No. 98816-1
COA No. 36223-0-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

STAFONE NICHOLAS FUENTES,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Stafone Fuentes asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Stafone Nicholas Fuentes*, No. 36223-0-III (June 25, 2020). A copy of the decision is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

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. Is a significant question of law under the United States and Washington Constitutions involved where the trial court violated Mr. Fuentes's right to present a defense when it placed the bar for admission higher than this Court has 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. Is an issue involving an issue of substantial public interest that should be determined by this Court presented where the trial court erred 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. 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?

5. 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?

D. 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. 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 fisticuffs. 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.

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.[1]

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

[1] 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.

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.

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.

On appeal, the Court of Appeals affirmed Mr. Fuentes's convictions and sentence.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

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

"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).

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.

The Court of Appeals held that Mr. Fuentes's proffer was overly speculative because, while the Court found Mr. Fuentes presented evidence of motive, the Court concluded there was nothing more that was presented. Decision at 6. The Court noted that Mr. Fuentes's theory that Mr. Budik was the shooter was "based on nothing more than a series of speculative inferences." *Id.*

But this holding by the Court placed too grant a burden on Mr. Fuentes and improperly analyzed the "other suspect" evidence. Properly conducted, the "other suspect" 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).

This Court must grant review to elucidate the correct analysis to be applied by the appellate and trial courts. This is important because Mr. Fuentes made an offer of proof that created a reasonable doubt regarding his guilt which is all that is required by this Court's decision in *Franklin*, 180 Wn.2d at 381. Yet the trial court and the Court of Appeals held him to a higher, nearly impossible to meet standard. This violated his right to present a defense and warrants further review.

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.

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, contrary to the Court of Appeals conclusion, the dynamics of the relationship between Mr. Fuentes and Ms. White was completely irrelevant. The evidence of their relationship did not a have a tendency to prove or disprove a fact that was of consequence at trial. ER 401; *Davidson*, 43 Wn.App. at 573.

Further, the evidence that Mr. Fuentes was a pimp is classic "prior act" evidence. As this Court has concluded, there is a categorical bar to the admission of "prior act" evidence unless it is admissible under ER 404(b). *See State v. Gunderson*, 181 Wn.2d 916, 921, 337 P.3d 1090 (2014) ("Evidence of a defendant's prior bad acts is not admissible to show the defendant has a propensity to commit crimes but may be admissible for some other proper purpose."). Merely claiming it was relevant is merely the first step in analyzing admissibility. The trial court was still required to address admissibility under ER 404(b) as this is the only basis for admission of Mr. Fuentes's prior acts involving Ms. White.

The evidence regarding Mr. Fuentes's and Ms. White's relationship was irrelevant and extremely prejudicial. This issue again warrants review by this Court to further give trial court's guidance on what evidence is admissible concerning the dynamics of relationships and what is not. This Court should grant review and rule the evidence admitted here was erroneously admitted and reverse Mr. Fuentes's convictions.

3. 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*, 541 U.S. 909 (2004); *State v. Wheeler*, 145 Wn.2d 116, 123-24, 34 P.2d 799 (2001).

However, this 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.

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 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).

This 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.

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.

4. 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 v. Washington*, 542 U.S. 296, 300-01, 124. S.Ct. 2531, 159 L.Ed.2d 403 (2004); *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, this 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.

F. CONCLUSION

For the reasons stated, Mr. Fuentes asks this Court to grant review and reverse his convictions.

DATED this 21st day of July 2020.

Respectfully submitted,

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APPENDIX

FILED
JUNE 25, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 36223-0-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
STAFONE NICHOLAS FUENTES,	)	
	)	
Appellant.	)	

PENNELL, C.J. — Stafone Fuentes appeals his convictions for attempted first degree murder and first degree assault. We affirm the convictions but remand with instructions to strike the $200 criminal filing fee from the judgment and sentence.

