SUPREME COURT NO. 91513-0

NO. 71005-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GERARDO ARELLANO-GAMA,

Petitioner.

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

The Honorable Susan K. Cook, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Gerardo Arellano Gama (Arellano) asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

The petitioner seeks review of the Court of Appeals' unpublished opinion in State v. Gerardo Arellano-Gama, case no. 71005-2-I, filed March 2, 2015 ("Opinion"). The opinion is attached as an Appendix.

C. ISSUE PRESENTED FOR REVIEW

Did the trial court violate the petitioner's right to a public trial, and the public's right to open court proceedings, by conducting peremptory challenges at a sidebar from which the public was excluded?

D. STATEMENT OF THE CASE[1]

The State charged Arellano with first degree unlawful possession of a firearm (UPFA), being an "alien" in possession of a firearm, and driving under the influence (DUI). CP 1-2.

During jury selection, after the parties finished questioning potential jurors, the court directed the parties to make their peremptory challenges at a sidebar, at which Arellano appears to have been present. Supp. RP at 24-25; CP 57. The court then called the jurors selected to

[1] This petition refers to the verbatim reports as follows: 1RP – 5/15 and 9/23/2013; 2RP – 9/24, 9/25, and 10/10/2013; and Supp. RP – 9/23/2013 (voir dire afternoon session only).

serve to the box. Supp. RP at 24-25; CP 57. The clerk's minutes, which were not filed until two days later, reveal that 10 total jurors were dismissed. CP 55-57, 64-65. The minutes indicate, by name of juror, which party exercised which challenge. CP 64-65.

Mid-trial, the court dismissed the second charge for insufficient evidence. 2RP 98; CP 39. The jury convicted Arellano of the remaining two charges. CP 36-37. It also entered special verdicts finding him guilty based on driving a motor vehicle "under the influence of or affected by intoxicants" and having "a blood alcohol concentration of .08 or higher." CP 38.

The court sentenced Arellano to 24 months on the firearm charge, within the standard range. On the DUI charge, the court sentenced him to 364 days of incarceration, with all but one day suspended, as well as 60 months of probation. CP 43; RCW 9.95.210; former RCW 46.61.5055(11) (2012).

Arellano appealed, arguing the public trial issue identified above. He also argued the State committed prosecutorial misconduct and imposed an illegal community custody condition.

The Court of Appeals rejected the public trial argument, stating, "Washington appellate court[s] have repeatedly held that identical or analogous procedures for peremptory challenges do not implicate a defendant's public trial rights. We adhere to the analysis in these decisions." Opinion at 4, n.5 (citing inter alia, State v. Dunn, 180 Wn. App. 570, 321 P.3d 1283 (2014), review denied, 181 Wn.2d 1030 (2015); State v. Marks, ___ Wn. App. ___, 339 P.3d 196 (2014);[2] and State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), review granted, 191 Wn.2d 1029 (2015)).[3]

The Court also rejected the other arguments. Opinion at 5-9 (finding that while misconduct occurred, Arellano did not show improper comments were incurable and prejudicial); Opinion at 9-11 (rejecting vagueness challenge to community custody condition).

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[2] A petition for review is pending in Marks under case no. 91148-7. As for the Dunn case, Mr. Dunn passed away while his petition was pending, and review was ultimately denied. See case no. 90238-1.

[3] This Court heard oral argument in Love on March 10, 2015 and a decision is pending. See case no. 89619-4.

E. REASONS REVIEW SHOULD BE ACCEPTED

BECAUSE THE EXERCISE OF PEREMPTORY CHALLENGES IN THIS CASE VIOLATED ARELLANO'S RIGHT TO PUBLIC JURY SELECTION, THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(1), (3), AND (4).

1. The trial court's procedure violated Arellano's right to public jury selection and the public's right to open court proceedings because peremptory challenge are part of the voir dire process.

