NO. 29645-8-III

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

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STATE OF WASHINGTON,

Respondent,

vs.

VINCENTE RUIZ,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR

FRANKLIN COUNTY

# BRIEF OF RESPONDENT

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(2) Does a prosecutor engage in misconduct by calling an accomplice to the stand notwithstanding the accomplice's unwillingness to testify, where the accomplice has already been convicted for his role in the crime, his conviction is final, and he has no ongoing privilege to withhold testimony?

(3) Are a defendant's confrontation rights violated where a witness does not put forth any testimony and no mention is made of the prior statements or testimony of the witness?

(4) When a prosecution witness provides substantive testimony that the defendant is unable to cross-examine, must a trial court strike the testimony if it is not central to the State's case? In any event, is a timely motion to strike necessary to preserve the issue for appeal?

(5) Is a claim that a defendant was unable to cross-examine a witness waived where the witness is present in court and (a) the defendant makes no effort to compel the witness to submit to cross-examination, or (b) the defendant makes no offer of proof of matters within the knowledge of the witness concerning which he wishes to cross-examine the witness?

(6) Does a trial court abuse its discretion by permitted an accomplice to be questioned in the jury's presence where (a) the accomplice has previously given testimony under oath in open court implicating both himself and the defendant in the commission of the crimes; (b) the accomplice refuses to answer questions at the defendant's trial

without legal justification; (c) there is reason to believe he is refusing to testify in order to protect the defendant; (d) the matter is submitted to the court outside the jury's presence to enable the court to exercise its gatekeeping role; (e) no mention is made in the jury's presence of any prior statements or testimony of the accomplice; and (f) the probative value outweighs any danger of unfair prejudice?

(7) Other than jurisdictional and constitutional issues, will an appellate court address issues that were not argued and decided at the trial court?

(8) Where an accomplice's unprivileged refusal to answer gives rise to an inference that a truthful answer would have implicated the defendant, is the value of that inference dependant upon maters suggested by the question being independently corroborated? In any event, does eyewitness testimony to the crime provide such corroboration?

(9) Do a prosecutor's questions unfairly prejudice a defendant where they are obviously based on the police investigation, to which the jury is privy?

(10) Does a defendant have a right to introduce irrelevant or inadmissible evidence?

(11) When the fingerprints and photograph of a defendant are used for comparison purposes, is it proper to show how they were obtained in order to establish that they are in fact those of the defendant?

(12) Would any rational juror find an identification was intentionally false where it is made by a victim from a hospital bed at a time when the victim had no way of knowing that the identification would be corroborated by extensive evidence?

(13) Would any rational juror find a defendant was unintentionally misidentified where he was indentified not only by the victim, but also by his girlfriend, his apartment manager, and the person who entrusted him with the vehicle used in the commission of the crimes?

## COUNTERSTATEMENT OF THE CASE

Vicente Ruiz (hereinafter defendant) is appealing his convictions for five counts of aggravated first degree murder and one count of attempted first degree murder. The case against defendant included direct evidence in form of testimony from the surviving victim, Aldo Montes. (RP 3208-33).[1] He indentified defendant and Pedro Mendez-Reyna as the two assassins who wounded him and killed five others at Medina's Auto Body Shop on October 13, 1987. (RP 3219-20, 3231, 3338).

When Detective Henry Montelongo contacted the surviving victim at the hospital, he reported the assailants had taken off in an RX-7 automobile. (RP 1530-31). He described the assailants as "Calentones" and also mentioned the first name "Vincente". (RP 1484-86). Detective Montelongo knew the Calentones to be a segment of the Mendez family. (RP 1486). The surviving victim picked out a photo of defendant from a montage without hesitation and identified him as the assailant named Vincente. (RP 1492-93, 1864-65). He identified Pedro Mendez-Reyna

[1] Except as indicated, RP Citations refer to the transcript of the jury trial. Other hearings will be distinguished by including the date of the hearing.

from the second group of photos that was shown to him in 1987, and also recognized him when he saw him in court in 1994. (3231, 3338).

Police located the Mazda RX-7 outside defendant's apartment in the early morning hours of October 14, 1987. (RP 1295-96, 1866). The apartment manager, David Gamino, identified defendant as the renter of the apartment. (RP 2048-49). Tear gas was shot into defendant's apartment, but he eluded the manhunt. (RP 1298-99).

The Mazda RX-7 was impounded and searched. (RP 1778). A receipt was found in the vehicle for the purchase of Winchester .223 rifle ammunition from Phil's Sporting Goods in Pasco; the sale was on October 13, 1987, at 6:03 p.m., less than an hour before the homicides. (RP 1780, 2295-96). Defendant's fingerprint was found on the window glass of the vehicle. (RP 1783, 3014-15). Mauricio Ortiz identified defendant as the person to whom he had entrusted the RX-7 for a test-drive on October 13, 1987. (RP 1706-12, 1534-36).

In October 1987, Diana Garcia was defendant's girlfriend and was pregnant with their second child. (RP 2107-08). She identified defendant and Pedro Mendez-Reyna as coming to her apartment in Kennewick shortly after 7:00 p.m. on October 13, 1987, within minutes after the homicides. (RP 1539-41, 1555-56, 2425-26). They were at her apartment only briefly. (RP 2425). In the search of her apartment after the

homicides, police found an empty box of Blazer CCI ammunition in the kitchen garbage. (RP 2851, 2854). After October 13, 1987, she did see or have any contact with defendant until after his arrest 20 years later. (RP 2114-15).