FACTS

In February 2013, Titus Davis and Lamont O'Neal were shot several times while seated in a car outside of Spokane's Knitting Factory, an event venue. Both Mr. Davis and Mr. O'Neal survived, but neither was able to identify the shooter. Mr. Davis saw the shooter from behind as he ran down an alleyway. Mr. Davis sensed the shooter was someone familiar, but there was nothing specific.

No strong leads developed until the federal government brought charges against a Spokane-area drug trafficking ring. One of the defendants named in the federal case was Stafone Fuentes. The informant in the federal case reported that during his undercover work, Mr. Fuentes had confessed to the Knitting Factory shooting.

While the federal case was pending resolution, several indicted co-conspirators came forward with information about the shooting. Deandre Gaither told law enforcement that Mr. Fuentes had not only confessed to the shooting but that he had also swapped the firearm used in the shooting for a clean gun owned by an individual named Jason Jones. Mr. Jones confirmed this information. Mr. Jones was present during Mr. Fuentes's confession as well as the gun swap. Mr. Jones told law enforcement he still had the gun provided to him by Mr. Fuentes. Law enforcement was able to recover the gun and testing revealed it was the one used in the shooting.

Both Mr. Gaither and Mr. Jones provided information regarding Mr. Fuentes's motive for the shooting. They claimed Mr. Fuentes was angry with Mr. Davis because Mr. Davis had interactions with Mr. Fuentes's girlfriend that Mr. Fuentes found suspicious.

Mr. Gaither and Mr. Jones pleaded guilty in the federal drug case pursuant to cooperation agreements. The agreements required Mr. Gaither and Mr. Jones to provide

truthful testimony regarding the shooting. In return, Mr. Gaither and Mr. Jones received substantially reduced prison sentences.

An additional co-conspirator in the federal drug case was Mr. Fuentes's girlfriend, Cierra White. Ms. White talked to the authorities two times before finally implicating Mr. Fuentes in the Knitting Factory shooting. Ms. White explained she had not originally come forward with information against Mr. Fuentes because she was acting under Mr. Fuentes's direction. Prior to her arrest, Ms. White worked for Mr. Fuentes as a prostitute and she described him as physically abusive.

According to Ms. White's final explanation, she was with Mr. Fuentes at the Knitting Factory on the night of the shooting. The two were in a car together and got into an argument. Things became physical and Mr. Fuentes hit Ms. White with a gun. Mr. Fuentes then left the car and walked down the alley toward an apparent fight. Shortly thereafter, Ms. White heard gun shots and then saw Mr. Fuentes running back to the car. Ms. White was with Mr. Fuentes the next morning during a news report of the shooting. Upon seeing the report, Mr. Fuentes commented Mr. Davis should have been dead.

The State charged Mr. Fuentes with one count of conspiracy to commit murder in the first degree and two counts of attempted murder in the first degree with firearm enhancements and alternatives of first degree assault. After the first trial ended in a hung

jury, the State dismissed the conspiracy charge. Mr. Fuentes then went to trial and was convicted of attempted murder on the charge involving Mr. Davis and assault in the first degree on the charge pertaining to Mr. O'Neal. Mr. Fuentes was sentenced to life imprisonment without the possibility of parole. The court also imposed several legal financial obligations.

Mr. Fuentes appeals.

ANALYSIS

Other suspect evidence

Mr. Fuentes contends the trial court violated his constitutional right to present a defense by preventing him from presenting "other suspect" evidence at trial. Other suspect evidence should generally be admitted if relevant and not overly prejudicial. *State v. Franklin*, 180 Wn.2d 371, 378-79, 325 P.3d 159 (2014). Relevance is established if proffered evidence tends to connect someone other than the defendant with the crime. *Id.* Mere speculation does not meet this standard. *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004). A trial court's decision to exclude other suspect evidence is reviewed for abuse of discretion. *Id*. at 856.

