No. 43422-9-II

Pierce County No. 11-1-03677-6

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

STATE OF WASHINGTON,

Respondent,

v.

JUAN JOSE GOMEZ VASQUEZ,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Ronald E. Culpepper, Judge

APPELLANT'S OPENING BRIEF

KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

WASHINGTON COURT OF APPEALS

FEDERAL CASELAW

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. ASSIGNMENTS OF ERROR

1. Appellant Juan Jose Gomez Vasquez was deprived of his Article 1, § 22 and Sixth Amendment rights to effective assistance of counsel at trial.

2. Extremely prejudicial, inflammatory and irrelevant evidence was admitted and deprived Gomez Vasquez of his state and federal due process rights to a fair trial before an untainted jury.

3. The prosecutor committed flagrant, prejudicial and ill-intentioned misconduct in eliciting and exploiting the improper "gun" evidence.

4. Gomez Vasquez was deprived of his Article 1, §22 and Sixth Amendments rights to self-representation.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. No guns were alleged to have been used in the crime, but a gun and some ammunition were found in a subsequent search of the house where Gomez Vasquez and others lived.

   Initially, Gomez Vasquez was charged with crimes involving that firearm but, on the eve of trial, the prosecution filed an information removing those charges. Counsel nevertheless did not move to exclude the now irrelevant, prejudicial gun evidence, and the prosecutor then elicited that evidence at trial, relying on it in closing argument.

   Was counsel prejudicially ineffective in failing to make any effort to prevent this extremely prejudicial evidence from being introduced and swaying the jury against his client, and then failing to attempt to try to minimize the damage?

   Was he further ineffective in failing to move to preclude further use of the testimony once it had occurred, thus allowing the prosecutor to commit misconduct in exploiting the improper evidence?

Did the introduction and use of such highly emotional, inflammatory and prejudicial evidence deprive Gomez Vasquez of his state and federal due process rights to a fair trial?

2. Where a defendant makes an unequivocal, timely request to represent himself prior to trial, it is reversible error for the court to deny that request.

Gomez Vasquez filed a motion for self-representation more than a month before trial. Did the trial court err and violate appellant's state and federal rights to self-representation in failing to even consider this request?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Juan Jose Gomez Vasquez was charged by amended information with unlawful delivery of methamphetamine. CP 31; RCW 69.50.401(1)(2)(b). After pretrial proceedings and motions before the Honorable Judges Edmund Murphy on October 26 and December 13, 2011, and Katherine Stolz on November 2, 2011, pretrial and jury trial proceedings were held before the Honorable Judge Ronald Culpepper on March 3, 6-8, 2012.[1] Mr. Gomez Vasquez was found guilty as charged. CP 56; 4RP 1-4.

After sentencing and motion proceedings on April 27 and May 4, 2012, Gomez Vasquez was ordered to serve a standard-range sentence.

---

[1]The volumes of the verbatim report of proceedings consists of 8 volumes, which will be referred to as follows:
the volume containing the proceedings of October 26 and December 13, 2011, as "1RP;"
November 2, 2011, as "2RP;"
March 3, 2012, as "3RP;"
the 3 chronologically paginated volumes containing the trial proceedings of March 6-7, as "RP;"
March 8, 2012, as "4RP;"
April 27 and May 4, 2012, as "SRP."

CP 169-81; Mr. Gomez Vasquez appealed, and this pleading follows. See CP 185.

2. Testimony at trial

Kevin Gordon started using and dealing drugs when he was about 20 years old. RP 223, 245, 281. He started with cocaine but then turned to methamphetamine. RP 223. 25 years later, his wife had left him, taking their two sons, who were in their twenties by the time of trial. RP 221, 223.

Gordon conceded that his meth use had ruined parts of his life and he had been in prison multiple times because of his involvement in drugs, including dealing and making "meth." RP 223, 245-47. He was still addicted at the time of trial, having relapsed only a few months before. RP 224, 245.

In April of 2010, Gordon was the focus of a police investigation of drug dealers. RP 221-22, 251. Gordon was caught. RP 223. He was offered and agreed to two different contracts settling multiple pending charges for crimes committed on several days in exchange for which he agreed to set up others for arrest as an "informant." RP 223. The charges he won "deals" for involved three counts of unlawful delivery of a controlled substance committed in April and two counts of possession with intent to deliver, committed a month later. RP 252.

