74110-1

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Court of Appeals
Division I
State of Washington

NO. 74110-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JUAN GARCIA-MENDEZ,

Appellant.

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

The Honorable John H. Chun, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to a fair trial when the prosecutor committed multiple acts of flagrant misconduct.

2. Appellant was denied effective assistance of counsel when defense counsel failed to object to the prosecutor's misconduct.

3. Did the trial court err when it miscalculated appellant's presumptive sentence?

4. If the State seeks appellate costs, those should be denied.

Issues Pertaining to Assignments of Error

1. During closing arguments, the prosecutor stated her opinion that appellant was guilty of attempted murder, but that her office made it "easy" for the jury by only charging appellant with first degree assault. The prosecutor also misstated the law as to self-defense by telling the jury it could find appellant was the first aggressor based solely on his state of mind that evening, rather than his conduct at the time of the incident. The prosecutor also conveyed to the jury that they needed to return a verdict that would bring the alleged victim "justice." Did this flagrant and prejudicial

misconduct deny appellant his right to a fair trial?

2. Defense counsel failed to object to the above stated misconduct. Did this constitute ineffective assistance of counsel?

3. When imposing sentence, the trial court mistakenly calculated appellant's standard range to be sixty months more than provided for in the Sentencing Reform Act of 1981 (SRA). Is remand for resentencing required?

4. Appellant is indigent. Should this Court deny appellant costs if they are requested?

B. STATEMENT OF THE CASE

1. Procedural History

On April 3, 2013, the King County prosecutor charged appellant Juan Garcia-Mendez with one count of first-degree assault with a firearm, one count of unlawful possession of a firearm, and an aggravator for rapid recidivism. CP 22-28. A jury found Garcia-Mendez guilty as charged. CP 281, 283, 284. He was sentenced to 400 months of confinement. CP 297-305; 1RP 199.[1] Garcia-Mendez timely appeals his conviction and sentence. CP 309-326.

[1] This brief refers to the verbatim report of proceedings as follows:

2. Substantive Facts.

On April 1, 2013, Garcia-Mendez and Richard Powell encountered each other in a West Seattle alley shortly before midnight. 2RP 131, 670, 942. Powell, a town car driver, was standing outside his car filling out paperwork and taking a smoke break. 2RP 124, 130. Powell was wearing a concealed Glock 9-millimeter pistol on his person for which he had a permit. 2RP 126. He had been robbed six months earlier and, as a consequence, carried a concealed weapon because he never wanted to feel helpless if a similar situation occurred. 2RP 126-27.

At some point, Garcia-Mendez and a friend approached Powell.[2] 2RP 942. A shoot-out ensued in which Powell and Garcia-Mendez wounded each other. 2RP 679-80. Powell was shot three times in the chest and nearly died. RP 594, 599. He

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- "1RP" – the single volume containing proceedings from 12/13/13, 5/1/15, 6/29/15, 7/1/15, 7/7/15, 9/25/15.
- "2RP" – the remaining volumes starting on 7/9/15 that are consecutively paginated.

[2] There was disputed evidence as to Garcia-Mendez's purpose for approaching Powell. While there was testimony suggesting Garcia-Mendez and two friends got in the car that night with the intent to go out and rob and cause damage to people, there was also testimony that Garcia-Mendez said he was merely asking for directions when he and a friend approached Powell. 2RP 131, 942, 944, 973.

was able to call 911, and responding officers and medics were able to stabilize him. 2RP 114, 131.

Meanwhile, Garcia-Mendez had been shot by Powell in the arm, hand, and flank. 2RP 602. After being shot, he ran back to the car he arrived in, and his friend drove him a short distance away. 2RP 231. Shortly thereafter, Garcia-Mendez ran into the street to flag down a passing police officer, seeking help for his wounds. 2RP 294-295, 304.

The primary issue at trial was whether Garcia-Mendez had acted in self-defense, or whether he was the first aggressor. Specifically, the question was whether Garcia-Mendez drew his weapon first, or whether he was reacting after Powell first drew his gun. 2RP 691-92. While the State introduced a surveillance video of the incident showing a quick exchange of gunfire between Garcia-Mendez and Powell, with Garcia-Mendez firing first, it did not show who drew their gun first. 2RP RP 279-80, 691. Based on what he saw in the video, the State's expert admitted it was possible the victim drew first. 2RP 692.

