COA NO. 29645-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

VINCENTE RUIZ,

Appellant.

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

The Honorable Cameron Mitchell, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES (CONT'D)

OTHER STATE CASES

TABLE OF AUTHORITIES (CONT'D)

Page

A. ARGUMENT IN REPLY

1. THE COURT AND PROSECUTOR VIOLATED RUIZ'S CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM AND HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

a. The Prosecutor's Exploitative Questioning Of Mendez-Reyna In Front Of The Jury Violated Ruiz's Right To Confrontation.

"Settled Supreme Court authority instructs that the validity of a witness's assertion of privilege does not determine whether such witness is subject to cross-examination." United States v. Torrez-Ortega, 184 F.3d 1128, 1133 (10th Cir. 1999) (citing Douglas v. Alabama, 380 U.S. 415, 420, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965)).

Try as it might to distinguish the cases cited in the opening brief that support Ruiz's argument, the State cannot escape the basic proposition established by each one of those cases: it is error to put a witness on the stand knowing the witness will invoke the privilege, whether it be invalid or valid, and then place the equivalent of testimony before the jury through exploitation of the witness's refusal to answer leading questions. State v. Morales, 788 N.W.2d 737, 752 (Minn. 2010); People v. Gearns, 457 Mich. 170, 198, 577 N.W.2d 422 (Mich. 1998), overruled on other grounds, People v. Lukity, 460 Mich. 484, 596 N.W.2d 607 (Mich. 1999); Shockley v. State, 335 So.2d 659, 662 (Ala. Crim. App. 1975); Martin v.

United States, 756 A.2d 901, 906 (D.C. 2000); Commonwealth v. DuVal, 453 Pa. 205, 217, 307 A.2d 229 (Pa. 1973); People v. Shipe, 49 Cal. App.3d 343, 349, 122 Cal. Rptr. 701 (Cal. Ct. App. 1975); United States v. Griffin, 66 F.3d 68, 71 (5th Cir. 1995).

The State contends Gearns supports its position that no error occurred. The State is wrong. Gearns recognized confrontation error blooms when the prosecution puts a witness on the stand knowing the witness will invoke the privilege and then places the equivalent of testimony before the jury through the interplay of questions and the refusal to answer them. Gearns, 457 Mich. at 184-87. There was no confrontation error in Gearns only because the prosecutor asked each witness a single preliminary question and made no attempt to exploit the refusal to answer.[1] Id. at 185-86. "In neither case was any substantive evidence, in the form of testimony or its equivalent, placed before the jury." Id. at 186. The court similarly found no due process violation resulting from prosecutorial misconduct because there was no attempt to exploit invocation of the privilege by asking additional questions. Id. at 189-92. The court ultimately held "evidentiary error" occurred because

[1] One witness invoked the privilege when asked with whom he lived at his address and no further questions were asked. Gearns, 457 Mich. at 177. A witness in another case would not even testify with regard to his name and no further questions were asked. Id. at 179.

the prosecutors called witnesses intimately connected to the crimes at issue, knowing those witnesses would assert their Fifth Amendment rights, validly or invalidly.[2] Id. at 193, 197-203.

The State claims it did not put the equivalent of testimony in front of the jury in questioning Mendez-Reyna. BOR at 15-16. A prosecutor places the equivalent of testimony before the jury when detailed, leading questions put the prosecution's version of the facts before the jury. State v. Nelson, 72 Wn.2d 269, 282-83, 285, 432 P.2d 857 (1967);[3] Robbins v. Small, 371 F.2d 793, 795 (1st Cir.), cert. denied, 386 U.S. 1033, 87 S. Ct. 1483, 18 L. Ed. 2d 594 (1967).

That is exactly what happened here. The leading questions posed to Mendez-Reyna represented an extensive, first-hand narrative of the murders and the events leading up to the shooting. 1RP 2629-33. Such questions are tantamount to "prosecutorial testimony." Hagez v. State, 110 Md. App. 194, 222, 676 A.2d 992 (Md. Ct. Spec. App. 1996) (invalid

---

[2] A majority of the Michigan Supreme Court agreed that it makes no difference whether the privilege is validly or invalidly invoked. Gearns, 457 Mich. at 197, 203 (Brickley, J., lead opinion), 207-09, (Cavanagh, J., concurring in part, dissenting in part).

[3] The State cites the concurring opinion in Nelson (BOR at 34), but fails to recognize the concurring opinion would find no error on retrial based on the premise that the State "would have no reason to believe that Patrick would invoke the Fifth Amendment." Nelson, 72 Wn.2d at 286 (Hill, J., concurring). In Ruiz's case, the State knew Mendez-Reyna would refuse to answer questions by invoking the privilege before he was put on the stand. 1RP 2613.

invocation of spousal privilege did not make prosecutor's conduct in calling witness to stand any less erroneous or prejudicial). The improper use of leading questions permitted the prosecution to avoid Ruiz's Sixth Amendment right to confrontation by permitting the prosecutor to testify without benefit of cross-examination. In such cases, "[t]he question itself is damning; the answer is almost irrelevant." Hagez, 110 Md. App. at 220. As in Hagez, the State sought to seize on the opportunity presented by invocation of a privilege: "through its leading, testimonial questions, it attempted to place before the jury evidence that it was otherwise unable to present and to construct its case from inferences derived from its own questions." Id. at 222.