And even after he had been caught in these two incidents, sometime in about June of 2011, he was again found with an ounce of methamphetamine when he was pulled over by police as he drove out of a casino without his headlights on. RP 253-54.

Gordon admitted that an ounce was a "significant" amount of drugs and was not, in fact, a normal quantity for "personal use." RP 255-58.

After the third incident, Gordon had already discussed signing an agreement to set someone up in a drug transaction in exchange for reducing his own time in jail with police, but had not yet done so. RP 257, 258. He was then put in jail for a probation violation and, while in custody for that offense, worked out the terms of his "deals." RP 257, 259-60. The contracts were signed pleas were entered the end of July, 2011. RP 253.

As a result of his "deals," Gordon walked out of jail that same day. RP 261. He had only served half of the time he had been ordered to serve for the probation violation. RP 25, 261. Gordon admitted that, without the "deals," he was facing at least 10 years on just one of his cases. RP 251. On cross-examination, he conceded that the potential was for 20 years on the other case for which he got a "deal." RP 262.

Under the contracts with police, Gordon was required to set up people for "felony narcotic charges of three separate one-ounce quantities of either heroin, methamphetamine, cocaine, or whatever[.]" RP 264. Officer James Buchanan of the Tacoma Police Department testified that Gordon was "on contract" with him after another officer, named Walkinshaw, had negotiated the contracts. RP 181.

It was Walkinshaw, not Buchanan, who was believed to have conducted "reliability" buys with Gordon, i.e., transactions officers do with possible informants in order to make sure they are able to perform and set people up and that they are "reliable." RP 196-97.

Officer Buchanan could not say, however, whether there was any documentation of those "reliability" buys. RP 197.

On October 17, 2011, Gordon spoke with officers and told them he thought he could buy drugs from someone he knew as "Santana," later identified as Juan Jose Gomez Vasquez. RP 184, 228. Either that day or the next, he made a phone call in front of officers, setting up a meeting at 56th and Portland. RP 184, 225-28.

On October 18, officers gave Gordon $300 pre-recorded "buy" money and a scale, which later turned out to be broken. RP 225-28. Gordon testified that, in addition to having him pull out his pockets, the officers did a "pat-down" of his body and legs. RP 244.

Officers did not have Gordon take off his shoes, nor did they look in his socks or pat down his private areas to make sure Gordon was not concealing any drugs in those places. RP 244.

Gordon claimed that he did not have any drugs concealed on himself that day. RP 229. Gordon admitted, however, that, as a long-time drug user and seller, he "always" had to conceal drugs "on his person." RP 265. He then backtracked, declaring he usually just "put it in my pocket." RP 265. But he conceded that, if he knew in advance that he would have to empty his pockets, he would put the drugs in different places. RP 265. He also admitted he would put it "[p]retty much" just about "anywhere" to conceal it. RP 265.

When asked what kind of "safety precautions" the officers take to ensure that an informant "doesn't introduce anything into this investigation," Officer Buchanan said people were first asked if they were

carrying anything, after which they would be asked to empty their pockets and officers would "conduct a thorough search to make sure that they're not bringing anything in[.]" RP 184, 198.

Officer Buchanan admitted that he does not conduct body cavity searches, and that, in general, people who use drugs are not only good at lying but also can be "pretty adept" at concealing controlled substances in places like body cavities. RP 199. The officer also knew from experience that "[d]rug users like to lie quite a bit" and he had been lied to by them in the past. RP 196.

Buchanan confirmed, however, that police did not search Gordon's shoes and did not check his private areas for drugs. RP 200, 244.

After giving him the money, the officers dropped Gordon off about a block away from the "meet location." RP 267. According to Gordon, when he got to there, two vehicles were already there. RP 267. One of them was apparently a "Bronco," but Gordon could not see who was inside. RP 268, 270.

Gordon said he got into one of the vehicles, a van, and there were people inside. RP 230, 268. Initially, Gordon testified that he did not know how many people were in the van, but there might have been three. RP 230. After a break in the testimony for the day, however, the next day Gordon then declared that only Gomez Vasquez and another man were inside. RP 230, 260, 268. The other man was the driver and, Gordon said, both that man and "Santana" were drinking. RP 230, 268.

