the community custody condition was simply crime-related, not overbroad. *Peters*, 2019 WL 4419800. Mr. Bramblee raised the same issues as in *Johnson*, and this Court should not find waiver of the issue. (Appellant's Opening Brief, pgs. 18-22).

#### **D. CONCLUSION**

Based upon the arguments set forth above and those set forth in Mr. Bramblee's opening brief, his conviction for attempted rape of a child in the second degree should be reversed and remanded for a new trial.

Respectfully submitted this 23rd day of October, 2019.

/s/ Laura M. Chuang  
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/s/ Jill S. Reuter  
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COURT OF APPEALS  
DIVISION III  
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STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA No. 36396-1-III  
vs. )  
)  
THOMAS L. BRAMBLEE, ) PROOF OF SERVICE  
)  
Defendant/Appellant )  
\_\_\_\_\_)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on October 23, 2019, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's reply brief to:

Thomas Lee Bramblee, DOC #409990  
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Having obtained prior permission, I also served a copy on the Spokane County Prosecutor's Office at [SCPAappeals@SpokaneCounty.org](mailto:SCPAappeals@SpokaneCounty.org) using the Washington State Appellate Courts' Portal.

Dated this 23rd day of October, 2019.

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