There are circumstances in which a defendant has so little opportunity to cross-examine that the right to confrontation is violated even though the witness is physically present. Hall v. State, 788 A.2d 118, 123 (Del. 2001). The assertion of privilege by the witness can be so limiting as to constitute such a violation. Hall, 788 A.2d at 123-24 (citing Torrez-Ortega, 184 F.3d at 1132). "Ordinarily a witness is regarded as 'subject to cross-examination' when he is placed on the stand, under oath, *and responds willingly to questions.*" Torrez-Ortega, 184 F.3d at 1132 (quoting United States v. Owens, 484 U.S. 554, 561, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988)) (emphasis added). "However, 'limitations on the scope

of examination by the trial court *or assertions of privilege* by the witness may undermine the process to such a degree that meaningful cross-examination within the intent of the Rule no longer exists.'" Torrez-Ortega, 184 F.3d at 1132 (quoting Owens, 484 U.S. at 562).

The Tenth Circuit in Torrez-Ortega accordingly held a witness who asserts an illegitimate claim of privilege, and refuses to answer questions at trial, is not sufficiently available for cross-examination to satisfy the requirements of the Confrontation Clause. Torrez-Ortega, 184 F.3d at 1131. In reaching that holding, the court rejected the government's attempt to link by analogy cases in which a witness professes loss of memory and cases in which a witness simply refuses to testify on the basis of an asserted privilege. Id. at 1134.

The Supreme Court in Owens clearly indicated a witness's assertions of privilege may prevent viable cross-examination. Id. (citing Owens, 484 U.S. at 561-62). "But that effect is not produced by the witness' assertion of memory loss — which . . . is often the very result sought to be produced by cross-examination, and can be effective in destroying the force of the prior statement." Torrez-Ortega, 184 F.3d at 1134 (quoting Owens, 484 U.S. at 562). The contrast to a case where a witness refuses to testify by invoking the privilege is "stark." Torrez-Ortega, 184 F.3d at 1134 (citing Douglas, 380 U.S. at 419).

Mendez-Reyna took the stand but he did not respond willingly to questions "precisely because of his obstinate and repeated assertion of the privilege against self-incrimination." Torrez-Ortega, 184 F.3d at 1132. Mendez-Reyna's refusal to testify before he took the stand was absolute and unequivocal.[4] 1RP 2623-24; 4RP 58, 61. His attorney advised Mendez-Reyna to exercise his Fifth Amendment rights, even after the court informed Mendez-Reyna that he would be held in contempt for refusing to answer questions. 1RP 2624. A witness is not subject to cross-examination when it is established that he will not answer questions before taking the stand. Torrez-Ortega, 184 F.3d at 1133.

The validity of a witness's assertion of privilege does not determine whether such witness is subject to cross-examination as required by the right to confrontation. Id. A witness's invalid assertion of a Fifth Amendment privilege renders him unavailable for cross-examination. Id. at 1132-1134.

Simply put, a witness who invalidly invokes a privilege and refuses to testify is no more subject to confrontation than a witness who validly invokes the privilege and refuses to testify. The real issue is

[4] His attorney told the court that the basis for privilege was that Mendez-Reyna's guilty plea was invalid. 4RP 61-63, 66. Mendez-Reyna asked his attorney to file a motion to withdraw the plea. 4RP 62. His attorney suggested the doctrine of equitable tolling was available to avoid the procedural bar for when a collateral attack must be filed. 4RP 66.

whether the prosecutor knows the witness will refuse to testify and the defendant will suffer possible prejudice as a result. Gearns, 457 Mich. at 198. Drawing a distinction between valid and invalid assertions of the privilege improperly turns "the focus away from the assertion of the privilege before the jury, which is the source of error, and toward an irrelevant determination that has absolutely no bearing on the inferences drawn by the jury." Id. at 209 n.1 (Cavanagh, J., concurring in part, dissenting in part). "[D]efendants are just as likely to suffer from unfair inferences when a witness asserts an invalid Fifth Amendment privilege as when a witness asserts a valid privilege." Morales, 788 N.W.2d at 752; accord, Griffin, 66 F.3d at 71.

In front of the jury, the court repeatedly ordered Mendez-Reyna to answer the questions posed to him, telling him (and the jury) that he did not have the right to remain silent. 1RP 2628-30. It is even "more prejudicial to permit the jury to observe that the recalcitrant witness (a person likely to be associated in the juror's minds with the defendant) elects to remain silent notwithstanding the order of the court that he testify." DuVal, 453 Pa. at 307.

These are sensible observations. This is why State v. Barone, 329 Or. 210, 986 P.2d 5 (Or. 1999) and its Oregon predecessors are in the distinct minority when it comes to deciding whether a defendant's rights to

confrontation and due process are violated when a State's witness refuses to answer questions through invalid invocation of a privilege. Barone allows the defendant to be punished through the injection of prejudice into a case where the defendant is powerless to avoid it. Barone improperly focuses on the impropriety of the witness's actions, rather than the impropriety of allowing the State to prejudice the outcome of the trial.

The State says Ruiz is unable to distinguish his case from Barone. He doesn't need to. Barone is not precedent for Washington and its reasoning is flawed. The reasoning of the majority of courts that have addressed the issue is sound. The State "must not be allowed to try its case by the use of improper inferences." Hagez, 110 Md. App. at 222 (quoting United States v. Morris, 988 F.2d 1335, 1340 (4th Cir. 1993)). Ruiz is the one on trial. He is the one entitled to the full panoply of constitutional rights, including the right to confront the witnesses against him and the due process right to a fair trial. Ruiz had two witnesses testifying against him that he could not cross-examine: Mendez-Reyna and the prosecutor. Mendez-Reyna's refusal to answer the prosecutor's leading questions concerning Ruiz's involvement in the crimes was as strong as pointing a finger at Ruiz and saying he did it.