Buchanan admitted he never saw Gordon get into any car or van. RP 202. When asked if he had observed "any possible transaction that

could have happened inside" the van, the officer first responded, "[o]ur surveillance unit saw those." RP 202. A minute later, however, Buchanan backtracked, conceding that, in fact, all those officers saw was the vehicles, not anything that happened inside them. RP 202.

According to Gordon, he gave the money to Gomez Vasquez, who then got out of the van and "hopped on a bike and went down the street to get the drugs." RP 229, 230, 268. Buchanan testified that, from where he was several blocks away, he noticed Gomez Vasquez ride up the street on a bike and then, a few minutes later, saw him go back. RP 185, 201.

Gordon said that Gomez Vasquez came back with a package of "stuff." RP 269. Gordon admitted, however, that no one looked at the package, Gomez Vasquez did not show it to anyone and all that was visible was the outside of a bag, not its contents. RP 269.

At that point, Gordon said, they were calling people on a phone and trying to find a scale, because the one police gave him was not working. RP 229. Gordon said they went to the Goodwill parking lot to meet someone and then Gomez Vasquez eventually decided "just to go home," so they went to his house. RP 229. Each time they moved, Gordon said, he texted Buchanan to let him know. RP 270. Buchanan said that Gordon had texted that they were going to the house to weigh and "cut up a bag" for Gordon. RP 208. They had already lost track of the "Bronco" by this time, although Gordon said that he thought that car was associated with Gomez Vasquez because it was "his Blazer." RP 270-271.

According to Gordon, once they got to the home, Gomez Vasquez weighed the drugs out on a scale in a "baggie." RP 230. Gordon said the

people who had been in the other vehicle also arrived, so that there were possibly five or six total people there for the first five minutes, after which a few more people arrived. RP 271. One of the people there started smoking meth but, despite his years of addiction, Gordon claimed he did not imbibe. RP 272.

Once the drugs were on the scale, Gordon said, Gomez Vasquez took some out, gave some to Gordon, and then had the driver of the van drive Gordon to drop him off at a place on 112th. RP 230, 272. Gordon had called the officers to tell them he was going to meet them there, so when he arrived he walked across the street towards them and then hopped into their truck. RP 231.

Buchanan said it was about 20 minutes from the time Gordon was let out of the police car to do the "deal" to the time he was picked up in the truck. RP 186-87. Gordon handed over the suspected drugs he claimed to have gotten from Gomez Vasquez, about 1/4 ounce of a substance which later tested positive for methamphetamine. RP 187, 218, 266.

Gordon initially testified that the only "search" the officers did at that point was to ask if he had "anything else" and make him turn his pockets inside out. RP 191, 232. A little later, however, Gordon said they also patted him down. RP 273.

Once again, however, officers did not have him take his shoes off or look in them or his socks. RP 273. Gordon admitted that the amount of drugs he had procured could well have been hidden in his shoe, although he denied having done so. RP 266, 278.

The officer also did not see any "deal" take place. RP 202.

Gordon conceded that he knew what was "expected" of him and that was to produce people the police could arrest for selling drugs. RP 273. If he did not produce those people, he thought, he would "probably go to prison." RP 273. Gordon had "a lot of incentive" not to want to go there. RP 273. He denied, however, feeling "pressure to perform." RP 274.

Gordon knew, however, that he had to keep the officers he was working with "happy." RP 274. He had to contact them every day, and knew that, if he "crossed" one of them, they could "obviously" put him in prison. RP 275.

Gordon maintained that he did not think that the police would have lost faith in his ability to perform the contract if he had told police he could get something from someone but could not actually follow through. RP 275.

When asked what would happen if he had changed his story and said, "you know, on second thought, that might not have been the person that sold me the drugs," he responded that this would probably be "stupid to do," and that you "could get in trouble." RP 276. He also thought it would not be "good" for him and that it was in his "best interest" to be consistent with what he first said, but also to "tell the truth." RP 276. He agreed he would be "in trouble with the prosecutor" if his testimony was different. RP 277. He claimed, however, that he had done unsuccessful "deals" before and had not gotten in trouble for that. RP 282, 284.

At the same time, he admitted at trial that he was willing to do

almost anything to stay out of prison, although he drew the line at "killing someone." RP 285.

Gordon testified at trial about his difficulties in fighting his addiction, and admitted that, at this very same time, during October of 2011, he had himself "relapsed" and was again involved in doing drugs. RP 245.