The Sixth Amendment and article I, section 22 guarantee the accused a public trial by an impartial jury. Presley v. Georgia, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 629 (1995). Additionally, article I, section 10 provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." The latter provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

While the right to a public trial is not absolute, a trial court may restrict the right only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Before a judge can close any part of a trial, therefore, he or she must first apply on the record the five factors set forth in Bone-Club. In re Pers. Restraint of Orange, 152 Wn.2d 795, 806-07, 809, 100 P.3d 291 (2004). A violation of the right to a public trial is presumed prejudicial on a direct appeal and is not subject to harmless error

analysis. State v. Wise, 176 Wn.2d 1, 16-19, 288 P.3d 1113 (2012); State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006).

In analyzing public trial right cases, this Court examines (1) whether the public trial right is implicated; (2) if so, whether there was a closure; and (3) if there was a closure, whether it was justified. State v. Smith, 181 Wn.2d 508, 513, 334 P.3d 1049 (2014) (citing State v. Sublett, 176 Wn.2d 58, 92, 292 P.3d 715 (2012) (Madsen, C.J., concurring)).

Jury selection in a criminal case is subject to the public trial right and is typically open to the public. Press-Enter. Co. v. Superior Court of California, Riverside Cnty., 464 U.S. 501, 506-08, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (Press I); Strode, 167 Wn.2d at 227 (lead opinion); Strode, 167 Wn.2d at 236 (concurrence). Parties' challenges of jurors have historically been conducted in public. Press I, 464 U.S. at 506-08. In Strode, moreover, jurors were questioned, and "for-cause" challenges conducted, in chambers. This Court treated the "for-cause" challenges in the same manner as individual questioning and held exercise in chambers violated the right to a public trial. Strode, 167 Wn.2d at 224, 227, 231 (lead opinion); Strode, 167 Wn.2d at 236 (concurrence).

Although the Court in this case relied on Marks to reject Arellano's claim,[4] the earlier opinion of Division Two in State v. Wilson supports Arellano's claim. 174 Wn. App. 328, 335-37, 298 P.3d 148 (2013). In Wilson, the Court applied the "experience and logic" test adopted in Sublett, 176 Wn.2d 58, to find that the administrative excusal of two jurors for illness did not violate Wilson's public trial rights. The Court noted that, historically, the public trial right has not extended to excusals for hardship before voir dire begins. But in doing so, the Court expressly differentiated between those excusals and "for-cause" and peremptory challenges, which must occur openly. Wilson, 174 Wn. App. at 342 (unlike potential juror excusals governed by CrR 6.3, exercise of peremptory challenges, governed by CrR 6.4, constitutes part of "voir dire," to which the public trial right attaches).

Thus, in Wilson, Division Two appeared to recognize, correctly, that "for-cause" and peremptory challenges are part of voir dire, which must be conducted openly, to be distinguished from the broader concept of "jury selection," which may encompass proceedings that need not. Wilson, 139 Wn. App. at 339-40; see also Press I, 506-08, 506 n. 4 (exercise of challenges is integral part of voir dire process).

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[4] Opinion at 4, n.5.

In Marks, 339 P.3d at 199, however, the same Court appeared to reverse course and hold that peremptory challenges are not part of voir dire. But the Court's attempt to reframe its prior consideration of the matter makes little sense. There, the Court observed that CrR 6.4(b) refers to "voir dire examination," apparently excluding of the exercise of challenges from "voir dire." Marks, 339 P.3d at 199. But, contrary to that reasoning, the rule's inclusion of the term "examination" instead indicates that the "examination" portion should be differentiated from voir dire as a whole, which would therefore include the exercise of challenges.[5] Division Two's reframing of its discussion in Wilson violates this principle. Moreover, if "voir dire examination" enables the intelligent exercise of peremptory challenges, then it follows that peremptory challenges themselves are an integral part of voir dire.