In adhering to its position, the State invents policy reasons for why Mendez-Reyna should be held accountable by putting him on the stand.

BOR at 35-36. Here's a better policy to consider: the defendant's right to a fair trial is always paramount. See In re Pers. Restraint of Glasmann, __Wn.2d__, 286 P.3d 673, 677 (2012) ("The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution.").

b. Prosecutorial Misconduct Violated Ruiz's Due Process Right To A Fair Trial.

The State argues bad faith is a prerequisite for prosecutorial misconduct. BOR at 11-15. The State's defensiveness is understandable[5] but misplaced. Regardless of good or bad faith, the controlling determination is whether error occurred as a result of the prosecutor's conduct and whether that error affected the fairness of the trial.

The Supreme Court has accordingly declined to draw fine lines between error and misconduct by applying different labels to the conduct at issue based on the prosecutor's state of mind. State v. Ish, 170 Wn.2d 189, 196 n.6, 241 P.3d 389 (2010) (rejecting request that term "prosecutorial misconduct" should be reserved for intentional misconduct and term "prosecutorial error" should be applied to unintentional missteps). Properly understood, "prosecutorial misconduct is a term of art referring to

[5] The State's appellate attorney was the trial prosecutor in this case who advocated for the error and conducted the examination of Mendez-Reyna.

prejudicial errors committed by the prosecuting attorney that deny the defendant a fair trial." State v. Fisher, 165 Wn.2d 727, 757 n.8, 202 P.3d 937 (2009). "Misconduct is to be judged not so much by what was said or done as by the effect which is likely to flow therefrom." State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012) (quoting State v. Navone, 186 Wn. 532, 538, 58 P.2d 1208 (1936)).

The "touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Smith v. Phillips, 455 U.S. 209, 219, 102 S. Ct. 940, 947, 71 L. Ed. 2d 78 (1982). The prosecutorial misconduct standard therefore applies to mere "mistakes." Fisher, 165 Wn.2d at 740 n.1 (analyzing "mistake" and reversing under prosecutorial misconduct standard). "If prosecutorial mistakes or actions are not harmless and deny a defendant fair trial, then the defendant should get a new one." Id.

The State suggests a prosecutor cannot commit misconduct if the trial court condones the prosecutor's conduct. BOR at 11-12. No doubt a prosecutor's disregard for a trial court's in limine ruling is misconduct. State v. Smith, 189 Wn. 422, 427-29, 65 P.2d 1075 (1937). A prosecutor's bad faith in that regard makes the prosecutor's conduct all the more egregious. But that is not the only way in which misconduct occurs.

The Supreme Court's decision in Ish is instructive. Over objection, the trial court ruled in limine that the State could establish the terms of a plea agreement with the State's witness during direct examination, including its requirement that the witness tell the truth while testifying. Ish, 170 Wn.2d at 193-94. A majority of the Supreme Court determined the prosecutor committed misconduct in vouching for the State's witness, even though the court sanctioned the prosecutor's conduct through its pre-trial ruling. Id. at 195-200 (Chambers, J., lead opinion), 206-09 (Sanders, J. dissenting).[6]

That the prosecutor in Ruiz's case improperly put Mendez-Reyna on the stand and questioned him with the trial court's blessing does nothing to change the fact that the prosecutor instigated the error. What happened is no different in kind from the situation where a court sanctions misconduct by overruling objection to it. The error resulting from the prosecutor's actions is still analyzed as prosecutorial misconduct. See, e.g., State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984) (defendant denied fair trial due to prosecutorial misconduct: trial court's overruling of counsel's objection "lent an aura of legitimacy to what was otherwise improper argument."); State v. Perez-Mejia, 134 Wn. App. 907, 920, 143

[6] The dissent agreed with the lead opinion's analysis that error occurred, but disagreed the error was harmless. Id. at 206-09.

P.3d 838 (2006) (trial court augmented improper argument's prejudicial impact by lending its imprimatur to the remarks).

That being said, the prosecutor here knew Mendez-Reyna intended to invoke the Fifth Amendment on the advice of his attorney before he took the stand. The record is crystal clear on this point. The prosecutor acknowledged, "as far as we know he is not going to give any testimony, he's just going to remain silent." 1RP 2613; see Gearns, 457 Mich. at 201 ("We fail to see how a prosecutor, in good faith, can believe that a witness will not heed the advice of his own counsel and suddenly become willing to testify merely because the jury enters the courtroom.").

The prosecutor then doggedly questioned Mendez-Reyna about Ruiz's role in the shooting after Mendez-Reyna invoked his privilege on the stand and refused to obey the court's order to testify. While a prosecutor might not invariably commit misconduct in calling a witness to the stand knowing the witness will invoke the privilege, misconduct most certainly occurs when the prosecutor persists in exploiting the refusal to testify by continuing to ask leading questions after the witness has invoked an invalid privilege. State v. Corrales, 138 Ariz. 583, 589-91, 676 P.2d 615 (Ariz. 1983); Gearns, 457 Mich. at 187-93. "Prosecutorial insistence in asking prejudicial questions depicting a defendant's involvement in the crime *after* it becomes clear that the witness-alleged accomplice has

refused and will continue to refuse to testify is an attempt to build the prosecutor's case out of inferences arising from use of the testimonial privilege and is misconduct." Corrales, 138 Ariz. at 591.

Ruiz sought the court's protection from what was foreseen as the prejudicial impact of the prosecution's tactics. The court instead chose to aid the prosecution's effort. The prosecution committed prejudicial misconduct that the court should have prevented.