On September 7, 2011, Buchanan executed a search warrant at the house where Gordon had gone. RP 182. Several people were there, including Gomez Vasquez. RP 210. Although there was a document found with Gomez Vasquez's name on it in the home, there were also documents found with other people's names on them, so Buchanan knew "this wasn't exclusively Mr. Gomez Vasquez's residence." RP 210.

Buchanan conceded that it appeared Gomez Vasquez was "tired, possibly high" when the officer spoke to him after Gomez Vasquez had been read his rights. RP 206. Initially, Gomez Vasquez admitted being a "consumer" of drugs. RP 193. Once he was told by police that "we had a delivery charge on him," he admitted he sold had sold drugs, but did not say anything about when or to whom. RP 193. He was never asked specifically about Gordon or the alleged transaction on the 18th. RP 207.

In the search of the house, no "large quantities of drugs" was found. RP 205. Some marijuana was found and there were some pills in a room suspected to belong to Gomez Vasquez. RP 205.

The officer admitted he found no methamphetamine, no heroin and no marked money at all. RP 205.

D. ARGUMENT

1. REVERSAL IS REQUIRED BECAUSE IMPROPER, PREJUDICIAL AND HIGHLY INFLAMMATORY IRRELEVANT GUN EVIDENCE WAS INTRODUCED AND USED AT TRIAL AND COUNSEL WAS INEFFECTIVE

Both the state and federal constitutions guarantee the accused the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by, Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. I, § 22. Further, defendants have a due process right to a fair trial before an unbiased jury. See, e.g., State v. Davenport, 100 Wn.2d 757, 761-62, 675 P.2d 1213 (1984). This due process guarantee can be denied by introduction of improper evidence, prosecutorial misconduct, or counsel's failure to live up to minimum standards and thus serve his crucial role. See State v. Webbe, 122 Wn. App. 683, 694, 94 P.3d 994 (2004).

In this case, reversal is required, because the prosecution introduced and used inflammatory highly prejudicial evidence of a completely irrelevant, unrelated gun, counsel was utterly ineffective in relation to this damaging misconduct and the result was that Mr. Gomez Vasquez was deprived of his constitutional rights to a fair trial.

a. Relevant facts

In charging the case, the prosecution initially accused Gomez Vasquez, *inter alia*, of second-degree unlawful possession of a firearm. CP 2. The prosecution also filed a Declaration for Determination of

Probable Cause, in which a prosecutor said that "the police report and/or investigation provided" him with information about the originally charged crimes, including that a search of the home where Gomez Vasquez was believed to live turned up a "handgun, magazines. . . [and] ammunition[.]" CP 4-5. These items were found in a different bedroom than the one in which Gomez Vasquez was found, along with several other people, at the time of the search. CP 4-5.

At the bail hearing on November 2, 2011, the prosecutor argued against lowering bail, mentioning not only the possible standard range if convicted but also that "[t]here was a gun involved. He is a felon, there was a gun in the house." 1RP 6. Counsel responded that he did not think it was a "proper place to argue any of the facts of the case," but that he had looked at the gun allegations somewhat:

> I have had contact - - I am, excuse me - - I've tried to contact the owner of the residence in question in terms of the firearm. The firearm was found in a bedroom. At this point, I don't know that there is indications that that was my client's room other than it was in the same house.

1RP 6. In denying the request to lower bail, the judge declared, "[t]here appears to be a likelihood of danger considering both the gun and his prior record." 1RP 7.

Prior to trial, however, on March 6, 2012, the prosecutor filed an amended information dismissing all charges except the single offense of unlawful delivery of methamphetamine on October 18, 2011. CP 31. In a trial memorandum filed the same day, counsel acknowledged that the amended information charged only that single drug count. CP 53. That memo included several motions, including a general request to exclude

"prior bad acts" under ER 404(b). CP 54. Counsel declared the prosecution had not indicated an intent to "introduce any testimony or evidence regarding any alleged prior bad acts" at that time, but asked for "ample notice and an opportunity to respond" should that change. CP 54-55. Counsel's apparent concern was that Gordon had said in defense interviews that he had "allegedly in the past both sold and purchased controlled substances to and from the Defendant." CP 55.