Prior to trial, Mr. Fuentes proffered the following other suspect evidence: He claimed an individual named Kenneth Budik had a motive to harm Mr. Davis, given Mr.

Davis had previously been acquitted of crimes against Mr. Budik and his associates. Although Mr. Fuentes lacked evidence that Mr. Budik ever threatened Mr. Davis or that Mr. Budik was actually present at the Knitting Factory on the night of the shooting, Mr. Fuentes claims there was evidence Mr. Budik could have been present and therefore might have been the shooter. Mr. Fuentes proffered that Mr. Budik matched the description of the shooter, as a light-skinned black male. In addition, on the night of the shooting, a car similar to one associated with Mr. Budik was observed at the Knitting Factory, members of Mr. Budik's gang (the "8-Trey") were seen at the venue, and Mr. Davis was seen interacting with one of the gang members. Clerk's Papers at 186-87, 192. Prior to the shooting, Mr. Davis received a text message from an individual who was associated with one of the victims from the criminal case involving Mr. Budik. The individual asked Mr. Davis if he was at the Knitting Factory. Although it was not unusual for Mr. Davis to be in contact with this individual, he thought the text was unusual because he had never mentioned his plans to go to the Knitting Factory.

We find no abuse of discretion in the trial court's conclusion that the aforementioned proffer was overly speculative. While Mr. Fuentes presented evidence of motive, there was nothing else. There was no evidence indicating Mr. Budik harbored ill-will against Mr. Davis. Nor was there any evidence Mr. Budik knew or associated with

any of the individuals in contact with Mr. Davis on the night of the shooting. Although Mr. Budik may have matched the description of a light-skinned black male, the description was too general to point to Mr. Budik. Mr. Fuentes's theory that Mr. Budik was the shooter is based on nothing more than a series of speculative inferences. As such, it did not merit presentation to the jury.

ER 404(b) evidence

Mr. Fuentes contends the trial court abused its discretion by allowing Ms. White's testimony about her abusive relationship with Mr. Fuentes and her characterization of Mr. Fuentes as her pimp. The trial court did not perform an explicit ER 404(b) analysis as required by our case law. *State v. Jackson*, 102 Wn.2d 689, 694, 689 P.2d 76 (1984). Nevertheless, the record is sufficient to permit an independent analysis and affirm the trial court's decision. *See State v. Barragan*, 102 Wn. App. 754, 759, 9 P.3d 942 (2000) (reviewing ER 404(b) factors when the trial court failed to conduct a complete inquiry).

The admission of other act evidence under ER 404(b) turns on four steps: (1) finding by a preponderance of the evidence that the act occurred, (2) identification of a proper noncharacter purpose for the evidence, (3) determination that the evidence is relevant to prove an element of the crime charged, and (4) an assessment that the

probative value of the evidence outweighs its potential prejudice. *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

The other act evidence at issue here readily meets all four components. Ms. White's testimony provided sufficient evidence that Mr. Fuentes served as Ms. White's pimp and subjected her to abuse. The evidence was relevant for the noncharacter purpose of explaining why Ms. White initially lied to police. Establishing Ms. White's credibility was important because she was a percipient witness to the events immediately prior to and after the shooting. And given the brevity of the testimony regarding prostitution and abuse,[1] admission of Ms. White's testimony was not overly prejudicial.

Mr. Fuentes also complains the trial court did not provide a limiting instruction regarding Ms. White's testimony. However, he did not request a limiting instruction. We will not fault the trial court for failing to issue an instruction sua sponte. *State v. Russell*, 171 Wn.2d 118, 123-24, 249 P.3d 604 (2011).

Brady *violation and the right of cross-examination*

Mr. Fuentes claims the State violated its obligations to turn over exculpatory information, as required by *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed.

[1] The only detailed allegation involved Ms. White's testimony that Mr. Fuentes hit her with a gun immediately prior to the shooting. This portion of Ms. White's testimony was res gestae evidence and was not subject to a ER 404(b) analysis.