The ballistic evidence was consistent with a Mini 14 rifle and .38 special or .357 Magnum handguns having been used. (RP 2518-19, 2569, 2573, 3105-06). Shell casings recovered at the scene included 14 that were .223 rifle cartridge cases manufactured by Winchester. (RP 2481, 2486, 2487, 2495). Some of the ammunition was consistent with that manufactured by CCI/Speer, which is a company based in the Lewiston/Clarkston area (and consistent with the empty ammunition box found in the kitchen garbage at Diana Garcia's apartment). (RP 2851, 2854, 2569).

Since Mr. Mendez-Reyna was arrested on American soil, he initially faced the death penalty (unlike defendant, who was later arrested in Mexico). (CP 863-64). However, a plea agreement was reached whereby Mr. Mendez-Reyna would plead guilty as charged in exchange for the State withdrawing its Notice of Special Sentencing Proceedings seeking the death penalty. (CP 863-64). At the plea hearing on May 6, 1994, the prosecutor explained the rationale for the plea agreement as follows:

> The final thing I wanted to point out is there is another defendant here. His name is Vicente Ruiz. And the State's case against Vicente Ruiz depends upon Aldo Montes, and although Aldo Montes has come back to this country to testify, who knows what could happen to him during the next five years or seven years, just like we've had seven years go by. And if Pedro Mendez Reyna were to be executed and something were to happen to Aldo Montes that would prevent him to come back to testify, the State does not have a case against Vicente Ruiz. But with Pedro Mendez Reyna confined for the rest of his life, the State has a witness against Vicente Ruiz.

(CP 957-58). At his plea hearing, Mr. Mendez-Reyna gave extensive and detailed testimony under oath in open court describing the involvement of both himself and defendant Vicente Ruiz in the commission of these crimes. (CP 876-902). The entire transcript of Mr. Mendez-Reyna's guilty plea hearing is in the Clerk's Papers at CP 862-962.

Other facts will be developed from the record as they relate to individual issues.

## RESPONSE TO ARGUMENT

### (a) Defendant's constitutional rights were not violated when his accomplice was questioned in the jury's presence.

Early in the proceedings, the trial court ruled that the former co-defendant, Pedro Mendez-Reyna, had no legitimate basis for claiming a Fifth Amendment privilege and refusing to testify:

> This Court is in the position of having to determine whether or not there is a legitimate basis for Mr. Mendez-Reyna to

> claim 5th Amendment protection in this particular matter. And the Court has not been provided information which suggests to this Court that Mr. Mendez-Reyna does, in fact, have a legitimate basis at this time for claiming 5th Amendment privilege in this particular court. It does not appear that he is subject to further jeopardy. A plea has been entered in this matter. Time under the statute for attacking that plea has long since passed.
>
> I do understand counsel's argument that there is a potential equitable argument to be made on Mr. Mendez-Reyna's behalf. However, at this point, there has been nothing presented to the Court indicating, again, that Mr. Mendez-Reyna would be likely to prevail on such equitable grounds in this particular matter.
>
> So it does not appear that Mr. Mendez-Reyna would be subject to jeopardy by testifying in this particular matter.

(06/14/10 RP 68-69). On December 2, 2010, the trial court addressed outside the jury's presence the manner in which Mr. Mendez-Reyna could be questioned. The trial court noted:

> [T]he court ruled previously that because Mr. Mendez-Reyna had previously pled guilty to any charges stemming from his involvement in this particular incident and has been sentenced, his appeal rights at this point exhausted, the court found that he has no potential jeopardy facing him by his testimony in this particular matter. And that any testimony that he might give could not be used to incriminate him in any way regarding this particular case. So the court found that he did not have any 5th Amendment right to remain silent and that he could be called to testify and required, by the court, to do so.

(RP 2602). The trial court further noted that the remaining issue was "the extent of the questioning that the State could go into with Mr. Mendez-

Reyna if in fact he refuses to testify after being ordered to do so by the court." (RP 2606).

Defendant argued Mr. Mendez-Reyna could not be called as a witness because he apparently intended to assert a bogus Fifth Amendment claim and refuse to answer questions. Defendant cited State v. Williams, 889 So.2d 1093 (La. App. 2004), which found a violation of the defendant's confrontation rights where the confession of an unavailable co-defendant was admitted (although the error was harmless in that case since the confession was merely cumulative of other evidence). (RP 2608-09). The State responded that Williams was not relevant to the instant case:

> We're not offering [Mr. Mendez-Reyna's] confession. We have his confession. We have it under oath. We have it in open court, but we're not offering it for the very reason that he's not making himself available for cross-examination, or at least as far as we know he will not.