That same day, when the parties appeared in front of the court, counsel and Mr. Gomez Vasquez said that they had reviewed the amended information together. RP 4-5. Counsel also said he had been told about the amendment "late last week." RP 5. He made no request for additional time to reevaluate his case strategy or get further prepared. RP 4-6.

The parties also discussed the "404(b)" motion, with the prosecutor arguing that he should be allowed to elicit evidence that Gomez Vasquez was a "known drug dealer," according to police. RP 10-12. The court was unconvinced by the prosecutor's argument that, "if it's part of the investigation, it's not a prior bad act" and excluded the evidence as irrelevant, although it told the prosecution it could raise the issue again if it thought "the door had been opened." RP 12. There was no discussion of the gun or ammunition evidence. RP 10-20.

During trial, in redirect examination of Officer Buchanan, the prosecutor asked about what was found in the house during the search. RP 208. The following exchange occurred:

> Q: So Mr. Kim [defense counsel] was asking you about some of the things you found in the house. Did you find a scale in the house?

A: Yes.

Q: **Did you find a gun in the house?**

A: **Yes.**

Q: **Did you find bullets in the house?**

A: **Yes**.

RP 208 (emphasis added). Counsel did not object, nor did he mention these comments after the witness was off the stand. RP 211.

In closing argument, after tying Gomez Villa to the house, the prosecutor used a "peg" theory, saying that little pegs added up to support Gordon's version of the events and show Gomez Vasquez's guilt. RP 302-304. The prosecutor then ridiculed counsel's questioning about whether there was any meth found in the house, declaring that there was other evidence to prove the case:

> Defense counsel] brought it up. He says, did you find any meth? No. He told you what he did find at the house. What was the reason? Ask yourselves, think about this, why did Mr. Gordon tell you that they went to this house? What did they need? You remember. He said, a scale, right? What did Officer Buchanan tel you that he found in that house? A scale. I'm going to hang up another little peg for Mr. Gordon, right. Everything keeps supporting what he told you. **You didn't find any methamphetamine, no, but I found some other drugs. You didn't find any methamphetamine, but I found a loaded handgun.**

RP 304-305 (emphasis added). Counsel made no effort to object. RP 304-305.

Throughout the trial and before sentencing, Mr. Gomez Vasquez had filed a number of pro se motions, including one filed on March 27 in which he argued, *inter ali*, that his attorney did not have time to prepare

for trial after the amendment of the information. CP 108-11. He also filed a motion on April 12, 2012, asking for an order of dismissal based on, *inter alia*, ineffective assistance of counsel and, on April 27, 2012, asking to arrest the judgment in part on the grounds that counsel did not take enough time after the amended information to prepare for trial. CP 122. A motion for a new trial filed the same date complained again about ineffectiveness and included an argument that mentioning the scale and the gun found in the house made the jury "taint[ed] because of the testimony on evidence that would not [sic] supposed to [be] coming to the light of the jury" and "the defense counsel failure to cure that statement or ask for [a] remedy to the testimony." CP 150-54.

Sentencing was initially set over because the court had not read any of Mr. Gomez Vasquez's pro se motions and when the sentencing began, the court discussed Gomez Vasquez's concern with him. SRP 10-21. When talking about his concerns about counsel's performance, Gomez Vasquez raised the issue of the gun, saying that the police report and the affidavit supporting the warrant for the search referred to the gun and noting that counsel had not objected. SRP 20. He told the court that counsel had failed to move to suppress that evidence and that it prejudiced him:

> It taints the jury because now not only does the jury know about this gun that was never present, there was no objection to that at all . . .That's ineffective assistance of counsel.

SRP 20. In denying the motion for a new trial, the court declared that the issues Gomez Vasquez had raised about inconsistencies between the testimony of Gordon and Buchanan and the search warrant affidavit/police

report could have been addressed at trial, but the court did not mention the gun evidence at all. SRP 23-24. The court said that, while Gomez Vasquez was not "happy with the outcome," that was "the way it is," so the court denied the motions for a new trial. SRP 24.

b. The prosecutor committed misconduct in eliciting and exploiting the completely irrelevant, inflammatory evidence, counsel was ineffective and Gomez Vasquez was deprived of his rights to a fair trial before an unbiased jury

The admission and exploitation of the irrelevant, inflammatory and extremely prejudicial evidence of the gun and ammunition compels reversal and remand in this case. Not only was it misconduct for the prosecutor to elicit the evidence and then exploit it, counsel was prejudicially ineffective in failing to move to exclude the evidence and/or failing to try to mitigate the damage once the evidence had been admitted. The result was that Gomez Vasquez was deprived of his due process rights to a fair trial before an unbiased jury.