It was the defense's theory that Powell, who had been the previous victim of a robbery and was armed in case it happened again, had been spooked when Garcia–Mendez and his friend

approached Powell to ask for directions. Perhaps understandably, Powell pulled out his gun. Unfortunately, however, this prompted Garcia-Mendez to defend himself by drawing his own weapon and shooting. 2RP 1054-57.

By contrast, the State's theory was that Garcia-Mendez approached Powell with his gun drawn in an attempt to rob Powell. 2RP 1033. This theory rested primarily on the testimony of Powell and Lawrence Askew, a former cellmate of Garcia-Mendez. 2RP 1033. Powel had testified that he remembered seeing Garcia-Mendez with gun drawn before he drew his own gun. 2RP 131, 172. However, under cross-examination, Powell admitted that he never told officers that Garcia-Mendez displayed a gun when he gave his first statement recounting the incident. 2RP 154-56. He also stated he had been exposed to outside news sources and discussion by family and friends about the incident. RP 156-57.

The State also relied on the testimony of Askew. 2RP 1033. According to Askew, Garcia-Mendez claimed that he and his friend came up to Powell with guns drawn. 2RP 946. Upon cross-examination, however, Askew was forced to admit that he had access to Garcia-Mendez's court documents and discovery before reporting his story to authorities and that he had received leniency

in his own criminal matters in exchange for his testimony against Garcia-Mendez.[3] 2RP 951, 955-59.

C. ARGUMENT

I. GARCIA-MENDEZ WAS DENIED A FAIR TRIAL WHEN THE PROSECUTOR COMMITTED MULTIPLE ACTS OF FLAGRANT MISCONDUCT.

Garcia-Mendez was denied his right to a fair trial when the prosecutor committed misconduct during closing argument, some of which were objectionable on multiple grounds and all of which resulted in an enduring prejudice to the outcome of the case.

Prosecutorial misconduct may deprive a defendant of the fair trial guaranteed him under the state and federal constitutions. State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); State v. Evans, 163 Wn. App. 635, 642, 260 P.3d 934 (2011). Because of their unique position in the justice system, prosecutors must steer wide from unfair trial tactics. Monday, 171 Wn.2d at 676.

> A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice.

[3] Further facts relevant to the specific legal issues raised are included below.

Id. Defendants are among the people the prosecutor represents and, therefore, the prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Id.

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. Monday, 171 Wn.2d at 675, (citations omitted). Prejudice is established where there is a substantial likelihood that the misconduct affected the jury's verdict. Id. at 578.

Failure to object to a prosecutor's improper remark constitutes waiver unless the remark is deemed to be flagrant and ill-intentioned. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). However, if the misconduct is flagrant, the petitioner has not waived his right to review of the conduct. State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978). In such cases, reversal is required if the misconduct caused an enduring and resulting prejudice. State v. Jones, 144 Wn. App. 284, 290, 183 P.3d 307, 311 (2008).

Here, the prosecutor flagrantly engaged in misconduct through unfair argument in which she: (1) expressly told the jury that she believed Garcia-Mendez had committed attempted murder, but her office made it "easy" on the jury by only charging first degree assault; (2) misrepresented the law as to whether Garcia-

Mendez was the first aggressor; and (3) appealed to the passions of the jury when she told the jurors to bring Powell justice via their verdict. The cumulative effective of this misconduct was to deny Garcia-Mendez a fair trial and an impartial verdict.

(i) The Prosecutor Improperly Stated Her Personal Opinion that Garcia-Mendez was Guilty of Attempted Murder.

a. Facts

During rebuttal argument, the prosecutor revealed her personal opinion that Garcia-Mendez was guilty, stating: "Now is this easily an attempted murder? Yeah." 2RP 1065. She went on to tell the jury: "But we made it easy for you. Assault in the first degree." 2RP 1065. She ended her argument by telling the jury that, "at the end of the day, [a guilty verdict is] a no-brainer." 2RP 1067.

b. Legal Argument

The prosecutor's statements were highly offensive to any notion of a fair trial and constituted an impermissible comment on guilt, an improper use of the power of the prosecuting attorney's office, a reference to facts not before the jury, and a deliberate effort to trivialize the State's burden.