"A person being tried on a criminal charge can be convicted only by evidence, not by innuendo." State v. Yoakum, 37 Wn.2d 137, 144, 222 P.2d 181 (1950); see Shockley, 335 So.2d at 662 (persistent questioning of witness even though prosecutor knew witness would not testify showed "the prosecution preferred to parade these questions before the jury, thereby impressing them with innuendoes and inferences of guilt prejudicial to defendant.").

The State argues the prosecutor's questions were not improper innuendo because they were "suggested" by other testimony. BOR at 46. The prejudicial force of the prosecutor's questions, however, lay in the fact that they told the story of Mendez-Reyna's personal eyewitness account of the shootings and the events leading up to the shootings. The prosecutor had no way to introduce extrinsic evidence of Mendez-Reyna's eyewitness account except through the innuendo contained in the testimonial

questions put to Mendez-Reyna. The prosecutor based his questions on what Mendez-Reyna testified to at the plea hearing. 1RP 2611-12, 4RP 73-75; CP 997-1011. From the jury's perspective, the prosecutor was clearly referring to prior statements made by Mendez-Reyna. Otherwise, the prosecutor would have no basis to ask his leading questions.

"Counsel is not permitted to impart to the jury his or her own personal knowledge about an issue in the case under the guise of either direct or cross examination when such information is not otherwise admitted as evidence." State v. Denton, 58 Wn. App. 251, 257, 792 P.2d 537 (1990). No other witness gave Mendez-Reyna's firsthand account of what happened. Mendez-Reyna's prior statements were not admitted into evidence. The prosecutor imparted his personal knowledge of the case to the jury in questioning Mendez-Reyna.

"A lawyer may not assume facts not in evidence, 'not because the facts are inadmissible, but because no witness is willing and available to testify as to those facts.'" State v. Miles, 139 Wn. App. 879, 888 162 P.3d 1169 (2007) (quoting 5 Karl B. Tegland, Washington Practice, Evidence Law and Practice, § 103.22 (4th ed.1999)). The facts imparted by the prosecutor's questions are the facts of Mendez-Reyna's personal knowledge of the crime. The foundation for those questions was not and could not be laid.

The State maintains there was no misconduct because "If Mr. Mendez-Reyna testified inconsistently with his prior testimony, a foundation would have been laid for admission of the previous testimony pursuant to ER 801(d)(1)(i)." BOR at 14.

The first problem with that argument is that Mendez-Reyna unequivocally made it known he would invoke the privilege on the advice of his attorney before he took the stand upon pain of contempt. There was no basis to believe he would provide testimony that could be impeached with prior testimony.

Second, once he was put on the stand, Mendez-Reyna made it clear that he would refuse to answer questions even when directed to do so by the court. Even if the prosecutor was allowed to put Mendez-Reyna on the stand to see if he would continue to refuse to answer in the presence of the jury, there was no longer any basis to believe he would give testimony that could be impeached with prior testimony once he refused to give any despite being ordered to do so by the court on the stand. There was no doubt at this point that a foundation could not be laid for the introduction of any prior testimony, yet the prosecutor persisted in asking leading questions based on facts within the prosecutor's personal knowledge.

c. The Error Is Preserved For Review.

The State asserts Ruiz forfeited his right to confrontation in declining to cross-examine Mendez-Reyna. BOR at 18. In other words, the State claims a defendant forfeits his confrontation right by declining to participate in the error.

The trial court stated "If he chooses not to answer, then the jury is allowed to draw what inference they may from his choosing not to answer. If he does answer, then he will be subject to cross-examination by the defense." 1RP 2617. Mendez-Reyna chose not to answer any questions about the crime.[7] 1RP 2627-35. A witness is not subject to cross-examination when it is established that he will not answer questions before taking the stand. Torrez-Ortega, 184 F.3d at 1133. Ruiz did not waive error by declining to participate in it.

---

[7] At the beginning of examination, Mendez-Reyna acknowledged his name. 1RP 2627. When next asked if Ruiz was his first cousin, Mendez-Reyna answered, "I plead the Fifth. I don't know that man." 1RP 2627. The prosecutor said "I'm sorry, sir?" 1RP 2627. Mendez-Reyna answered, "I'm pleading the fifth." 1RP 2627. When the court instructed him to answer the question, Mendez-Reyna told the court to find him in contempt and again said, "I take the fifth." 1RP 2627-28. Mendez-Reyna invoked the privilege for the remainder of the examination. 1RP 2628-35. His answer acknowledging his name and his answer of "I don't know that man" while invoking the privilege were preliminary manners of collateral concern. The State acknowledges as much, contrasting his "I don't know that man" comment with testimony that relates to an essential part of the State's case. BOR at 17. The heart of the error, and of prejudice, lies in the prosecutor's detailed narrative of the crime after Mendez-Reyna continued to invoke the privilege despite the court ordering him to answer.

The State's reliance on Fowler v. State, 829 N.E.2d 459 (Ind. 2005) is misplaced. BOR at 18-21. Fowler is inapposite because it addressed what is needed to preserve a Confrontation Clause objection to prior statements of a witness admitted into evidence. Fowler, 829 N.E.2d at 461-62, 467. The State in Ruiz's case did not seek to admit the prior statements of Mendez-Reyna into evidence. Conversely, Fowler did not involve a confrontation error predicated on exploitation of the refusal to testify through the prosecutor's persistent use of innuendo.