(RP 2611-12). The State relied on State v. Barone, 329 Or. 210, 986 P.2d 5 (1999), cert. denied, 528 U.S. 1086, 120 S.Ct. 813, 145 L.Ed.2d 685, 68 USLW 3431 (2000), State v. Cagno, 409 N.J. Super. 552, 978 A.2d 921, 941-42 (2009), and 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 38 (15th ed. 2009). The State explained:

> We need to able to ask the co-defendant whether he accompanied Mr. Ruiz to Phil's Sporting Goods; whether they purchased ammunition at Phil's Sporting Goods;

> whether after purchasing ammunition whether he saw that there were guns in the car; whether they proceeded . . . to Medina's Body Shop; whether the defendant entered Medina's Body Shop carrying two handguns; whether the people in Medina's Body Shop were rounded up in the one room, all six of them; and whether the witness saw the defendant open fire with the handguns in his possession and whether he saw people fall to the floor; whether when they left whether the people were moving, whether they checked to see whether they were still alive; and whether they fled to Mexico after that. Those are the things that we need to be able to ask the co-defendant. And the jury has to know that he's refusing to say whether he saw the defendant do those things, otherwise they're not going to be able to draw the interference that he's refusing to testify to protect the defendant.

(RP 2606-07). The trial court then ruled:

> The court has [had] an opportunity to read the cases submitted by both counsel. And addressing the Williams case that was submitted by the defense in this matter, the court does not believe that that case is on point with the issue that we're addressing here this morning regarding the scope of questioning the State can involve themselves in with Mr. Mendez-Reyna. That case indicates that it was improper for the court allow the admission of a previous statement by the witness because the witness refused to testify at the time of trial and was therefore unavailable. The court did not indicate that is was improper for the State to have asked the [co-] defendant in that case specific questions regarding the alleged incident, simply indicated it was improper for the court to admit . . . the previous statement, the confession.
>
> As Mr. Jenny [prosecutor] indicated at this point there is no indication the State is seeking to introduce any out of court statement by Mr. Mendez-Reyna, so the court does not believe that the Crawford analysis is applicable to this particular issue.

> The only case that's been cited that the court believes appears to be on point with the factual circumstances that we have in this case is the Barone case that Mr. Jenny referred to where we had a co-accomplice, or alleged accomplice who was refusing to testify. And the court indicated that it was in fact proper for the State to call that individual as a witness and ask him specific questions regarding the events, the alleged events. There was no attempt to introduce any previous out-of-court statements of the witness, which is the circumstance that we are in, at least at this point in the trial.
>
> The court believes that the case law supports the State's intention that they should be allowed to call Mr. Mendez-Reyna as a witness, ask him specific questions regarding his conduct and his observations. He will either answer or chose not to answer. If he chooses not to answer, then the jury is allowed to draw what inference they may from his choosing not to answer. If he does answer, then he will be subject to cross-examination by the defense.
>
> . . . The issue at this point is whether or not the State can call him as a witness and ask him the questions that they've indicated, and this court finds that the only case law that apparently is available indicates that the State is entitled to call this individual as a witness, ask him those questions and he will either choose to respond or not respond.

(RP 2615-18) (emphasis added). The trial court further refused to establish a pre-set limit on the number of questions the witness could be asked by the State. (RP 2618).

Mr. Mendez-Reyna was then called to the stand in the jury's presence. (RP 2627). The first substantive question he was asked was the following: "Referring to the defendant here in court today, second man from the wall; is that gentleman your first cousin?" Mr. Mendez-Reyna

answered: "I don't know that man." (RP 2627). He responded to all of the prosecutor's remaining questions just by saying, "I plead the fifth" in spite of the court's order that he answer the questions. (RP 2627-33). The State then asked he be found in contempt of court. (RP 2633). The jury was excused and the witness was found in contempt outside the jury's presence. (RP 2635). The court acknowledged there was no additional sanction it could impose on Mr. Mendez-Reyna since he was already serving a life sentence without possibility of release. (RP 2635). Defense counsel declined the court's invitation to ask any questions of Mr. Mendez-Reyna "in view of the direct and assertion of Fifth Amendment rights." (RP 2635). No motion was made to strike Mr. Mendez-Reyna's substantive testimony that he does not know defendant. (RP 2627-35).[2]

Defendant offers two theories in this appeal to support his claim that it was improper for Mr. Mendez-Reyna to be called and questioned in the jury's presence: (1) it constituted prosecutorial misconduct, and (2) it violated defendant's confrontation rights. Neither theory has any validity.

The trial court's ruling specifically authorized the State to call Mr. Mendez-Reyna as a witness in the jury's presence and "ask him specific

[2] While defendant argues at 32 that "[t]he prosecutor was screaming at Mendez-Reyna," he cites only to a statement by defense counsel at RP 2634. The trial court denied the motion for mistrial and made no finding of fact that the prosecutor was screaming. (RP2634). As every jury is told, the statements of counsel are not evidence. See WPIC 1.02. Thus, there was no evidence that the prosecutor was screaming.

questions regarding his conduct and his observations." (RP 2617). The trial court also made clear that the State could "ask him those questions that they've indicated [.]" (RP 2618). The trial court expressly refused to set any limit in advance on the number or questions the State could ask Mr. Mendez-Reyna. (RP 2618). A prosecutor commits misconduct when he or she elicits or attempts to elicit testimony before the jury that violates an express ruling of the trial judge. People v. Crew, 31 Cal.4th 822, 839, 74 P.3d 820 (2003); State v. Erickson, 148 Idaho 679, 683-84, 227 P.3d 933 (2010). The converse of this rule is that no misconduct occurs where the prosecutor's examination of the witness is authorized by an unambiguous ruling of the trial judge. Even where the trial court's ruling is ambiguous, the prosecutor commits no misconduct so long as his or her reliance on that ruling is reasonable. People v. Price, 1 Cal.4th 342, 452-53, 3 Cal.Rptr.2d 106 (1991). As explained in State v. Colton, 234 Conn. 683, 699 n.15, 663 A.2d 339 (1995):