It is impermissible for a prosecutor to express a personal opinion as to the credibility of a witness or the guilt of a defendant. State v. Lindsay, 180 Wn.2d 423, 437, 326 P.3d 125 (2014). Additionally, the prosecutor cannot use his or her position of power and prestige to sway the jury independent of the evidence. State v. Reed, 102 Wn.2d 140, 147-48, 684 P.2d 699, 701 (1984). Such misconduct poses a serious risk of prejudice because a "prosecutor's argument is likely to have significant persuasive force with the jury due in part to the prestige associated with the prosecutor's office." In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 706, 286 P.3d 673 (2012) (citing Am. Bar Ass'n Standards for Criminal Justice: Prosecution & Defense Function, std. 3–5.8, cmt. at 107 (3d ed.1993)).

It is the jury's duty to independently decide the case on the evidence. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). Hence, the prosecutor may make "only those arguments that are consistent with the trier's duty to decide the case on the evidence, and should not seek to divert the trier from that duty." ABA Criminal Justice Standards 3-6.8(c). The prosecutor may not divert the jury's attention away from the gravity

of its role in assessing its case by trivializing its own burden. State v. Walker, 164 Wn. App. 724, 732, 265 P.3d 191, 196 (2011).

A prosecutor must "seek convictions based only on probative evidence and sound reason," State v. Casteneda–Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). "[T]he scope of argument must be consistent with the evidence and marked by the fairness that should characterize all of the prosecutor's conduct." Glasmann, 175 Wn.2d at 705. Hence, a prosecutor may not make references to charges that were not brought against the defendant. State v. Boehning, 127 Wn. App. 511, 522, 111 P.3d 899, 905 (2005); State v. Torres, 16 Wn. App. 254, 256, 554 P.2d 1069 (1976); ABA Standards for Criminal Justice 3–6.9.

Here, the prosecutor violated these well-recognized precepts that are crucial to a fair trial process with a single line of argument. First, the she cavalierly stated that based on the facts of the case she had concluded that Garcia-Mendez was "easily" guilty of attempted murder. RP 1065. The is a truly outrageous statement for a government official to be making in a closing argument. Beyond offering the prosecutor's personal opinion on guilt,

reference to any attempted murder was not based on facts in evidence, irrelevant, and highly prejudicial.

The prosecutor's reference to the uncharged crime of attempted murder also effectively diverted the jury's attention away from reaching a verdict based on reason and the evidence before it. First, she elevated Garcia-Mendez's culpability to attempted murder. The implication of this was to say to the jury – I believe Garcia-Mendez is really a murderer and, thus an assault conviction necessarily follows. However, the notion of murder, or the attempt thereof, was not a material consideration in this case and very evocative.

A charge of "murder" is exceptionally powerful, evoking a serious emotional response and disdain from the average person. Thus, by injecting the concept of murder into Garcia-Mendez's trial, the prosecutor was arousing the passions of the jury against Garcia-Mendez. The jury should never have been thinking about murder during its deliberations, but the prosecutor's bombshell in rebuttal argument destroyed any real chance of that.

The prosecutor's statement about her personal opinion regarding Garcia-Mendez's guilt is notably similar prosecutorial misconduct as that which occurred in Reed. There, the prosecutor

stated: "He's a cold murder two. It's cold. There is no question about murder two." Reed, 102 Wn.2d at 144. The Washington Supreme Court found the prosecutor's statement of his personal opinion on guilt to be "reprehensible" and to constitute a "grievous departure" from the fundamental notions of the role of the prosecutor in a fair trial process. Id. at 146-48. The same occurred here.

Remarkably, the prosecutor did not stop with offering her personal opinion that the defendant was guilty of attempted murder; she went on to state that her office ("we") made it "easy" on the jury by only charging Garcia-Mendez with first degree assault. 2RP 1065. Again this was entirely irrelevant and beyond the evidence. More importantly, this statement served to trivialize the State's burden, and it was a thinly veiled attempt to throw the power of the prosecutor's office behind a guilty verdict. Indeed, the prosecutor summarized her entire argument by concluding "at the end of the day, it's a no-brainer." 2RP 1067. Such trivialization of the State's burden and misuse of the power of the prosecutor's office have no place in a fair trial.

Finally, the prosecutor trivialized the State's burden. Essentially, she told the jury "we" in the prosecutor's office know that Garcia-Mendez is guilty of attempted murder, so we expect that you, the jurors, will easily reach a verdict on first degree assault.