Contrary to Marks, and consistent with Wilson and Press I, peremptory challenges implicate the public trial right. Here, the peremptory challenges were conducted away from public scrutiny, at a private sidebar. The record of which party exercised which challenge was

[5] Court rules are interpreted in the same manner as statutes, Jafar v. Webb, 177 Wn. 2d 520, 526, 303 P.3d 1042 (2013), and courts presume statutes do not include superfluous language. State v. Roggenkamp, 153 Wn.2d 614, 624-25, 106 P. 106 P.3d 196 (2005).

not filed until two days later. The procedure used by the court in this case constituted an unjustified closure. Reversal is required.

2. The "experience and logic" test also supports the need for open exercise of peremptory challenges.

Assuming for the sake of argument it is necessary to apply the "experience and logic," the result is no different: The public trial right attaches to the exercise of peremptory challenges. To employ the test, courts examine (1) whether the place and process have historically been open and (2) whether public access plays a significant positive role in the functioning of the process. Sublett, 176 Wn.2d at 73 (citing Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press II).

First, Arellano can satisfy the "logic" prong because meaningful public scrutiny plays a significant positive role in the exercise of peremptory challenges. The right of an accused to a public trial "keep[s] his triers keenly alive to a sense of their responsibility" and "encourages witnesses to come forward and discourages perjury." Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). "[J]udges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." Estes v. Texas, 381 U.S. 532, 588, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965) (Harlan, J.,

concurring). The openness of jury selection (including which side exercises which challenge) enhances core values of the public trial right, "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Sublett, 176 Wn.2d at 75; see Orange, 152 Wn.2d at 804 (process of jury selection "is itself a matter of importance, not simply to the adversaries but to the criminal justice system").

While peremptory challenges may be made for almost any reason, openness still fosters core values of the public trial right, such as to ensure that there is no inappropriate discrimination. This protection can only be accomplished if peremptory challenges are made in open court in a manner allowing the public to determine whether a party is targeting and eliminating jurors for impermissible reasons. See State v. Sadler, 147 Wn. App. 97, 107, 109-118, 193 P.3d 1108 (2008) (private Batson[6] hearing following State's use of peremptory challenges to remove only African-American jurors from panel denied defendant his right to public trial), review denied, 176 Wn.2d 1032 (2013), overruled on other grounds, Sublett, 176 Wn.2d at 71-73; see also State v. Saintcalle, 178 Wn.2d 34, 46, 88-95, 118-19, 309 P.3d 326 (2013) (opinions highlighting difficulty

[6] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

of obtaining appellate relief for discriminatory acts even where discriminatory exercise of peremptory challenges may have occurred).

Regarding the historic practice, as recognized by the United States Supreme Court, the voir dire process as a whole, including the exercise of challenges, has been historically open to the public. Press I, 464 U.S. at 506 n. 4 (providing historical example of open exercise of challenges to jurors); see also see also People v. Harris, 10 Cal.App.4th 672, 684, 12 Cal.Rptr.2d 758 (1992) (state and federal authority support conclusion that "peremptory challenge process is a part of the 'trial' to which a criminal defendant's constitutional right to a public trial extends"); accord, Hollis v. State, 221 Miss. 677, 74 So.2d 747 (1954) (to comply with state constitutional mandate of a public trial, peremptory challenges must be exercised at the bar, in open court, not at a private conference).

Love, a case out of Division Three that was relied on by Division Two in Dunn and Marks, appears to have reached an incorrect conclusion as to this factor. Love cites to one Washington case, State v. Thomas, 16 Wn. App. 1, 553 P.2d 1357 (1976), as "strong evidence that peremptory challenges can be conducted in private." Love, 176 Wn. App. at 918. The Thomas Court rejected the argument that "Kitsap County's use of secret—written—peremptory jury challenges" violated the defendant's right to a fair and public trial where, notably, the defendant had failed to cite to any

supporting authority. Thomas, 16 Wn. App. at 13. Notably, Thomas predates Bone-Club by nearly 20 years. But most significantly, the fact that the Thomas appellant challenged the practice suggests it was atypical even at the time.

In summary, both prongs of the experience and logic test support that the public trial right was implicated.