> The defendant claims, in part, that the prosecutor's objections at trial on evidentiary matters constituted prosecutorial misconduct. Raising a good faith objection in the trial court, however, is obviously not itself prosecutorial misconduct. In this case, the trial court ruled on the objections raised by the prosecutor and, as a result of that ruling, limited the scope of the defendant's cross-examination of [the witness]. We subsequently reversed the trial court's ruling, concluding that it violated the defendant's right to confront the state's chief witness, without whom the state's case would fail. Although the

> rulings were improper, the prosecutor's good faith objections cannot be the basis of the defendant's claim of prosecutorial misconduct.

Like the defendant in Colton, the defendant in our case fails to make the above distinction. To the extent the issue was properly preserved, the trial court's ruling may be subject to appeal; but it was not misconduct for the prosecutor to seek and rely upon that ruling.

Moreover, defendant's own authority shows there was no prosecutorial misconduct here. In State v. Morales, 788 N.W.2d 737 (Minn. 2010), the defendant argued the prosecution acted in bad faith in calling a witness it knew would refuse to testify. However, the court held that because the trial court ordered the witness to testify and the prosecutor believed the witness did not have a valid privilege to refuse to testify, the State may have had legitimate reasons for calling the witness. Id. at 754. Such reasons potentially included having the witness held in contempt upon his expected refusal to testify and to lay a foundation for admission of the witness's previous testimony as substantive evidence. Id. Therefore, the court concluded "the State did not call [the witness] in bad faith." Id. at 755.

The same is true here. First, the State desired to have the witness held in contempt in the event he refused to testify. Moreover, in Washington, as in Minnesota, the prior sworn statements of a testifying

witness are admissible as substantive evidence where they are inconsistent with the witness's testimony at trial. ER 801(d)(1)(i); State v. Smith, 97 Wn.2d 856, 651 P.2d 207 (1982). If Mr. Mendez-Reyna testified inconsistently with his prior testimony, a foundation would have been laid for admission of the previous testimony pursuant to ER 801(d)(1)(i). Mr. Mendez-Reyna was obviously a very unpredictable witness. The only way to ascertain how he would behave on the witness stand in front of the jury was to actually call him in that setting. Indeed, he began his examination by testifying that he does not even know defendant. (RP 2627). While he refused to answer the prosecutor's remaining questions, he nonetheless provided some significant substantive testimony. The State clearly had a good faith basis for calling Mr. Mendez-Reyna as a witness.

In addition, State v. Lowry, 56 Or. App. 189, 641 P.2d 1144 (1982) is directly on point. In Lowry, the defendant made a "claim of prosecutorial misconduct . . . based on the state's calling a witness to the stand knowing that the witness would refuse to testify." Id. at 1146. The court noted that while it would ordinarily be improper for a prosecutor to force a witness to invoke his privilege against self-incrimination before the jury, that rule "does not apply where, as here, the witness does not have a valid basis for asserting his rights under the Fifth Amendment." Id. Thus, it is not prosecutorial misconduct for the State to call an alleged

accomplice to the witness stand in the jury's presence knowing that he will refuse to testify, where the witness has already been convicted for his role in the crime. Id. That is all that occurred here.

Nor was defendant denied his constitutional confrontation rights. The instant matter differs from the typical case where a defendant claims a confrontation violation, because here the witness was present in court on the witness stand. Mr. Mendez-Reyna's responses to questions may be divided into two categories: (1) his assertions of "I plead the fifth", and (2) his substantive testimony that he does not know defendant.

Regarding the "I plead the fifth" responses, it is once again unnecessary to look any farther than defendant's own authority. In People v. Gearns, 457 Mich. 170, 577 N.W.2d 422 (1998), the lead opinion noted that a constitutional confrontation clause violation was found by the United States Supreme Court in Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). The court explained:

> In Douglas, the trial judge ruled that witness could not rely on the privilege against self-incrimination to support his refusal to testify because he had been convicted. He was ordered to answer, but persisted in his refusal. The prosecutor produced a document purported to be the witness' confession and read from the document, asking the witness every few lines whether he had made that statement, until the entire document was read to the jury. The Supreme Court held that, in the circumstances of that case, the petitioner's inability to cross-examine the witness

> about the alleged confession denied him the right of cross-examination secured by the Confrontation Clause.

Gearns, 577 N.W.2d at 428 (citation omitted). The Michigan Supreme Court continued:

> Implicit in the [United States] Supreme Court's Confrontation Clause jurisprudence is that a witness must put forth some testimony before the defendant's right of confrontation comes into play. A defendant has no right to confront a witness who does not provide any evidence at trial. A mere inference is simply insufficient for a confrontation clause violation.