To the extent Fowler is applicable, it supports Ruiz's argument. Fowler held "a witness who takes the stand but refuses to answer questions with no claim of privilege is available *until the witness refuses to answer after being ordered to do so.*" Fowler, 829 N.E.2d at 461 (emphasis added). Here, the trial court repeatedly ordered Mendez-Reyna to answer but he refused to do so. 1RP 2628-30. Under Fowler, Mendez-Reyna was no longer available for confrontation purposes at that point. Fowler, 829 N.E.2d at 461. Yet the prosecutor persisted in posing leading questions to the witness, knowing full well he would not answer. That is error, even under Fowler. Mendez-Reyna's persistent refusal to respond despite being ordered by the court to do so made him unavailable for confrontation purposes. Id. at 461, 469.

The State elsewhere mistakenly asserts Ruiz was required to make a motion to strike Mendez-Reyna's testimony to preserve the error for appeal. BOR at 18. The court had already ruled in no uncertain terms that it would permit the State to place Reyna on the stand and question him so that the jury could witness the spectacle. 1RP 2617-18, 2284-85, 2623-24; 4RP 69. Any motion to strike would have been a futile endeavor in light of the trial court's unequivocal ruling that there was nothing improper and therefore nothing to strike. The rules of appellate procedure do not require pointless acts to preserve an error for review. See State v. Cantabrana, 83 Wn. App. 204, 208-09, 921 P.2d 572 (1996) (additional objection not required where it would have been a useless endeavor).

For preservation purposes, "[t]he purpose of requiring an objection in general is to apprise the trial court of the claimed error at a time when the court has an opportunity to correct the error." State v. Moen, 129 Wn.2d 535, 547, 919 P.2d 69 (1996). Ruiz objected before Mendez-Reyna took the stand and gave the trial court ample opportunity to correct the error. 1RP 2282-83, 2608-11, 2614-15, 2618-19; 4RP 70, 72-77, 152.

The party who loses a motion in limine is deemed to have a standing objection where a judge has made a final ruling on the motion unless the judge indicates further objections are required. State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). The court's ruling was clear

and Ruiz is deemed to have a standing objection to it. 1RP 2617-18, 2284-85, 2623-24; 4RP 69. In fact, the court expressly acknowledged Ruiz had a standing objection to any and all questions asked of Mendez-Reyna by the State. 1RP 2618-19.

The State also claims the defense did not raise a prosecutorial misconduct error below. BOR at 43. All that is required to preserve a prosecutorial misconduct issue for appeal is an objection to the prosecutor's conduct. Emery, 174 Wn.2d at 760-61. Both the right to confrontation and prosecutorial misconduct implicating the due process right to a fair trial arise from the same constituent set of facts involving putting a witness on the stand knowing he will refuse to answer questions based on privilege and then exploiting that refusal through persistent leading questions. The confrontation and prosecutorial misconduct analyses are two sides of the same coin in this context. Nelson, 72 Wn.2d at 280-85 (analyzing under both prosecutorial misconduct and confrontation theories); Gearns, 457 Mich. at 180, 187-88 (same).

The defense argued putting Mendez-Reyna on the stand would violate Ruiz's right to confrontation. 1RP 2608-09; 4RP 152. The defense also argued the prosecutor planned to place innuendo before the jury through the prosecutor's leading questions. 1RP 2610; 4RP 72-74. In the motion for mistrial, the defense reiterated the prosecutor's questions were

improper innuendo. CP 247, 250-53 (citing People v. Barajas, 145 Cal. App.3d 804, 193 Cal. Rptr. 750 (Cal. Ct. App. 1983) (prosecutor commits misconduct in calling a witness to the stand knowing that the witness will invoke the Fifth Amendment privilege)). The defense clearly stated the substance of the prosecutorial misconduct error. Yoakum, 37 Wn.2d at 144; Miles, 139 Wn. App. at 887-88.

d. The Error Is Not Harmless Beyond A Reasonable Doubt.

In calling Mendez-Reyna, the State was attempting to bolster its uncertain case against Ruiz. As acknowledged in the State's brief, "the trial court would have deprived the jury of highly valuable substantive testimony had it not permitted Mr. Mendez-Reyna to be called as a witness." BOR at 42. Yet it was constitutional error to put that "highly valuable substantive testimony" in front of the jury by way of the prosecutor's innuendo. The error is not harmless beyond a reasonable doubt for precisely this reason. The State similarly argues the back and forth between the prosecutor and Mendez-Reyna was so probative of Ruiz's guilt that any unfairness was outweighed by its probative value. BOR at 37. Again, the prosecutor makes Ruiz's argument for him. The jury likely considered the error to be highly probative of guilt as well. That is why the error is not harmless beyond a reasonable doubt.

Over vehement objection, the State insisted on calling Mendez-Reyna to the stand so that the jury could observe the spectacle of him repeatedly invoking the privilege as it plied him with a detailed narrative of inculpatory events. The State's energetic efforts below belie its claim elsewhere on appeal that this event was so insignificant as to amount to harmless error. See State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996) (trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case), review denied, 131 Wn.2d 1018 (1997).

The State's harmless error argument looks more like a sufficiency of evidence argument, where all the evidence is taken in the light most favorable to the State and is presumed true. The issue here is not whether the evidence was sufficient to establish that Ruiz committed the charged offenses but whether the State is incapable of overcoming the presumption that this constitutional error was not harmless beyond a reasonable doubt.

There was evidence to support the defense theory of mistaken identity. 1RP 1720-21, 1734, 1737-39, 3770-71, 3774, 3796-98. Rocio provided the only direct, first-hand account of how the shooting happened. Rocio's credibility was compromised for many reasons. See BOA at 28-30. Aside from Rocio's questionable testimony, a collection of murky

circumstantial evidence connected Ruiz, or someone who looked like Ruiz, to the shootings in some manner. But that circumstantial evidence is not overwhelming on the crucial question of whether those shootings were premeditated. The innuendo supplied by the questions put to Mendez-Reyna left no doubt that the shootings were premeditated and that Ruiz, and not a relative that resembled Ruiz, was the shooter.