The prosecutor told the jury his office decided to throw them an "easy" charge and that a guilty verdict was a "no-brainer." These statements not only trivialized the State's burden, they were designed to divert the jury away from the kind of reasoned deliberations that are a hallmark of our judicial system. A jury should never be told that a guilty verdict is a "no-brainer" no matter how strong the prosecutor thinks her case. Our justice system demands a more reasoned consideration of the evidence.

In sum, Garcia-Mendez was denied his right to a fair trial when the prosecutor told the jury her personal opinion as to Garcia-Mendez's guilt, stated that her office made it easy on the jury by merely charging Garcia-Mendez with first degree assault, and trivialized the State's burden by stating reaching a guilty verdict was a "no-brainer." This misconduct violated several cannons of professional conduct. As such, it cannot be characterized as anything other than flagrant, and reversal is warranted.

(ii) The Prosecutor Misstated the Law when She Claimed Garcia-Mendez's Alleged Malicious Intent when He Went out that Night Was Sufficient Evidence to Find him the First Aggressor.

When determining whether a person is the first aggressor for self-defense purposes, the jury must consider the conduct of the two parties involved. The prosecutor misled the jury as to this point, telling them that Garcia-Mendez's state of mind when he got in the car on the evening of the incident determined whether he was the first aggressor. This line of argument misstated the law regarding the core issue in dispute and thus denied Garcia-Mendez his right to a fair jury determination regarding his defense.

a. Facts

Garcia-Mendez's defense was that he acted in self-defense and only pulled out his weapon after Powell drew his gun first. 2RP 1053-57. Defense counsel argued that it was understandable why Powell would draw his gun – he recently had been the victim of an armed robbery and did not want to feel helpless again. However, even under these circumstances, defense counsel argued, Garcia-Mendez was entitled to act in self-defense. 2RP 1053-54.

The jury was instructed that if it found Garcia-Mendez the first aggressor, self-defense was not available to him. CP 232.

The State argued to the jury that Garcia-Mendez was the first aggressor and not entitled to self-defense because: (1) the surveillance video showed Powell did not approach the others; (2) that it was unbelievable that Garcia-Mendez was just asking for directions; and (3) Garcia-Mendez was out that night with the intent to rob and damage people. 2RP 1046.

During rebuttal, the prosecutor again zeroed in on the question of who was the first aggressor and told the jury that defendant's state of mind alone qualified him as the first aggressor:

> The key issue here is what did Mr. Garcia intend. Because the intent, his intent that day, is what determines was he the primary aggressor ....

2RP 1063.

b. Legal Argument

The prosecutor may not misstate the law to the jury. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). This constitutes misconduct. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). "The prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury." State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

When the jury determines whether a defendant is a first aggressor, the crucial question is "whether the defendant's acts precipitated a confrontation with the victim." State v. Wingate, 155 Wn.2d 817, 821, 122 P.3d 908 (2005) (emphasis added). It is the defendant's conduct that must be scrutinized. Focusing on this, the Washington Supreme Court has concluded words are insufficient provocation to make some a first aggressor. State v. Riley, 137 Wn.2d 904, 911, 976 P.2d 624 (1999). If words alone are insufficient provocation, then surely Garcia-Mendez's state of mind when going out was insufficient proof that he was the first aggressor.

The State wrongly told the jury that Garcia-Mendez's intent to go out and cause trouble that evening was sufficient proof to deny him of the right to act in self defense. If the prosecutor's statement was correct, Garcia-Mendez could never claim self-defense for any acts the entire night because of his earlier state of mind. That means that even if someone pulled a knife on Garcia-Mendez while he was getting cash at a cash-machine and he defended himself, he would not be able to claim self-defense. The law does not support this kind of conclusion.

The law required the jury to look at Garcia-Mendez's conduct at the time of the incident with Powell, not his state of mind when he decided to go out that evening. The prosecutor's statements to the contrary constituted a misstatement of the law, which misled the jury as to the core issue in dispute.

The prosecutor knew that a critical issue here was whether Garcia-Mendez was the first aggressor. She also presumably knew the law as it pertains to first aggressors. Under the correct law, the jury's focus should have been directed to Garcia-Mendez's conduct. By telling the jury that Garcia-Mendez's intent – rather than his conduct at the time of the confrontation – was the controlling factor in regards to determining whether he was the first aggressor, the prosecutor gutted Garcia-Mendez's most crucial line of defense. This was flagrant misconduct that prejudiced Garcia-Mendez's right to have the jury fairly and fully consider his defense when deliberating. Consequently, reversal is required.