3. The filing of a written record after-the-fact does not render the proceedings open or otherwise cure the error.

In response, the State may argue that the opportunity to find out, sometime after the process, which side eliminated which jurors satisfies the pubic trial right. In other words, the State may argue that the filing of paperwork listing each side's peremptory challenges renders the proceedings open.

Any such argument should be rejected. Even if members of the public could recall which juror name or number was associated with which individual, they also would have to recall the identity, gender, and race of those individuals to determine whether protected group members had been improperly targeted. In Arellano's case, this would have required members of the public to recall, two days later, the characteristics of 10 individuals. CP 55-57, 64-65. This is not realistic. But see State v. Filitaula, ___ Wn. App. ___, 339 P.3d 221, 223 (2014) (Division One

opinion holding it is sufficient to file written form containing names and numbers of the prospective jurors who were removed by peremptory challenge, listing the order in which the challenges were made, and identifying the party who made them).

In addition, Wise holds individual questioning of jurors in chambers, even when questioning was recorded and transcribed, violates the public trial right. 176 Wn.2d 1. By analogy, filing a record of which party exercised which challenge after-the-fact is inadequate as well.

In summary, Arellano's right to a public trial, and the public's right to open proceedings, were violated. Because the Court of Appeals' opinion conflicts with decisions of the United States Supreme Court and this Court, involves a significant question of constitutional law, and is a matter of substantial public interest, this Court should accept review. RAP 13.4(b)(1), (3), and (4).

F. CONCLUSION

For the foregoing reasons, this Court should accept review.

DATED this 1ST day of April, 2015.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 71005-2-I
Respondent,	)	DIVISION ONE
v.	)	
GERARDO ARELLANO-GAMA,	)	UNPUBLISHED
Appellant.	)	FILED: March 2, 2015

Cox, J. – A jury found Gerardo Arellano-Gama guilty of unlawful possession of a firearm in the first degree and driving under the influence (DUI). On appeal, he contends that the deputy prosecutor committed reversible misconduct during closing argument and that the trial court violated his public trial rights and imposed an unconstitutionally vague condition of community supervision. But Arellano-Gama did not object to the deputy prosecutor's argument, and he has failed to establish that a curative instruction would have been ineffective and that any misconduct was prejudicial. Nor did the trial court violate Arellano-Gama's public trial rights by permitting the exercise of peremptory challenges at a sidebar, or abuse its discretion by prohibiting Arellano-Gama, as a condition of community supervision, from possessing "drug paraphernalia." We therefore affirm.

During the early morning hours of January 6, 2013, Sylvia Alvarez heard a loud noise outside of her Mount Vernon apartment. Alvarez looked out her

window and saw a white car dragging a bumper and speeding into the parking lot. Alvarez called 911.

After the car parked, the driver got out and went into a nearby apartment. The driver appeared to be drunk from the way he was walking. A woman got out of the car from the passenger door. Alvarez identified Arellano-Gama in court as the driver.

A short time later, Arellano-Gama emerged from the apartment. The woman put him into the back seat of the white car and then got into the driver's seat. Police officers arrived just as the woman started to drive away.

Mount Vernon police officers Chester Curry and Zachary Wright responded to the 911 report. Upon arriving, Officer Curry saw a white Nissan Murano stopped partially off the roadway and straddling the sidewalk. The right front wheel rim was broken and the tire was flat.

As he approached the car, Officer Curry saw Arellano-Gama get out of the front passenger door and stagger toward him "on unsteady legs." When Arellano-Gama ignored his command to stop, Officer Curry restrained him on the shoulder. Arellano-Gama expressed a desire to go into the apartment. Officer Curry noticed that Arellano-Gama's eyes were bloodshot, that he smelled strongly of alcohol, and that he slurred his words.

While Officer Curry engaged Arellano-Gama, Officer Wright approached the Nissan and observed a small silver .22 caliber "pocket gun" lying on the front passenger seat. Officer Wright later determined that the gun was loaded. When

Officer Wright informed Officer Curry about the gun, Arellano-Gama responded, "that's nothing" or "that's no big deal."