Nor should we lose sight of the fact that the jury was given the option of finding Ruiz guilty of the lesser offenses of second degree murder and attempted second degree murder.[8] CP 57, 68-73, 77-78. The circumstances surrounding the shooting allowed for competing inferences as to whether the shootings were carried out with a deliberately formed design to kill as opposed to an intentional but rash decision made without forethought. See CP 60 (instruction defining "premeditated").

The State itself proposed the lesser offense instructions for second degree murder and attempted second degree murder. 1RP 3840, 3849-54. It did so because it was less than certain a jury would find beyond a reasonable doubt that Ruiz acted with premeditation. The State acknowledged it was plausible for a rational trier of fact to conclude "the individuals went to the body shop armed with guns in case some trouble

[8] The jury was also instructed on the lesser offenses of first and second degree manslaughter. CP 79-93.

developed and then in the heat of passion, shot and killed the victims." 1RP 3853. Substantial evidence supported the lesser offense theory of the case as recognized not only by the State but also by the judge who gave the lesser offense instructions. See State v. Griffith, 91 Wn.2d 572, 574, 589 P.2d 799 (1979) (criminal defendant entitled to jury instruction on his theory of the case if substantial evidence supports it).

The innuendo supplied by the improper questioning of Mendez-Reyna provided the only continuous, coherent story of what happened that day. It also painted a compelling picture of premeditated action on the part of Ruiz. The State cannot show beyond a reasonable doubt that it did not persuade the jury to reject the lesser offense options.

2. THE COURT VIOLATED RUIZ'S CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE WHEN IT EXCLUDED FAVORABLE IDENTIFICATION EVIDENCE.

The State concedes Van Hoy's extrajudicial statements on identification were relevant to Ruiz's defense. See In re Detention of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("by failing to argue this point, respondents appear to concede it.") The State, however, maintains exclusion of this evidence did not violate Ruiz's constitutional right to present a complete defense because Ruiz does not have the right to present evidence that is "inadmissible" under ER 801(d)(1)(iii). BOR at 52-53.

The State fails to recognize relevant defense evidence is inadmissible only if the State can show a compelling interest to exclude prejudicial or inflammatory evidence that disrupts the fairness of the trial. State v. Jones, 168 Wn.2d 713, 720-21, 230 P.3d 576 (2010); State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002); State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). The presence of an evidentiary rule barring relevant defense evidence does not automatically make such evidence inadmissible in light of the constitutional right to present a complete defense. State evidentiary rules that infringe upon a weighty interest of the accused to present evidence in his defense are not controlling when they are arbitrary or disproportionate to the purposes they were designed to serve. Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006); see also Jones, 168 Wn.2d at 723-24 (even if rape shield statute did apply, it could not be used to bar defense evidence of high probative value per the Sixth Amendment).

In excluding Van Hoy's identification evidence, the trial court relied on a mechanical application of ER 801(d)(1)(iii), which prevents admission of an extrajudicial identification as hearsay when the witness does not testify. In light of the constitutional right to present a complete defense, we must examine whether application of ER 801(d)(1)(iii) to

Ruiz's case is arbitrary or disproportionate to the purposes the rule was designed to serve. Holmes, 547 U.S. at 324.

The purpose of the hearsay rule is to insure that evidence considered at trial is reliable. State v. Chapin, 118 Wn.2d 681, 685, 826 P.2d 194 (1992). Reliability is also the linchpin in determining the admissibility of identification testimony. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 2252–53, 53 L. Ed. 2d 140 (1977). "Evidence of pretrial identification has greater probative value than a courtroom identification because the witness' memory is fresher and the identification occurs before the witness can be influenced to change his mind." State v. Grover, 55 Wn. App. 923, 931-32, 780 P.2d 901 (1989) (citing State v. Simmons, 63 Wn.2d 17, 19-21, 385 P.2d 389 (1963)), review denied, 114 Wn.2d 1008, 790 P.2d 167 (1990).

In Ruiz's case, neither party disputed the accuracy of Van Hoy's identification statements, which were meticulously reported by the detective investigating the case. CP 223-24. Neither party disputed those statements, from a disinterested third party, were reliable and trustworthy. The general dangers that attend hearsay evidence are non-existent here.

Under ER 801, Van Hoy's out of court identification statements were hearsay because Van Hoy, the identifier, was not subject to examination. "ER 801(d)(1)(iii) does not require that the statements be

elicited from the declarant; they may be elicited from another person who heard or saw the identification." State v. Jenkins, 53 Wn. App. 228, 233 n. 3, 766 P.2d 499, review denied, 112 Wn.2d 1016 (1989); accord, Grover, 55 Wn. App. at 932. But the identifier must testify at trial and be subject to examination to safeguard the defendant's constitutional right to confrontation. Grover, 55 Wn. App. at 933-34; Simmons, 63 Wn.2d at 22.

This rule is for the benefit of the defendant. Ruiz, however, did not care about his constitutional right to confront Van Hoy. He did not assert that right in relation to Van Hoy. Insofar as the purpose of ER 810(d)(1)(iii) is to protect a defendant's right to confrontation, that purpose has no application here.

The State maintains "ER 801(d)(1)(iii) merely incorporates the long-established and universally recognized rules making most hearsay inadmissible." BOR at 53. That argument misses the mark.