Id. at 430 (emphasis original; citations omitted). Since in the consolidated cases in Gearns there were no statements or other evidence presented to the jury that were the equivalent of testimony, there was no confrontation clause violation. Id. at 429.[3] By the same token, there was no constitutional confrontation violation here. The prosecutor did not read from Mr. Mendez-Reyna's prior confession or testimony or ask if he had made those statements. In fact, there was no mention made at all of his prior testimony and statements. (RP 2627-33). The prosecutor merely asked the questions, suggested by the testimony of other witnesses during the trial, which the jurors themselves would have wanted to ask if they had the opportunity. Mr. Mendez-Reyna gave no answers to these questions, only uttering, "I plead the fifth." Mr. Mendez Reyna only exhibited

[3] Five of the seven justices joined in opinions finding no constitutional violation. Id. at 429, 445-48. The other two justices did not address the constitutional confrontation issue. Id. at 439-45.

contemptuous behavior in the courtroom; while his antics certainly created some inferences, he did not put forth any testimony. Accordingly, the confrontation clause did not come into play.

A different analysis is required for Mr. Mendez-Reyna's testimony that he does not know defendant, but the same result flows. When a government witness provides substantive testimony on direct examination but the defendant is unable to cross-examine the witness regarding that particular matter, a motion should be granted to strike that portion of the testimony if it relates to an essential part of the prosecution's case. United States v. Cardillo, 316 F.2d 606, 611 (2d Cir. 1963), cert. denied, 375 U.S. 822, 84 S.Ct. 60, 11 L.Ed.2d 55 (1963); Thomas v. State, 63 Md. App. 337, 344-46, 492 A.2d 939, 943 (1985). However, a motion to strike need not be granted if the matter is only preliminary or collateral; in such circumstances, there is little danger of prejudice to the defendant. Id. In the instant case, the State's case was based on allegations that defendant and Mr. Mendez-Reyna are first cousins and jointly committed the crimes; Mr. Mendez-Reyna's testimony that he does not even know defendant was completely at odds with the State's case. Accordingly, defendant was not prejudiced by any inability to cross-examine this testimony and there would have been no need to strike it even if such a motion had been made.

In any event, a timely motion to strike the testimony is required to preserve the issue for appeal. Thomas, 492 A.2d at 942-43. Here, defendant made no motion to strike Mr. Mendez-Reyna's testimony that he does not know defendant. (RP 2635). Accordingly, any claim that defendant was unable to cross-examine Mr. Mendez Reyna concerning his testimony that he does not know defendant was waived.

As to both answers and non-answers, defendant further forfeited any claim that he was unable to cross-examine Mr. Mendez-Reyna simply because he made no effort to do so. The trial court made very clear that if Mr. Mendez-Reyna "does answer, then he will be subject to cross-examination by the defense." (RP 2617). The trial court expressly directed Mr. Mendez-Reyna to answer the questions of the State "and any questions that may be asked by the defense[.]" (RP 2630). But defense counsel declined to question Mr. Mendez-Reyna when given the opportunity by the trial court. (RP 2635).

Since defendant did not ask Mr. Mendez-Reyna any questions, it is unknown how he would have responded. The witness had already demonstrated his unpredictability by testifying in the jury's presence that he does not know defendant (RP 2627) despite his earlier claims that he would not answer any questions (RP 2624). Merely because he was

hostile to the prosecutor, it cannot be assumed he would not have responded favorably to friendly questions from his own cousin's attorney.

In Denton v. State, 348 So.2d 1031 (Miss. 1977), the court found no prejudice had been shown from an alleged inability to cross-examine a witness; the record did not show "that the defense was denied the right to question the witness on a material matter within the knowledge of the witness or to show what the witness's testimony would have been [had he answered truthfully]." Id. at 1034. By the same token, not only did defendant not attempt to question Mr. Mendez-Reyna, he did not even make an offer of proof of matters within the knowledge of the witness concerning which defendant wished to inquire. Accordingly, no prejudice has been shown from any inability to question the witness. See State v. Allan, 88 Wn.2d 394, 396-97, 562 P.2d 632 (1977) (offer of proof required to show prejudice from inability to examine witness).

A witness who is present and takes the stand, but then refuses to testify with no valid claim of privilege, is available for cross-examination for purposes of the Confrontation Clause if no effort is make to compel the witness to respond. Fowler v. State, 829 N.E.2d 459, 465-68 (Ind. 2005). [4] In Fowler, the Indiana Supreme Court explained that Crawford v.

[4] While the Fowler court's discussion of forfeiture by wrongdoing may be abrogated in part by Giles v. California, 554 U.S. 353, 128 S. Ct. 2678, 171 L.Ed.2d 488 (2008) the central holding of Fowler – that a witness who is present and takes the stand, but then

Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) is not dispositive in such circumstances as Crawford dealt with a witness who was not physically present at trial. Fowler, 829 N.W.2d at 466. Fowler involved a domestic violence victim, Ms. Roar, who was called to the stand by the State and sworn as a witness, but refused to answer any questions concerning the incident. Neither the State nor the defense made any attempt to compel her to answer further questions. The defendant did not recall her for examination even after her excited utterances were admitted. The court noted that "a defendant's decision not to seek to compel the witness's testimony, like the decision not to subpoena a witness, leaves open the availability of the witness." Id. at 470. The court further noted:

> Because Roar refused to answer the questions from the defense on cross-examination during Fowler's criminal trial, either the prosecutor or the defendant could have requested the court to conduct a hearing on Roar's refusal and then determine whether Roar was required to answer the questions. We can only speculate as to what the result of such an inquiry would have been. It seems clear, however, that there is a range of possible remarks from very favorable to the defense ("I lied to Officer Decker") to very unfavorable ("my husband threatened me if I testified"). . . . We simply point out that there are very good reasons that a defendant may choose to forgo pressing the issue if a witness, such as Roar, refuses to testify. . . . By choosing to allow Roar to leave the witness stand

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refuses to testify with no valid claim of privilege, is available for cross-examination for purposes of the Confrontation Clause if no effort is made to question the witness or compel a response – remains intact.