The officers arrested Arellano-Gama and transported him to the station for a breath test. The two tests showed blood alcohol levels of .215 grams per milliliter and .242 grams per milliliter.

The State charged Arellano-Gama with DUI and unlawful possession of a firearm in the first degree.[1]

At trial, Arellano-Gama testified that he spent the evening before his arrest at a bowling alley. He explained that the white Nissan belonged to his fiancée. Before driving to the bowling alley, he consumed two cups of brandy and cola in the car. He recalled having five or six beers at the bowling alley, but could not recall leaving. He could not remember anything until the officers tackled him and he took the breath tests at the police station. Arellano-Gama denied ever having seen the gun or knowing to whom it belonged.

The jury found Arellano-Gama guilty as charged. The court sentenced him to 24 months on the firearm charge and 364 days, with 363 days suspended, on the DUI charge.

Public Trial

Arellano-Gama contends that the trial court violated his public trial rights by allowing the parties to exercise their peremptory challenges during a sidebar

[1] The court dismissed a charge of being an alien in possession of a firearm for insufficient evidence.

conference. He argues that peremptory challenges are an integral part of jury voir dire and jury selection and must therefore be exercised in open court.

A criminal defendant has a right to a public trial under both the state and federal constitutions.[2] But "not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public."[3] Consequently, before determining whether a public trial violation occurred, an appellate court first considers "whether the proceeding at issue was one to which the constitutional right to a public trial attaches."[4]

Here, the parties questioned the jury venire in open court and on the record. The court then announced that counsel would discuss jury selection at a sidebar conference. At the conclusion of the conference, the court identified in open court which jurors had been selected. The court also documented, as part of the public record, the identity of each juror challenged, the order of the challenges, and the party that exercised the challenge.

Washington appellate court have repeatedly held that identical or analogous procedures for peremptory challenges do not implicate a defendant's public trial rights.[5] We adhere to the analysis in these decisions. The trial court did not violate Arellano-Gama's public trial rights.

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[2] State v. Lormor, 172 Wn.2d 85, 90-91, 257 P.3d 624 (2011); see U.S. Const. amends. VI, XIV; Wash. Const. art. I, § 22.

[3] State v. Koss, 181 Wn.2d 493, 499, 334 P.3d 1042 (2014) (quoting State v. Sublett, 176 Wn.2d 58, 71, 292 P.3d 715 (2012)).

[4] Koss, 181 Wn.2d at 499.

[5] See, e.g., State v. Dunn, 180 Wn. App. 570, 574-75, 321 P.3d 1283 (2014), review denied, 181 Wn.2d 1030 (2015) (the exercise of peremptory challenges at clerk's station does not implicate public trial right); State v. Marks, ___ Wn. App. ___, 339 P.3d 196

Prosecutorial Misconduct

Arellano-Gama contends that prosecutorial misconduct during closing argument violated his right to a fair trial. He maintains that the deputy prosecutor used an improper "fill in the blank" argument that misstated the burden of proof and then highlighted the misstatements with a PowerPoint slide. Defense counsel did not object to the challenged comments or the slide.

A defendant claiming prosecutorial misconduct bears the burden of establishing that the challenged conduct was both improper and prejudicial.[6] Prejudice occurs only if "there is a substantial likelihood the instances of misconduct affected the jury's verdict."[7] We review misconduct claims in the context of the total argument, the evidence addressed, the issues in the case, and the jury instructions.[8] Where, as here, the defendant fails to object, we will not review the alleged error unless the defendant demonstrates that the misconduct was "so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct."[9] This analysis

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(2014) (exercise of peremptory challenges in writing at sidebar conference did not implicate public trial rights), petition for review filed; State v. Love, 176 Wn. App. 911, 919-20, 309 P.3d 1209 (2013) (challenges for cause and peremptory challenges at a sidebar do not implicate public trial rights), review granted in part, 181 Wn.2d 1029 (2015); see also State v. Filitaula, ___ Wn. App. ___, 339 P.3d 221 (2014) (exercise of peremptory challenges in writing, rather than orally, does not implicate defendant's public trial rights), petition for review filed; State v. Smith, 181 Wn.2d 508, 334 P.3d 1049 (2014) (sidebar conferences in hallway do not implicate public trial rights).