First, there can be no question that the evidence was completely irrelevant. Evidence is only relevant if it has a tendency to make a fact which is of consequence either more or less likely. ER 401, 402; see State v. Harris, 97 Wn. App. 865, 868, 989 P.2d 553 (1999), review denied, 140 Wn.2d 1017 (2000). There was no allegation that any guns whatsoever were involved in the charged crime. CP 31. Indeed, there was no such allegation even *before* the information was amended, when it still charged the gun possession offense, because the only claim was that the gun was in the house and Gomez Vasquez was a felon, not that the gun had been used in any of the charged crimes. CP 1-5.

After the amended information was filed, however, there was no relevance to the gun at all. There was no evidence that a gun was used in any way, shape or form on October 18 during the incident. CP 31. No gun was displayed, used or even mentioned during the alleged events. Thus, the evidence was completely irrelevant and inadmissible as such.

Further, evidence of prior crimes, wrongs or acts is inadmissible to prove the defendant's "character" or "propensity." ER 404(b). Such evidence is prohibited because it is so likely to cause the jury to "prejudge" the defendant and "deny him a fair opportunity to defend" himself against the state's case. Michelson v. United States, 335 U.S. 469, 475-76, 93 L. Ed. 168, 69 S. Ct. 213 (1948). A defendant is entitled to be tried based on the evidence rather than being convicted because the jury believes he is a bad person who "is by propensity a probable perperator of the crime." Id.; see also, State v. Perrett, 86 Wn. App. 312, 319-20, 936 P.2d 426, review denied, 133 Wn.2d 1019 (1997).

Put another way, ER 404(b) evidence is likely to cause the jury to try a defendant not for what he is accused of doing but rather for who they think he *is*. See State v. Kelly, 102 Wn.2d 188, 199-200, 685 P.2d 564 (1984).

For these reasons, a court admitting ER 404(b) evidence is required to take careful steps to ensure that it is only admitted when the prosecution can show it is material and necessary for a legitimate purpose, such as proving motive or opportunity. See Kelly, 102 Wn.2d at 199-200. The court must first "identify the purpose for which the evidence will be admitted," second "find the evidence materially relevant to that purpose,"

and third, "balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder." State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).

Indeed, because of its inherent prejudice, ER 404(b) evidence is only admissible if it has "substantial probative value" to a necessary part of the state's case, not simply if it meets the minimum standard of "relevance." State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 487 (1995). A court deciding whether to admit such evidence must examine the other available evidence and admit only the quantum of ER 404(b) evidence required. State v. White, 43 Wn. App. 580, 587-88, 718 P.2d 841 (1986).

Here, the prosecution did not meet any burden of proving that the gun evidence should be admitted. The prosecutor did not even *try* to establish that the gun was relevant before eliciting testimony about it and the ammunition found at the home. Instead, he simply put that information before the jury, even though it is well-recognized that such evidence is highly likely to cause undue prejudice to the ability of the defendant to receive a fair trial. See, e.g., State v. Rupe, 101 Wn.2d 664, 708, 683 P.2d 571 (1984).

Further, he clearly intended the evidence to come in. If the prosecutor had not intended to elicit the gun evidence, he would have stopped when the officer first brought it up. Instead, the prosecutor pursued it further, asking if there were also bullets found in the home. And he then exploited it in closing, using it as evidence to prove that Gomez Vasquez was a drug dealer, declaring that, while no meth was found in the house, other drugs were found, as was "a loaded handgun."

RP 304-305.

The prosecutor's misconduct in eliciting this highly prejudicial, inflammatory and irrelevant gun evidence could have been minimized, had counsel been effective. Counsel was clearly aware of the gun - it was part of the original charges and discovery. He was thus on notice that the prosecution could seek to introduce the gun at trial. See, Kimmelman v. Morrison, 477 U.S. 35, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); see also, State v. Smith, 15 Wn. App. 716, 721, 552 P.2d 1059 (1976); see CP 4-5 (referring to the presence of the gun at the home).