> without challenging her refusal to answer questions on cross-examination and then choosing to not recall her to the stand after her statement was admitted through Decker's testimony, Fowler's right to further confrontation was forfeited.

Id. (citation omitted). As in Fowler, here there was a range of possibilities if defendant had pressed the issue of the witness's refusal to answer questions. If defense counsel was confident Mr. Mendez-Reyna would not respond to questions posed by him, he had the option of asking him a series of questions favorable to defendant; this would have demonstrated to the jury that Mr. Mendez-Reyna would answer, "I plead the Fifth" to any and all questions. But this would have been a risky strategy indeed. It is possible Mr. Mendez-Reyna, overcome by guilt and emotion on the witness stand, would have begun testifying truthfully that he and defendant jointly committed the murders. A third possibility is one that may have the most devastating to defendant's case: That he would have responded to friendly questions by defense counsel by giving testimony inconsistent with that provided at the time of his guilty plea, which would have made his earlier testimony admissible as substantive evidence under ER 801(d)(1)(i). Indeed, defense counsel was "walking on eggshells" to not do anything that would make Mr. Mendez-Reyna's prior testimony admissible. As in Fowler, it was a strategic decision by the defense to get the witness off the stand as rapidly as possible. By choosing to allow Mr.

Mendez-Reyna to leave the witness stand without attempting to question him on cross-examination, any right to further confrontation was waived.

There was clearly no constitutional violation in calling Mr. Mendez-Reyna to the witness stand. As these are the only grounds on which defendant challenges the action, the matter should not be considered further. See State v. Sims, 171 Wn.2d 436, 441, 256 P.3d 285 (2011).

If the matter is further considered, the trial court's ruling should be reviewed only under the abuse of discretion standard. Absent constitutional implications, the evidentiary rulings of a trial court are within that court's sound discretion, and will not be reversed absent a manifest abuse of such discretion. State v. Hyder, 159 Wn. App. 234, 246, 244 P.3d 454 (2011); State v. Perez-Valdez, 172 Wn.2d 808, 814, 265 P.3d 853 (2011); Det. Of Coe, 160 Wn. App. 809, 817, 250 P.3d 1056 (2011). A trial court abuses its discretion when the reason for its decision is manifestly unreasonable or based on untenable grounds. Hyder, 159 Wn. App. at 246. Restated, a trial court abuses its discretion when it adopts a view no reasonable person would take. Id.

**(b) The trial court did not abuse its discretion in allowing the accomplice to be questioned in the jury's presence.**

Even if the issue is considered, the trial court's decision was clearly not an abuse of discretion. Defendant does not appear to dispute that the trial court was correct in finding Pedro Mendez-Reyna had no privilege to withhold testimony in this case. He could not be incriminated by merely repeating what he had previously disclosed under oath (CP 876-902), Tomlin v. United States, 680 A.2d 1020, 1022 (DC. App. 1996), and his convictions for his role in the crimes had been final for many years (CP 769-91), Reina v. United States, 364 U.S. 507, 513, 81 S.Ct. 260, 5 L.Ed.2d 249 (1960). Any motion by Mr. Mendez-Reyna to withdraw his guilty plea would constitute a collateral attack. RCW 10.73.090(2). Does the possibility of a collateral attack revive the privilege against self-incrimination that was lost by the conviction? A leading treatise answers as follows:

> Whether the possibility that a conviction might be invalidated in collateral attack should render the privilege available is another matter. Collateral attack is generally available at any time, so regarding the risk of retrial after a successful attack of this sort as preserving protection would dramatically expand the protection of the privilege. The best solution is to treat the possibility of successful collateral attack and retrial as raising the question of whether the facts present a "real and appreciable" danger of incrimination. *In the absence of some specific showing that collateral attack is likely to be successful, a conviction should be regarded as removing the risk of incrimination and consequently the protection of the privilege. Most courts, however, treat the finality of a conviction as unqualifiedly removing the risk of incrimination.*

1 McCORMICK ON EVIDENCE § 121 AT 527 (Kenneth S. Broun, gen. editor, 6th ed. 2006) (italics added; footnotes omitted).

Here, the trial court appointed an attorney for Mr. Mendez-Reyna by amended order filed with the court on September 4, 2009. (CP 973). The appointed counsel was qualified under SPRC Rule 2 to represent death penalty defendants. (CP 974). The scope of appointed counsel's representation included providing Mr. Mendez-Reyna with "counsel relating to his desire to move to withdraw his plea, including filing any such proper motion as necessary[.]" (CP 974). Thus, Mr. Mendez-Reyna had counsel for almost 15 months prior to his testimony on December 2, 2010, to assist with filing a motion or petition to withdraw his guilty plea and to make a showing to the trial court that such collateral attack was likely to be successful. As noted by the trial court, no such motion or petition was filed and no effort was made to persuade the court that any such attack would succeed if filed. (06/14/10 RP 68-69). Moreover, it is not plausible that Mr. Mendez-Reyna would desire to withdraw his guilty plea since he gave a complete confession and would face the death penalty but for his plea agreement. (CP 862-962).