[6] State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003).

[7] State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

[8] State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005).

[9] State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

focuses more on whether any resulting prejudice could have been cured, rather than on the flagrant or ill-intentioned nature of the comments.[10]

During closing argument, the deputy prosecutor informed the jury that the State had the burden of proving the elements of the crime beyond a reasonable doubt. He then attempted to explain that burden:

> So in doing that, you're applying that reasonable doubt standard. And you get an instruction about reasonable doubt, Instruction Number 3, which describes what reasonable doubt is. But it's a little bit circular. I like to look at it more of what that concept is and think about it in breaking it down. Reasonable means there has to be a reason. It's a doubt with a reason you can attach to it. In other words, you have to say why there's a reason that this doubt exists in my mind as a particular element. If you're going to find it's not proven beyond a reasonable doubt, if you don't have any reason that you can attach to that, that you can explain to your jurors then it's proven beyond a reasonable doubt, if there's not something you can attach to it.[11]

During this portion of the argument, the deputy prosecutor displayed a PowerPoint slide stating that reasonable doubt was "a doubt with a REASON you can attach to it" and "A REASON you can explain to your fellow jurors."[12]

Arellano-Gama contends that the highlighted comment was essentially identical to "fill in the blank" arguments that Washington courts have repeatedly found to be improper.[13] In State v. Emery, the deputy prosecutor argued that:

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[10] State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).
[11] Report of Proceedings (Sept. 24, 2013) at 127-28 (emphasis added).
[12] Brief of Respondent at 11.
[13] See, e.g., Emery, 174 Wn.2d at 759; State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009).

> [I]n order for you to find the defendant not guilty, you have to ask yourselves or you'd have to say, quote, I doubt the defendant is guilty, and my reason is blank. A doubt for which a reason exists. If you think that you have a doubt, you must fill in that blank.[14]

Our Supreme Court concluded that the "fill in the blank" argument was improper because it implied that the jury "must be able to articulate its reasonable doubt by filling in the blank."[15] The court found that this argument "subtly shifts the burden to the defense" and "could potentially have confused the jury about its role and the burden of proof."[16]

Contrary to the State's assertions, we agree with Arellano-Gama that the deputy prosecutor's remarks were analogous to the improper argument in Emery. First, the deputy prosecutor incorrectly suggested that the jury had to articulate a basis for any reasonable doubt. The deputy prosecutor then informed the jury that if it could not articulate a basis for reasonable doubt -- "that you can explain to your jurors" – "then it's proven beyond a reasonable doubt." As in Emery, the argument improperly suggested that the jury could acquit only if it could articulate a reason for doubt.

Although the deputy prosecutor's comments were improper, Arellano-Gama must also demonstrate that a curative instruction could not have obviated the prejudicial effect of the misstatements and that the argument had a substantial likelihood of affecting the jury verdict.[17] He fails to satisfy this burden.

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[14] 174 Wn.2d at 750-51.
[15] Id. at 760.
[16] Id. at 760, 763.
[17] Id. at 761.

The Emery court concluded that the improper arguments were potentially confusing, but not "inflammatory."[18] Consequently, a timely objection could have cured any potential confusion or prejudice and permitted the trial court to reiterate the State's burden of proof.[19] In determining that the defendants could not show a substantial likelihood that the misstatements affected the jury's verdict, the court considered the context of the improper comments and jury instructions that correctly set forth the State's burden of proof.[20]

Here, as in Emery, the deputy prosecutor's misstatements formed a discrete and limited portion of the total argument. The deputy prosecutor repeatedly told the jury that the State bore the burden of proving the elements of the crime beyond a reasonable doubt. The court's instructions correctly informed the jury of the State's burden of proof, that the defendant "has no burden of proving that a reasonable doubt exists,"[21] and "to disregard any remark, statement, or argument that is not supported by the evidence or the law in [the court]s] instructions."[22]

Arellano-Gama argues that the PowerPoint slide emphasized the misconduct and exacerbated the resulting prejudice. But the single slide reproduced only a portion of the improper argument. A timely objection and

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[18] Id. at 763.
[19] Id. at 764.
[20] Id. at 762-64.
[21] Clerk's Papers at 20.
[22] Id. at 17.

curative instruction could have negated any potential confusion and prejudice resulting from both the comments and the slide.