(iii) The Prosecutor Deliberately Invoked the Jury's Sympathies When She Asked the Jury to Bring Powell Justice by Finding Garcia-Mendez Guilty.

The jury's duty is to independently decide the case based on reasoned consideration of the evidence regardless of where their

personal sympathies may lay. Yet, the prosecutor blatantly played to the jurors' sympathies when she called on them to return a guilty verdict in order to bring justice to Powell.

a. Facts

The thrust of the State's argument was that Powell was an unsuspecting, innocent citizen who was gunned down by a man who was looking to rob and hurt someone. 2RP 1031-32. After emphasizing what a miracle it was that Powell was alive and able to testify against the defendant, the prosecutor stated: "Now it's time to bring him justice." 2RP 1033.

b. Legal Argument

A prosecutor is forbidden from appealing to the passions of the jury and encouraging it to render a verdict based on emotion rather than properly admitted evidence. Echevarria, 71 Wn. App. at 598; State v. Bautista–Caldera, 56 Wn. App. 186, 195, 783 P.2d 116 (1989) (holding it was misconduct to exhort jury to let the victims "know that you're ready to believe them and [e]nforce the law on their behalf"). The jury must independently decide the case based on reasoned consideration of the evidence submitted at trial, not on the whim of passions and sympathies. Echevarria, 71 Wn. App. at 598.

The weight of the prosecutor's argument that the jury must bring Powell justice was an exhortation to the jury to decide the case because they felt Powell deserved justice, not because the State had proved its case against Garcia-Mendez beyond a reasonable doubt. The prosecutor's statement was irrelevant and inflammatory. It served no purpose other than to inflame the passions of the jury. It had a natural tendency to stir juror sympathies and prejudice the jury against the Garcia-Mendez. As such, it constituted flagrant misconduct that denied appellant his right to an impartial verdict based solely on the evidence.

(iv) The Prosecutor's Multiple Acts of Flagrant Misconduct Resulted in Cumulative and Enduring Prejudice.

There are two standards for determining the prejudice stemming from prosecutorial misconduct. If there has been an objection, prejudice is established when there is a substantial likelihood that the misconduct affected the jury's verdict. Monday, 171 Wn.2d at 578. If defense counsel failed to object, there is a heightened standard. The defendant must show not only that the misconduct likely affected the verdict, but also that the conduct was so flagrant or ill-intentioned that it evinces an enduring prejudice

that could not have been cured by an instruction to the jury. Glasmann, 175 Wn.2d at 704.

The cumulative effect of repetitive prosecutorial misconduct may be so flagrant that no instruction or series of instructions could erase their combined prejudicial effect. State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011). In such cases, reversal is required. Glasmann, 175 Wn.2d at 707. This is one of those cases.

First, the prosecutor's opinion that Garcia-Mendez was guilty of attempted murder was a serious bombshell that damaged the trial process in numerous ways. She injected into the deliberation process the image of Garcia-Mendez as a potential murderer. He was not charged of this crime. It was utterly irrelevant and highly prejudicial to even mention it.

Not only did the prosecutor inject the highly evocative issue of "murder" into deliberations, she did so by offering her personal opinion that Garcia-Mendez was guilty of attempted murder: "Now is this easily an attempted murder? Yeah." CP 1065. The prosecutor's inability to restrain herself from telling the jury her opinion on guilt was truly outrageous misconduct, highly prejudicial, and had an enduring taint on the outcome of the case.

Yet, the prejudicial nature of the misconduct does not end with the prosecutor offering her opinion of Garcia-Mendez's guilt. The prosecutor went on to tell the jury that her office made it "easy" for the jury to convict by only asking them to consider assault in the first degree, not attempted murder. She told the jurors that a guilty verdict was a "no-brainer." This line of argument essentially conveyed to the jury that its job was trivial because the prosecutor's office had already determined the defendant was guilty. She implied the jurors need not put any real effort into reaching a verdict – the result was a foregone conclusion as far as the prosecutor's office was concerned.