Since Mr. Mendez-Reyna had no legitimate Fifth Amendment claim, it was proper for him to be questioned in the jury's presence. The

instant case is directly on point with the unanimous decision of the Supreme Court of Oregon in State v. Barone, 329 Or. 210, 986 P.2d 5 (1999), cert. denied, 528 U.S. 1086, 120 S.Ct. 813, 145 L.Ed.2d 685, 68 USLW 3431 (2000). Barone involved a prosecution for capital murder for which the defendant was sentenced to death. The State called to the stand a former co-defendant named Darcell who had previously been convicted at trial and whose appeals had been exhausted. Darcell had made it known that he would refuse to answer questions. The trial court nonetheless permitted the State to call him to the stand in the jury's presence, finding he had no legitimate Fifth Amendment right not to answer questions about the murder. The following then transpired:

> The state called Darcell as a witness and asked him four questions: Where he lived, whether he had seen defendant attempt to rape Woodman, whether he had seen defendant shoot Woodman, and whether, after shooting Woodman, defendant had threatened him with a gun. Darcell invoked the Fifth Amendment privilege and refused to answer. The state than asked the trial court to order Darcell to answer, and the court did so. The state again asked if Darcell had seen defendant shoot Woodman, and Darcell again refused to answer. In response, the state asked the trial court to hold Darcell in contempt. The trial court excused the jury and held Darcell in contempt. Defendant moved for a mistrial, which the trial court denied.

Id. at 19-20. On appeal, the Oregon Supreme Court first agreed with the trial court that the witness had no Fifth Amendment right not to answer questions about the murder, since his conviction was final. Neither the

fact that he had gone to trial or that he may in the future collaterally attack his conviction changed the analysis:

> Nor did Darcell's expressed intention to seek post-conviction or habeas relief in the future render the danger of self-incrimination "real" and "appreciable." Defendant in effect argued to the trial court that Darcell might in the future petition for post-conviction or habeas corpus relief, on some basis unknown to the trial court; that some or all of Darcell's claims for relief might be successful; that, as a result, Darcell might receive a new trial; and that his testimony from defendant's trial might be used to incriminate him during that new trial. Those speculations did not – and do not – establish that Darcell faced real and appreciable danger of self-incrimination at the time when he was asked to testify. The possibility of future prosecution based on his testimony in defendant's trial was too remote to resurrect Darcell's Fifth Amendment privilege.

Id. at 21. Accordingly, the trial court did not err in allowing the State to call the witness in the jury's presence:

> In Oregon, it generally is improper for the state to call a criminal defendant's accomplice to testify when the state knows that the accomplice will invoke his Fifth Amendment . . . privilege and refuse to testify. However, in State v. Abbott, 275 Or. 611, 552 P.2d 238 (1976), this court created an exception to that general rule. In Abbott, the court held that it not error to allow the state to call the defendant's accomplice, who had been convicted and sentenced following a plea of guilty and had not appealed, even though the state knew that the accomplice would invoke his Fifth Amendment privilege and refuse to testify. . . . The witness in Abbott . . . had no ongoing Fifth Amendment privilege, because he had been convicted and his time for appeal had run. Thus, the court concluded it was reasonable to infer that the witness was refusing to testify to protect the defendant, because the witness could

> not incriminate himself further by testifying about the crime. Under the circumstances, it was permissible for the state to call the witness for the sole purpose of having the witness invoke his Fifth Amendment privilege, in order the jury might infer that the witness was protecting the defendant.

Id. at 20 (some citations omitted). The trial court in Barone "noted that Darcell appeared sincerely to believe that he retained the privilege based on the possibility that his convictions might be overturned." Id. However, the trial court also stated that "it was reasonable to conclude that Darcell had another motivation for refusing to testify, namely, a desire to protect defendant." Id. In other words, the accomplice's true motivations, and what weight to give his unprivileged refusal to testify, were questions for the jury. The Supreme Court of Oregon concluded:

> In sum, Darcell did not possess a Fifth Amendment privilege to refuse to testify in this case. Under Abbott, the state could call Darcell as a witness, even knowing that he would refuse to testify. As the trial court found, the jury reasonably could believe that Darcell's refusal to testify was motivated by a desire to protect defendant. Accordingly, the inference that the state sought to establish from that refusal to testify – namely, that Darcell was trying to protect defendant through his silence – also was reasonable. The trial court did not err in allowing the state to call Darcell as a witness; nor did the court abuse its discretion in denying defendant's motion for mistrial on that ground.

Id. at 21.

1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 38 (15th ed. 2012) states the general rule as follows: "Where a prosecuting attorney calls an accomplice as a witness for the apparent purpose of forcing him to assert his privilege against self-incrimination, the error may or may not be prejudicial." However, Professor Torcia then cites Barone for the following proposition: "Exception to general rule that is improper for State to call witness to testify where State knows that witness will invoke his Fifth Amendment privilege against self-incrimination exists where witness has been convicted and his time for appeal has expired; in such cases, witness has no ongoing Fifth Amendment privilege, and it is reasonable to infer that witness is refusing to testify to protect defendant." WHARTON'S CRIMINAL LAW § 38 n.14.