Before the information was amended, it might be permissible for counsel to assume that he could not exclude the evidence of the gun, as it formed the basis for one of the counts against Gomez Vasquez. But once the information was amended, however, there was no more relevance to the gun. Yet counsel made absolutely no effort to move to exclude that evidence, even though he moved to exclude the other "404(b)" evidence of prior alleged transactions.

But reasonably competent counsel would have also made a motion to exclude the completely irrelevant, prejudicial and inflammatory evidence of the gun and ammunition. In fact, even if counsel mistakenly thought the court would deny the motion he still had a duty to make it. See State v. Dawkins, 71 Wn. App. 902, 863 P.2d 124 (1993).

And once the first mention of the gun was elicited by the prosecutor, counsel should have taken some action. Even if he did not wish to object in front of the jury, he could have asked for a sidebar. He could - and should - have done *something*, not just sat mute while his

client was linked with a dangerous weapon completely irrelevant to his case.

Even if he chose not to do anything during the testimony, he should have made sure to bring the improper evidence to the court's attention to *ensure* that the prosecution did not later exploit it. Yet again, counsel did nothing - allowing the prosecutor to cite to the "loaded handgun" as evidence that Gomez Vasquez was guilty as charged.

The prosecutor's misconduct in eliciting the highly prejudicial, irrelevant evidence and counsel's ineffectiveness must be viewed in light of the almost incalculable harm the evidence caused to the ability of Mr. Gomez Vasquez to receive a fair trial. As our highest court has noted:

> Personal reactions to the ownership of guns vary greatly. Many individuals view guns with great abhorrence and fear. Still others may consider certain weapons as acceptable but others as "dangerous." A third type of these individuals might believe that defendant was a dangerous individual. . . just because he owned guns.

Rupe, 101 Wn.2d at 708.

Indeed, courts have "uniformly condemned" admission of evidence of weapons tied to a defendant when those weapons are irrelevant to the crime charged. State v. Freeburg, 105 Wn. App. 492, 502, 20 P.3d 989 (2001); United States v. Warledo, 557 F.2d 721, 725 (10th Cir. 1977); Moody v. United States, 376 F.2d 525, 532 (9th Cir. 1967) (evidence of gun unrelated to charge was irrelevant and prejudicial as a jury would likely use the evidence as proof the defendant was a "bad man"); see also, State v. Oughton, 26 Wn. App. 74, 83-84, 612 P.2d 812, review denied, 94 Wn.2d 1004 (1980) (evidence of a knife unrelated to one used in murder was of highly questionable relevance).

The gun evidence was highly prejudicial, improper character evidence which was irrelevant to any legitimate purpose. The only reason to admit the evidence was to sway the jury into believing Gomez Vasquez was a "dangerous" or "violent" man and thus more likely to be guilty of being a drug dealer. Counsel's failures were the reason that evidence was admitted against his client. Had he brought a proper motion, the court would have erred in denying it. And counsel made no effort whatsoever to minimize the prejudice to his client once the evidence came in, thus allowing the prosecutor to commit further misconduct in closing by reminding the jury of the completely irrelevant "loaded handgun."

Reversal is required. Where, as here, counsel is ineffective, this Court must reverse if there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. Strickland, 466 U.S. at 694. There is more than such a reasonable probability here. The prosecution's case was based solely on the testimony of Gordon, a man whose credibility was seriously in question. It was only Gordon who said Gomez Vasquez gave him drugs - no officer saw any such transaction. And the officers admitted they did not fully search Gordon, who himself admitted that he could have hidden the amount of drugs he said he got from Gomez Vasquez inside his shoes - the shoes the officers did not bother to search. Gordon was in relapse at the time, again involved with drugs. And Gordon admitted he would do *anything*, short of killing someone, to stay out of prison.

Given the facts of this case, there is more than a reasonable likelihood that the introduction of evidence that a loaded gun and

ammunition was found in the house with Gomez Vasquez was likely to cause the jury to convict on that improper evidence, rather than the actual evidence at trial. There was more than just the danger of unfair prejudice i.e., that the evidence was "likely to stimulate an emotional rather than a rational response." State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). The irrelevant gun evidence could only have swayed the jury against Gomez Vasquez, making them believe that he was a dangerous man who dealt drugs and had loaded weapons in his house. And there is more than a substantial likelihood that counsel's completely unprofessional failures in this regard led to the conviction in this case. Reversal and remand for a new, fair trial with different, competent counsel is required.

2. APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO SELF-REPRESENTATION WERE VIOLATED

Reversal is also required because Mr. Gomez Vasquez was deprived of his constitutional rights to self-representation. Under both the state and federal constitutions, a defendant not only has the right to effective assistance of counsel but also the right to waive assistance and represent himself. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2424, 34 L. Ed. 2d 562 (1975); see, State v. Woods, 143 Wn.2d 561, 585, 23 P.3d 1046, cert. denied, 534 U.S. 964 (2001); Sixth Amend.; Fourteenth Amend.; Art. 1, § 22. If a court improperly deprives a defendant of the right to self-representation, automatic reversal is required, because the error can never be said to be "harmless." See State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995); McKaskle v. Wiggins, 465 U.S. 168,

177 n. 8, 104 S. Ct. 944, 79 L.Ed.2d 122 (1984).

The parameters of the right to self-representation depend upon timing. See State v. Fritz, 21 Wn. App. 354, 361, 585 P.2d 173 (1978), review denied, 92 Wn.2d 1002 (1979). If the defendant makes a knowing, intelligent and unequivocal request to represent himself "well before trial" and not accompanied by a motion to continue, the right effectively "exists as a matter of law" and the court has no discretion to deny it. Id. In contrast, if the defendant does not ask to represent himself until the trial is about to start, the trial court has some limited discretion to deny the request. Id.

In this case, Mr. Gomez Vasquez's request was timely. On February 3, 2012, Mr. Gomez Vasquez filed a pro se "motion and demand for self-representation," with a "note" asking for it to be heard. CP 14-16. Trial did not even start until nearly a month later. As a result, Gomez Vasquez was entitled to represent himself as a matter of law. See State v. Barker, 75 Wn. App. 236, 238, 241, 881 P.2d 1051 (1994).

Further, by failing to even address the request, the trial court failed in its duties. A judge is required to "investigate as long and as thoroughly as the circumstances. . . demand," whenever a defendant makes a request to represent himself. See, Bellevue v. Acrey, 103 Wn.2d 203, 210, 691 P.2d 957 (1984) (quotations omitted). The purpose of this investigation is to make sure that the defendant understands the potential risks of representing himself, before he chooses to do so, and the preferred method is a colloquy on the record between the court and defendant. Id.

Here, no such colloquy occurred. Indeed, the court never discussed

the motion at all. Yet Mr. Gomez Vasquez clearly filed his request, asking to be allowed to represent himself. See CP 14-16.

There is no question that allowing a defendant in a criminal case to represent himself can be disruptive. Without proper education in the law, a pro se defendant is likely to cause delays and difficulties in the orderly progress of the case. Such inconvenience, however, has no bearing on whether a defendant's rights should be honored. As the Supreme Court recently declared:

> Although the trial court's duties of maintaining the courtroom and the orderly administration of justice are extremely important, the right to represent oneself is a fundamental right explicitly enshrined in the Washington Constitution and implicitly contained in the United States Constitution. The value of respecting this right outweighs any resulting difficulty in the administration of justice.

State v. Madsen, 168 Wn.2d 496, 509, 229 P.3d 714 (2010). Mr. Gomez Vasquez was deprived of his constitutional rights to represent himself, for no apparent reason other than that the trial court simply did not pass on the issue. Reversal and remand for a new trial is required.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 30th day of January, 2013.

Respectfully submitted,

/s/Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

CERTIFICATE OF SERVICE BY MAIL AND PORTAL UPLOAD

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel via this Court's portal upload and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:
to Mr. Juan Jose Gomez Vasquez, DOC 761317, Clallam Bay CC, 1830 Eagle Crest Way, Clallam Bay, WA. 98326.

DATED this 30th day of January, 2013.

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

RUSSELL SELK LAW OFFICES

January 30, 2013 - 4:53 PM

Transmittal Letter

Document Uploaded: 434229-Appellant's Brief.pdf

Case Name: State v. Gomez Vasquez

Court of Appeals Case Number: 43422-9

Is this a Personal Restraint Petition? ○ Yes ◉ No

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: Appellant's
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Petition for Review (PRV)
- ○ Other: _____

Comments:

No Comments were entered.

Sender Name: K A Russell Selk - Email: karecrire@aol.com

A copy of this document has been emailed to the following addresses:

pcpatcecf@co.pierce.wa.us