2d 215 (1963), when it failed to turn over unsealed plea agreements pertaining to Mr. Gaither and Mr. Jones. This claim fails for multiple reasons. Most fundamentally, the record indicates the State did not have any unsealed plea agreements to provide. The plea agreements in question were generated by the federal government and were sealed by a federal judge. *Brady* only requires the State to turn over exculpatory evidence in its possession or control. It does not require the State to obtain exculpatory evidence from a third party. *State v. Mullen*, 171 Wn.2d 881, 895, 259 P.3d 158 (2011). In addition, Mr. Fuentes has not explained how the failure to disclose unsealed plea agreements negatively impacted his case. Mr. Fuentes's attorney extensively cross-examined Mr. Gaither and Mr. Jones about their plea agreements and the benefits derived therefrom. Mr. Gaither and Mr. Jones were forthcoming regarding the contents of their plea agreements. It is unclear what further information would have been available if the plea agreements had been unsealed and available for publication to the jury.

Tailored testimony

During cross-examination, the following exchange occurred between the State and Mr. Fuentes:

> [PROSECUTOR:] Okay. Now, you, also, had opportunities numerous times to watch Mr. Gaither and Mr. Jones and Ms. White testify, correct?
> [MR. FUENTES:] Yes.

[PROSECUTOR:] 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.
[PROSECUTOR:] You've watched them testify numerous times, correct?
[MR. FUENTES:] Yeah.
[PROSECUTOR:] And you actually had opportunities to testify before, haven't you?
[MR. FUENTES:] In this case?
[PROSECUTOR:] Yeah.
[MR. FUENTES:] Yes, retrial.
[PROSECUTOR:] Okay. And your testimony today is different than your first testimony; is it not?
[MR. FUENTES:] In what respect?
[PROSECUTOR:] I'm asking you a question.
[MR. FUENTES:] I'm—in what respect? That's what I'm wondering.
[PROSECUTOR:] You testified to a lot more things last time you testified; did you not?
[MR. FUENTES:] You guys asked me different things.

3 Report of Proceedings (June 25, 2018) at 1255.

Mr. Fuentes contends the State violated his constitutional right to presence by asking about whether he had tailored his trial testimony. *See State v. Wallin*, 166 Wn. App. 364, 377, 269 P.3d 1072 (2012). We agree that the State's question on tailoring was improper. Mr. Fuentes never opened the door to the subject of tailoring. Thus, the State had no grounds for asking a generic tailoring question. *Id*.

While the State's question was improper, it is unclear whether it amounted to constitutional error. The trial court sustained an objection immediately after the State's

question, prior to any testimony. Although there was no order to strike, the prosecutor's unanswered question was not evidence and it did not amount to legal argument.

To the extent the State's mere mention of tailoring was constitutional error, this irregularity was harmless beyond a reasonable doubt. The idea of tailoring was only mentioned once and it had no obvious application to Mr. Fuentes's testimony or credibility. Given that the trial court sustained Mr. Fuentes's tailoring objection and the prosecution presented overwhelming evidence of guilt, we will not disturb the jury's verdict.

Legal financial obligations

Fuentes contends, and the State concedes, that the sentencing court erred by ordering Fuentes to pay the $200 criminal filing fee because he is indigent as defined by RCW 10.101.010(3)(a) through (c). RCW 36.18.020(2)(h). We accept the State's concession and remand to the sentencing court to strike the criminal filing fee.

Persistent offender

Fuentes contends the court erroneously classified him as a persistent offender without putting the issue to a jury. We disagree for the reasons set forth in *State v. Williams*, 156 Wn. App. 482, 496-99, 234 P.3d 1174 (2010).

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Mr. Fuentes has filed a lengthy statement of additional grounds for review (SAG), most of which consists of a running commentary of the trial, annotated with criticisms of the State's case. The narrative nature of the SAG, which at times is only loosely grounded in specific claims of error, inhibits our review. *See* RAP 10.10(c) (SAG need not include citation to authorities, but must "inform the court of the nature and occurrence of alleged errors."). To the extent we can discern Mr. Fuentes's claims, he is not entitled to relief.