The prosecutor's misuse of her office's prestige served no purpose other than to lull the jurors into a false sense of inevitability as to a guilty determination. This type of misconduct is prejudicial because of the high prestige of the prosecutor's office. With such institutional persuasive force, no instruction could have wiped from the juror's minds the prosecutor's personal determination and her office's conclusion Garcia-Mendez was guilty. As such, this line of argument is so prejudicial, and it so undermined Garcia-Mendez's ability to have an independent jury verdict, that reversal is required based on it alone.

However, the prejudice of the prosecutor's misconduct was amplified when the prosecutor misled the jury as to the law regarding first aggressors – the core issue for determining guilt. Garcia-Mendez's theory was that he was just asking Powell for directions, and it was Powell who pulled out a gun. While he may have shot Powell first, this was only after he believed Powell was going to shoot him. Hence, the key issue for the jury to decide was whether Powell or Garcia-Mendez was the first aggressor.

In her closing argument, the prosecutor misled the jury as to what evidence was sufficient to establish whether Garcia-Mendez was the first aggressor. She specifically told the jury that it was Garcia-Mendez's intent when he went out that night that determined whether he was the first aggressor. This is patently incorrect. It was his conduct during the interaction with Powell that should have determined whether Garcia-Mendez was the first aggressor. This was an important fact determination for the jury that required careful consideration of controverted facts. However, the prosecutor diverted the jury from even needing to delve into this consideration. As such, the prosecutor's argument was nothing more than a flagrant act of misconduct that struck at the core of the defense.

Even though the jury was given a first aggressor instruction that correctly stated the law, there is still a significant possibility the jury believed the prosecutor's misstatement of the law. The jury could have reasonably concluded that it was Garcia-Mendez's act of going out that night with the intent to hurt someone that determined whether he was the first aggressor. Hence, the jurors – after being misled by the prosecutor – reasonably could have misapplied the law given to them in that instruction. Indeed, it is not unreasonable for the jury to believe that the prosecutor is an expert on the State's burden and for it to give the prosecutor the benefit of the doubt when reading instructions.

Garcia-Mendez's right to a fair trial was also prejudiced when the prosecutor appealed to the sympathies and asked for the jury to use its verdict to "bring [Powell] some justice." CP 1033. It is not the jury's job to bring the victim justice, and the prosecutor presumably knew this. Yet, it was the jury's job to reach a reasoned verdict based on the evidence. The prosecutor never should have put it in the jurors' minds that one of their jobs might be to bring Powell justice. This was flagrant misconduct and prejudiced Garcia-Mendez's right to an impartial and independent jury verdict.

Finally, a curative instruction could not have effectively addressed the relentless misconduct of the prosecutor. The prosecutor presumably knew the law on self-defense. She understood the power of her office in the jury's eyes and that she should not be using that prestige to persuade the jury. She knew that it was highly prejudicial for her to give a personal opinion on guilt. She also presumably understood the damage she could do to the trial process by diverting the jury away from its duty to decide the case based on careful and reasoned consideration of the evidence. Yet, she still persisted with her misconduct. If all this knowledge did not prevent the prosecutor from engaging in unjust tactics to derail the fairness of the trial process, it is doubtful that curative instructions would have done so either.

More importantly, to offer curative instructions on all of these acts of misconduct would have certainly made the instructions to the jury intolerably convoluted and confusing. While the jury can be assumed to follow instructions, at some point asking them to set aside so much misconduct by the prosecutor is simply not effective. Curative instructions can only go so far before the jury's ability to effectively compartmentalize is stretched beyond its capacity. See e.g. State v. Stith, 71 Wn. App. 14, 22-23, 856 P.2d 415 (1993). In

Stith, although the trial court gave a curative instruction, the appellate court held the prosecutor's misconduct was "so prejudicial" that "[o]nce made, such remarks cannot be cured." Id. at 22-23. A defendant's right to a fair trial should not rest precariously on whether the jurors are good at compartmentalizing and ignoring repeated prosecutorial misconduct.

For the reasons stated above, this Court should find there is a substantial likelihood that the prosecutor's multiple acts of misconduct affected the jury's verdict and that the cumulative effect of the misconduct was so flagrant that it could not have been cured with an instruction.

II. GARCIA-MENDEZ WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO OBJECT TO MULTIPLE ACTS OF MISCONDUCT.

Even if this Court decides the prosecutor's misconduct was not flagrant and could have been cured with an instruction to the jury, this Court should still reverse on ineffective assistance of counsel grounds.