Although the United States Supreme Court has emphasized that state rule makers have broad latitude "to establish rules excluding evidence from criminal trials,"[9] the right to present a complete defense is abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are

[9] United States v. Scheffer, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998).

designed to serve. Holmes, 547 U.S. at 324. "This is true even if the rule under which it is excluded is 'respected [,] . . . frequently applied,' and otherwise constitutional." Jackson v. Nevada, 688 F.3d 1091, 1096 (9th Cir. 2012) (quoting Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). "If the 'mechanical' application of such a rule would 'defeat the ends of justice,' then the rule must yield to those ends." Jackson, 688 F.3d at 1096 (quoting Chambers, 410 U.S. at 302).

Where, as here, a defendant tenders probative identification evidence that neither party disputes and which supports the defense theory of the case, the trial court cannot refuse to admit it without giving a better reason than that it is hearsay. The relevant constitutional question is the proportionality between the excluded evidence and the interests served by the evidentiary rule. Jackson, 688 F.3d at 1101. The complete exclusion of Van Hoy's statements of identification was disproportionate to the abstract policy interests served by the exclusion of such evidence. Neither purpose behind the hearsay rule — reliability and the protection of the right to confrontation — is implicated here. Arbitrary rules are those that exclude important defense evidence but that do not serve any legitimate interests. Holmes, 547 U.S. at 325. No legitimate interest was served by excluding Van Hoy's identifications from trial.

The State relies on State v. Hilton, 164 Wn. App. 81, 261 P.3d 683 (2011) as the "complete" answer to Ruiz's argument. BOR at 52-53. Hilton does not answer the question posed by Ruiz's case.

In Hilton, there was no error because the trial court allowed defense counsel to accomplish everything he wanted to accomplish in cross-examining a State's witness. Hilton, 164 Wn. App. at 102. There was no evidence to support an argument that someone else was the murderer and counsel did not even pursue that theory at trial. Id. at 98-102. For these reasons, Hilton was not like Holmes. Id. at 101.

But the principle enunciated in Holmes and elsewhere is the law of this land: "Although a state court undoubtedly has the authority to enforce procedural rules intended to serve its legitimate interests in ensuring the orderly administration of justice, it must always do so in light of the constitutional requirement that the exclusion of evidence may not be disproportionate to the interests served by the rule under which it is excluded." Jackson, 688 F.3d at 1104.

To be sure, "well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." Holmes, 547 U.S. at 326. The Washington Supreme Court likewise recognizes even relevant defense evidence remains

inadmissible if it is so prejudicial or inflammatory evidence that it introduction would disrupt the fairness of the trial. Jones, 168 Wn.2d at 720-21; Darden, 145 Wn.2d at 621; Hudlow, 99 Wn.2d at 15-16.

The identification evidence at issue here would not have disrupted the fairness of the trial. The State's cursory argument to the contrary is unavailing. The State claims it would have been unfair to admit Van Hoy's identification statements because the State was unable to admit the testimony of Mendez-Reyna that he and Ruiz were the two men who purchased the ammunition at Phil's Sporting Goods. BOR at 53. The State's contention is ironic, given that it did place the equivalent of Mendez-Reyna's identification testimony before the jury through innuendo in questioning him on the stand. 1RP 2631; see section A. 1., supra. The admission of Van Hoy's statements to the contrary would have countered that one-sided version of events.

Moreover, the State would not be able to admit Mendez-Reyna's prior identifications if Van Hoy were alive and testified at trial. The result is no different if Van Hoy did not testify at trial but his statements were admitted. The admissibility of one witness's identification does not affect whether another person's identification is admissible. There is no authority for the State's "tit for tat" theory of admissibility.

The State also remarks it would have been impossible to ask Van Hoy how certain he was of the identification from the montage and whether it changed his opinion knowing that Mendez-Reyna had testified the ammunition was purchased by him and the defendant. BOR at 53. That argument likewise fails.

Van Hoy's statements, made at a time when they have the greatest probative force and trustworthiness,[10] already demonstrate his degree of certainty. Van Hoy was unable to pick Ruiz from the photo lineup: "He stated he just wasn't sure." CP 223. Van Hoy said Antonio Mendez "was definitely there." CP 224. The passage of time does nothing to change the degree of certainty present when the statements were originally made.

Further, it would have been improper to ask Van Hoy if he would change his opinion knowing that Mendez-Reyna claimed to have identified Ruiz. Any answer would be irrelevant because it does not affect how Van Hoy perceived his identifications at the time his statements were made. The State is essentially claiming it had the right to impeach Van Hoy's identification with another person's identification — an identification that Van Hoy was unaware of and had not even happened yet. Whatever Van Hoy would have said years later at trial does nothing to change the fact of what he said at the time of his original identification.

---

[10] Grover, 55 Wn. App. at 931-32.

3. THE COURT COMMITTED REVERSIBLE ERROR IN ADMITTING EVIDENCE OF RUIZ'S PRIOR ARREST UNDER ER 404(b).

The State implies evidence of Ruiz's prior arrest unrelated to the charged crimes does not qualify as ER 404(b) evidence. BOR at 54-55. The State cites no authority for its claim, thus demonstrating its lack of merit. See State v. McNeair, 88 Wn. App. 331, 340, 944 P.2d 1099 (1997) (failure to cite authority constitutes a concession that the argument lacks merit). Evidence that a defendant has been previously arrested on an unrelated matter qualifies as prior bad act evidence under ER 404(b). State v. Acosta, 123 Wn. App. 424, 433, 98 P.3d 503 (2004); see also United States v. McCarthur, 6 F.3d 1270, 1279-80 (7th Cir. 1993) (same under federal rule).

The State argues "[i]t was essential for the State to show that the fingerprints and the photograph used for comparison purposes were in fact those of the defendant." BOR at 54. What the State does not show is why it was essential for the State to elicit evidence that the fingerprints and photograph were obtained as a result of Ruiz being arrested and jailed.