Given the discrete and limited scope of the misstatements, the State's repeated reliance on the correct burden of proof throughout the entire closing argument, and the trial court's instructions setting forth the correct burden of proof, Arellano-Gama has failed to establish that the improper comments were incurable and prejudicial.

Sentencing Condition

Arellano-Gama contends that the trial court erred in imposing, as a condition of community supervision, a prohibition from possessing "drug paraphernalia." He argues that the term "drug paraphernalia" is unconstitutionally vague.

"[T]he due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution requires that citizens have fair warning of proscribed conduct."[23] Statutes and other legal standards are unconstitutionally vague if they do not "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed," or do not "provide ascertainable standards of guilt to protect against arbitrary enforcement."[24]

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[23] State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008).
[24] Id. at 752-53.

When assessing vagueness, a court considers terms in the context of their use.[25] Because of the inherent vagueness of language, citizens may have to consult statutes and court rulings to clarify the meaning of a specific term.[26] Such sources are "presumptively available to all citizens."[27] If "persons of ordinary intelligence can understand what the [law] proscribes, notwithstanding some possible areas of disagreement, the [law] is sufficiently definite."[28] We do not accord a sentencing condition the presumption of constitutionality.[29]

We will overturn the trial court's imposition of a sentencing condition only for a manifest abuse of discretion.[30]

Arellano-Gama relies solely on State v. Sanchez Valencia,[31] in which the court held that a sentencing condition prohibiting the possession of "any paraphernalia that can be used for the ingestion or processing of controlled substances" was unconstitutionally vague.[32] The court concluded that the term "paraphernalia" was too broad to provide fair notice of prohibited conduct and failed to provide ascertainable standards to protect against arbitrary enforcement.[33]

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[25] Id. at 754.
[26] Id. at 756.
[27] Id. (quoting State v. Watson, 160 Wn.2d 1, 8, 154 P.3d 909 (2007)).
[28] City of Spokane v. Douglass, 115 Wn.2d 171, 179, 795 P.2d 693 (1990).
[29] State v. Sanchez Valencia, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010).
[30] Bahl, 164 Wn.2d at 753.
[31] 169 Wn.2d 782, 792, 239 P.3d 1059 (2010).
[32] Id. at 785.
[33] Id. at 794-95.

In determining that the term "paraphernalia" was unconstitutionally vague, the court in Sanchez Valencia expressly distinguished the more specific term "drug paraphernalia."[34] Moreover, the Uniform Controlled Substances Act expressly defines "drug paraphernalia":

> "[D]rug paraphernalia" means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance.[35]

The statutory definition not only includes a lengthy, non-exclusive list of specific items that constitute drug paraphernalia, but also imposes express intent requirements that the prohibited objects be "intended for use" in conjunction with controlled substances. The detailed statutory definition and intent requirements for "drug paraphernalia" serve to provide fair notice of the prohibited conduct and protect against arbitrary enforcement, the two deficiencies that the court in Sanchez Valencia identified for the term "paraphernalia." The condition prohibiting "drug paraphernalia" is not unconstitutionally vague.

Affirmed.

Cox, J.

WE CONCUR:

Dwyer, J.

Spearman, C.J.

[34] Id. at 794.
[35] RCW 69.50.102(a).

NIELSEN, BROMAN & KOCH, PLLC

April 01, 2015 - 1:50 PM

Transmittal Letter

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Case Name: Gerardo Arellano-Gama
Court of Appeals Case Number: 71005-2

Party Respresented:

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