The Sixth Amendment guarantees the right to effective counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "This right exists, and is needed, in

order to protect the fundamental right to a fair trial." Id. at 684. Ineffective assistance of counsel is established if: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting two-prong test from Strickland, 466 U.S. at 687). As shown below, both prongs are satisfied here.

"Counsel ... has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688. Counsel fails to render constitutionally required effective assistance when he does not exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances. Hawkman v. Parratt, 661 F.2d 1161 (8th Cir.1981). Thus, deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997).

Competent defense counsel must be aware of the law and should make timely objections when the prosecutor crosses the line during closing argument and jeopardizes the defendant's right to a fair trial. State v. Neidigh, 78 Wn. App. 71, 79-80, 895 P.2d 423 (1995).

Defense counsel's deficient performance denied Garcia-Mendez a fair trial. Counsel's performance was deficient because she failed to object to the prosecutor's obvious misconduct. Competent counsel would not have sat by while the prosecutor gave her personal opinion that the defendant was guilty of attempted murder. She would not have remained silent when the prosecutor said her office made it "easy" or a "no-brainer" for the jury to convict Garcia-Mendez by only charging him with assault. Competent counsel would have objected to the prosecutor's misleading the jury into thinking Garcia-Mendez's state of mind was sufficient to make him the first aggressor. Finally, competent counsel would have objected when the State attempted to arouse the jurors' sympathies toward Powell by asking them to bring him justice via their verdict.

There was no tactical advantage to not objecting to the prosecutor's multiple acts of misconduct or failing to request a curative instruction. As such, defense counsel's performance was objectively unreasonable.

Counsel's deficient performance also prejudiced the outcome of the case. Prejudice occurs if there is a reasonable probability that the result would have been different, had the deficient

performance not occurred. Thomas, 109 Wn.2d at 226. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. That is the case here.

There can be no confidence in the jury's verdict given the prosecutor's serious misconduct. As stated above, the defense rested primarily on the jury finding that Garcia-Mendez acted in self-defense. The prosecutor's misconduct struck at the heart of this defense. As explained in detail above – given the erroneous, persistent, and misleading nature of the prosecutor's comments, there is a reasonably probability the outcome of the case would have been different had defense counsel objected to the misconduct.

Moreover, by not objecting, defense counsel prejudiced Garcia-Mendez's ability to obtain relief on appeal. But for counsel's deficient performance, Garcia-Mendez would have had a less rigid standard to meet when showing he was prejudiced by prosecutorial misconduct. Without an objection, Garcia-Mendez is saddled with the higher standard. Instead of just having to prove that the there was a substantial likelihood that the misconduct affected the

outcome of the case, Garcia-Mendez has to show that the misconduct could not have been cured by additional instruction.

If this Court finds that Garcia-Mendez is able to meet the lower standard for showing misconduct, but is unable to meet the higher standard, he is able to establish counsel's failure to object was prejudicial to the outcome of the case. As such, this Court should reverse for ineffective assistance of counsel. See e.g. In re Pers. Restraint of Morris, 176 Wn.2d 157, 288 P.3d 1140 (2012) (prejudice prong for ineffective assistance of counsel claim established because Morris would have been entitled to reversal had appellate counsel raised the public trial right issue on direct appeal).

III. THE TRIAL COURT ERRED WHEN IT MISTAKENLY CALCULATED GARCIA-MENDEZ'S STANDARD RANGE AS SIXTY MONTHS LONGER THAN THAT PROVIDED FOR IN THE SRA.

"The starting point in the application of the Sentencing Reform Act to an individual case lies in determining the sentence range applicable to the particular case at hand." David Boerner, Sentencing in Washington: A Legal Analysis of the Sentencing Reform Act of 1981 at 5-1 (1985); RCW 9.94A.530. The sentencing court may impose a sentence outside the standard

sentence range when aggravating circumstances have been properly found or when there is an enhancement. RCW 9.94A.537; RCW 9.94A.533(3).

When imposing an exceptional sentence, however, the court must first consider the correct presumptive punishment as legislatively determined for an ordinary commission of the crime before it may adjust the sentence up or down to account for aggravating circumstances. See, State v. Worl, 129 Wn.2d 416, 918 P.2d 905 (1996) ("'Imposition of an exceptional sentence is directly related to a correct determination of the standard range. That determination can be made only after the offender score is correctly calculated.") Only after getting the presumptive punishment correct may the trial court then depart therefrom. State v. Parker, 132 Wn.2d 182, 186-88, 937 P.2d 575, 577-78 (1997).