ER 404(b) evidence should not be admitted to show something if it is of no consequence to the outcome of the action. State v. Saltarelli, 98 Wn.2d 358, 362–63, 655 P.2d 697 (1982). Ruiz made it abundantly clear that he was in no way, shape or form disputing the accuracy of his photo

and his fingerprints. 1RP 1044, 1063-64. It was unnecessary for the State to not once or twice but repeatedly reference the gratuitous fact that Ruiz was arrested and jailed in connection with obtaining the photo and fingerprints. See Powell, 126 Wn.2d at 261-62 (trial court erred in admitting ER 404(b) evidence to prove intent where intent not at issue).

The State cannot explain why the fact of arrest and how the State obtained his photo and fingerprints made any fact of consequence more or less probable where the defense did not dispute that it was Ruiz's photo and fingerprints. The fact of arrest and being jailed does not shed any light on anything of significance with respect to the offenses charged here. ER 404(b) evidence is inadmissible when it is used to prove something that is immaterial to issues in a case. State v. Ramirez, 46 Wn. App. 223, 227-28, 730 P.2d 98 (1986).

The State downplays the significance of the ER 404(b) evidence at issue, alleging the jury only learned Ruiz was arrested "based on a traffic stop." BOR at 55-56. It was obvious to the jury that something more than a simple traffic stop happended. When the prosecutor asked the officer if he had occasion to have contact with Ruiz in 1983, the officer testified, "on a contact I made an arrest for --." 1RP 1085. The court sustained defense counsel's relevancy objection. 1RP 1085-86. The officer then said he did a traffic stop. 1RP 1086.

The jury did not learn what Ruiz was arrested for. But jurors are expected to bring common sense, insight and deductive reasoning into deliberations. State v. Balisok, 123 Wn.2d 114, 119, 866 P.2d 631 (1994); State v. Carlson, 61 Wn. App. 865, 878, 812 P.2d 536 (1991). Any juror employing such tools knows people are not ordinarily arrested following a traffic stop, leaving jurors to wonder what extraordinary set of circumstances existed to call for Ruiz's arrest. Jurors also learned Ruiz was jailed. 1RP 1042-43, 1087. How many people are jailed following something as innocuous as a traffic stop? Common sense tells any juror that something serious happened to warrant what otherwise appears to be a disproportionate outcome to a routine police action.

The State claims Ruiz's case is "controlled" by State v. Dennison, 115 Wn.2d 609, 801 P.2d 193 (1990). It is not. Dennison is readily distinguishable. In Dennison, the defendant in a felony murder case sought to prohibit explanation of how and why police took a picture of a pillowcase taken at his home that was similar to a pillowcase found at the scene of the decedent's death. Dennison, 115 Wn.2d at 627 n.18. In ruling the probative value of such explanation outweighed prejudice, the trial court reasoned "the jury is going to know perfectly well that police weren't there visiting him for social purposes when they took a picture of the pillowcase . . . the statement of circumstances isn't any worse than the

implication is going to be, anyway." Id. at 628 n.19. In other words, the jury was going to know police did not obtain that photograph for reasons unconnected to criminal activity given the circumstances of that case. Any reasonable juror knows police do not take photographs of the interior of a citizen's home unless they are investigating a crime.

The trial court here did not justify its decision to admit the challenged evidence on the basis that jurors were going to learn about it anyway. And unlike Dennison, the circumstances surrounding Ruiz's photo and fingerprints are unrelated to the charged crimes. Furthermore, non-criminal explanations exist for why the government would be in possession of Ruiz's fingerprints and photo. The jury would not know of Ruiz's prior criminal activity without being expressly told about it. For example, a person's fingerprints and photograph would be on file in connection with immigration or travel to the United States.[11] This is not a case where the "statement of circumstances was no worse than the implication was going to be anyway." BOR at 56.

It was unnecessary to reference Ruiz's prior arrest and incarceration as a basis to support testimony about the accuracy of the photo and fingerprints. The State's fingerprint analysts testified by simply

[11] Evidence showed Ruiz was from Mexico and traveled between the two countries. 1RP 1561-63,1660-64, 1678-80, 3782, 3784.

referring to "official" or "public" records as the source of the fingerprint information. 1RP 2091, 2437, 2441. But by that time, the jury had already learned Ruiz was arrested and jailed and that his photo and fingerprints had their source in that event. The damage was already done.

Evidence of Ruiz's arrest and his subsequent jailing did not need to be placed before the jury and was inadmissible under ER 404(b). This is not evidence the jury was likely to forget and disregard during deliberations because it was repeated and objected to in the presence of the jury. 1RP 1037, 1042-43, 1047-48, 1085-87, 1RP 1861-63, 2435-36; see In re Personal Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (objection emphasizes evidence).

B. CONCLUSION

For the reasons stated above and in the opening brief, Ruiz requests reversal of his convictions and remand for a new trial.

DATED this 21st day of December 2012

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC

CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.
1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. LIND
JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT

OF COUNSEL
K. CAROLYN RAMAMURTI
JARED B. STEED

State v. Vincente Ruiz

No. 29645-8-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 21st day of December, 2012, I caused a true and correct copy of the **Reply Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Shawn Sant
Franklin County Prosecutor's Office
Appeals@co.franklin.wa.us

Vincente Ruiz
DOC No. 740324
Washington State Peniteniary
1313 N. 13th Avenue
Walla Walla, WA 99362

Signed in Seattle, Washington this 21st day of December, 2012.

X Patrick Mayovsky