Other suspect evidence

Mr. Fuentes reiterates his counsel's arguments regarding the exclusion of other suspect evidence. This claim does not merit further analysis. *State v. Thompson*, 169 Wn. App. 436, 493, 290 P.3d 996 (2012).

Rule of completeness

Mr. Fuentes complains the trial court erroneously refused to introduce an audio recording of Mr. Davis's pretrial interview with detectives. The contents of the recording are not part of the record. Given this circumstance, we cannot assess the admissibility of the recording or any prejudice from its exclusion. The proper vehicle for raising this issue is a personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Prosecutorial misconduct, vouching, and opinion testimony

Mr. Fuentes contends the State committed prosecutorial misconduct in multiple instances including: (1) the State refused to provide information about the confidential informant, (2) the State purposely made Fuentes unavailable for trial, (3) during 23 points in trial the State made improper comments or objections, and (4) during 10 points in trial the State either engaged in vouching or presented improper opinion testimony.

The record is insufficient to support Mr. Fuentes's first two claims. Any recourse must be sought through a personal restraint petition. *Id.*

With respect to allegations of improper comments, alleged vouching, and opinion testimony, the majority of the assignments of error pertain to comments and testimony that did not generate an objection. We will not reverse on allegations of prosecutorial misconduct unless the comments were so flagrant and ill intentioned that they could not have been remedied by a curative instruction. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). Similarly, an unpreserved claim of constitutionally defective opinion testimony will not merit review under RAP 2.5 unless the impropriety is "nearly explicit." *State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). Neither standard is met.

Mr. Fuentes also points to areas in the record where defense counsel successfully objected to the State's comments and questions. Here, we do not discern a basis for

complaint. Although the contested questions or comments were not accompanied by an order to strike or a curative instruction, none was requested. Given these circumstances, Mr. Fuentes's criticisms are not fertile ground for appeal.

Finally, Mr. Fuentes points to four instances where the State objected to testimony. He suggests this was misconduct but we disagree. The State does not commit misconduct merely by stating an objection, regardless of whether the objection is successful. Mr. Fuentes's criticism of the State in this regard fails.

Impartiality doctrine

Mr. Fuentes contends the trial court's adverse legal rulings are indicative of bias. We disagree. Most of Mr. Fuentes's assignments of error are unsuccessful. A trial court does not exhibit bias by issuing proper legal rulings.

Deoxyribonucleic acid (DNA) collection fee

Mr. Fuentes contends the trial court erroneously assessed a $100 DNA collection fee at sentencing. We disagree. There was no assessment of a DNA fee.

Cumulative error

Mr. Fuentes contends the trial court's multiple errors entitle him to relief under the cumulative error doctrine. We disagree. Our review of the record indicates only one

possible trial error (pertaining to tailoring testimony) that was preserved for review. The cumulative error doctrine is inapplicable.

CONCLUSION

The judgment of conviction is affirmed. This matter is remanded with instructions to strike the $200 criminal filing fee from Mr. Fuentes's judgment and sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, C.J.

WE CONCUR:

Korsmo, J.

Fearing, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF JULY, 2020, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	LARRY STEINMETZ [lsteinmetz@spokanecounty.org] [SCPAappeals@spokanecounty.org] SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
[X]	STAFONE FUENTES BKG# 15002918 SPOKANE COUNTY JAIL 1100 W MALLON SPOKANE, WA 99260	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 24TH DAY OF JULY, 2020.

X_____

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WASHINGTON APPELLATE PROJECT

July 24, 2020 - 4:15 PM

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Appellate Court Case Title:	State of Washington v. Stafone Nicholas Fuentes
Superior Court Case Number:	14-1-00873-3

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