Here, the State failed to correctly calculate Garcia-Mendez's standard range when imposing a sentence for the assault conviction. Given Garcia-Mendez's offender score (7) and the seriousness of the offense (XII),[4] the standard range in effect at the

[4] The Judgement and Sentence incorrectly states that the seriousness level for Count I was XIII. CP 29. Under RCW 9.94A.515, assault in the first degree is listed as a level XII offense. Despite this mistake in the sentencing document,

time the crime was committed was 238-296 months. RCW 9.94A.510. Garcia-Mendez also was looking at a 60-month firearm enhancement. This brought his total standard range (including the gun enhancement) to 268-296 months. RCW 9.94A.533.

The trial court stated it would sentence appellant to the top of the presumptive range, which it mistakenly determined to be 296 months rather than 236 months. 1RP 197. To that it added a 60-month mandatory firearm enhancement. 1RP 197. After giving careful consideration to the rapid-recidivism aggravator and conducting its own legal research, the trial court imposed an exception sentence of 44 months. 1RP 197-99. Based on these calculations, it imposed a total sentence of 400 months. 1RP 199.

Unfortunately, it appears the trial court was mistaken about the presumptive range. It mistakenly believed the top of the presumptive range – without the gun enhancement – was 296 months. It then it added on the 60-month enhancement and the 44-month exceptional sentence to this incorrect range.

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however, the correct seriousness level was used by the prosecutor when calculating the standard range to be 238-296 months. Supp CP __ (sub no. 175, Presentencing Statement of the King County Prosecutor 9/15/15).

Given the court's decision to sentence Garcia-Mendez to the top of the total standard range and a 44-month enhancement – the defendant's sentence should have been 236 months (top of the presumptive range), plus 60 months for the firearm enhancement, plus 44 months. The total sentence therefore would be 340 months, not 400 months. By miscalculating the presumptive sentence, the trial court essentially imposed two firearm enhancements instead of one. This was error.

Because the trial court miscalculated the defendant's presumptive sentence and imposed an extra 60 months beyond that provided for in the SRA, this Court should remand for the trial court to correct the Judgement and Sentence to accurately reflect a total sentence of 340 months.

IV. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR APPELLATE COSTS.

Garcia-Mendez was represented below by appointed counsel. Supp. CP __ (sub. no. 179, Motion and Declaration of Indigency, 9/28/15). The trial court found him indigent for purposes of this appeal. Supp. CP __ (sub. no. 182, Order Authorizing Appeal In Forma Pauperis, 9/28/15). Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency

throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."

At sentencing, the court imposed only the $500 VPA and $100 DNA fee. CP 299. Garcia-Mendez may be ordered to pay a substantial sum in restitution. CP 299.

Under RCW 10.73.160(1), appellate courts "*may* require an adult offender convicted of an offense to pay appellate costs." (Emphasis added). The commissioner or clerk "will" award costs to the State if the State is the substantially prevailing party on review, "*unless the appellate court directs otherwise in its decision terminating review.*" RAP 14.2 (emphasis added). Thus, this Court has discretion to direct that costs not be awarded to the state. State v. Sinclair, __ Wn. App. __, __ P.3d __ 2016 WL 393719.[5] Our Supreme Court has rejected the notion that discretion should be exercised only in "compelling circumstances." State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In Sinclair, this Court concluded, "it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an

[5] Only the Westlaw version is available at the time of this filing.

appellant's brief. Sinclair, WL 393719, *5. Moreover, ability to pay is an important factor that may be considered. Id.

Based on Garcia-Mendez's indigence, this Court should exercise its discretion and deny any requests for costs in the event the state is the substantially prevailing party.

D. CONCLUSION

This Court should reverse Garcia-Mendez's convictions as prosecutorial misconduct and ineffective assistance of counsel denied him of his right to a fair trial. Alternatively, this Court should remand for correction of the judgment and sentence. Finally, this Court should exercise its discretion and deny costs, in the event the state is the substantially prevailing party.

Dated this 18th day of April, 2016

Respectfully submitted

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 74110-1-I
	)	
JUAN GARCIA-MENDEZ,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

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 18TH DAY OF APRIL 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JUAN GARCIA-MENDEZ
DOC NO. 342980
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99632

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF APRIL 2016.

X Patrick Mayovsky