In State v. Cagno, 409 N.J. Supper. 552, 978 A.2d 921, 941-42 (2009), the New Jersey appellate court recently cited Barone, stating that "[r]ecent cases support the proposition that the refusal to testify, when there is no longer a Fifth Amendment privilege to refuse . . . can be understood, and is admissible, as evidencing an on-going conspiracy." The court compared it to giving "a signal such as 'thumbs-up' or similar gesture." Id.

As in Barone, the convicted accomplice in our case was hostile to the prosecution and was asked specific leading questions regarding his

observations of defendant's criminal conduct. See ER 611(c). Such specific questions were necessary so the jury would know exactly what questions he was refusing to answer. As in Barone, the jury was entitled to conclude that the accomplice's refusal to answer was the equivalent of flashing a "thumbs up" sign to the defendant.

Defendant does not deny that Barone is directly on point, nor does he argue that the State is misrepresenting its holding. He argues only that Barone is "poorly reasoned." Appellant's brief, at 23. However, the rule in question was well established in our sister state of Oregon long before Barone. See Barone, 986 P.2d at 20. For example, in State v. Lowry, 56 Or. App. 189, 641 P.2d 1144 (1982), the defendant claimed it was prosecutorial misconduct for the State to call a witness to the stand knowing that the witness would refuse to testify. The witness was defendant's alleged accomplice and had earlier been convicted of the robbery for which defendant was standing trial; he refused to answer certain questions because (he said) of fear for what would happen to him when he returned to the penitentiary. However, the court found no prosecutorial misconduct, recognizing there is a distinction between a witness under indictment and one who has already been convicted:

> Viewed realistically, a refusal to testify by an already convicted accomplice cannot stem from his desire to protect himself and must, therefore, stem from his desire to

> protect the defendant. The defendant cannot complain if the jury chooses to draw the logical inference that a truthful answer would have implicated defendant.

Id. at 1146 (quoting State v. Abbott, 275 Or. 611, 552 P.2d 238 (1976) (citations and footnotes omitted)).

In Abbott (which, like Barone, was a unanimous decision of the Oregon Supreme Court), the court acknowledged that when an accomplice intends to invoke a valid Fifth Amendment claim, "it should not be made known to the jury where the prosecutor is aware the witness is likely to exercise his privilege." Abbott, 552 P.2d at 240. But the court continued:

> However, the situation is significantly different where, as here, the witness has no privilege to remain silent, having been convicted on a plea of guilty. Here there is not the danger of a silent witness protecting himself at the expense of an innocent defendant, because a previously convicted witness had no reason not to reveal facts which may exculpate the defendant, even if these facts tend to inculpate the witness.
>
> The case before us clearly illustrates why we should distinguish between the two situations discussed above. The question which provoked the refusal to testify was:
>
> - * * Mr. Morgan, did you have occasion to go with him (defendant) to the Littlejohn residence on the afternoon of October 16, 1974?'
>
> It is possible that a truthful answer to this question would have been that, indeed, the witness did go to the burglarized residence on the afternoon of the burglary but that the defendant was elsewhere. An unconvicted accomplice could be expected to refuse to answer this question. This

> would leave the false impression with the jury that both he and the defendant were at the scene. However, an already convicted accomplice would have no reason not to give a truthful answer that only he was present.
>
> Viewed realistically, a refusal to testify by an already convicted accomplice cannot stem for his desire to protect himself and must, therefore, stem from his desire to protect the defendant. The defendant cannot complain if the jury chooses to draw the logical inference that a truthful answer would have implicated defendant. This being the logical inference, we see no reason for not permitting the prosecutor to present the matter to the jury through the device of calling a convicted accomplice who the prosecutor knows will make the inference possible by the witness remaining silent.

Id. at 241. The Abbott court further noted:

> We recognize the theoretical possibility that in some rare circumstances there may be other reasons for the refusal to testify. For instance, the witness might believe that his guilty plea can be overturned on post-conviction relief, and that a truthful answer will jeopardize his chances for acquittal at the hoped for new trial. Alternatively, the witness may fear that a truthful answer, because of what it reveals about modus operandi or surrounding circumstances, would connect him with other crimes. It is even possible that a spiteful witness might prefer facing contempt penalties rather than give an answer that would exculpate defendant. These possibilities are simply too remote to require a rule that would keep the jury from hearing the refusal to testify and drawing the more obvious conclusion.

Id. at 241 n.2. Similarly, in the instant case it was for the jury to decide what weight to give the refusal to answer. It was additionally observed by the Abbott court:

> It should also be pointed out that in most cases the jury will not know that the witness-accomplice has pled guilty or been convicted. Evidence that an accomplice has pled guilty or been convicted is inadmissible against a defendant in most circumstances. It does not appear that the jury in this case knew that Morgan had pled guilty. Hence the precise inference that the jury may draw in this case is that the silent witness is covering up both his own and defendant's guilt. The point is, however, that the adverse inference drawn against defendant is not an unfair one because realistically the witness is covering up the defendant's guilt, though unconcerned about his own.

Id. at 241 n.3. Likewise, the jury in our case was not told that Mr. Mendez-Reyna had entered a guilty plea. Thus, the same rationale applies. Finally, the Abbott court stated: "We need not now decide whether it is proper for a prosecuting attorney to use a refusal to answer as the basis for a jury argument." Id. at 241. It is also unnecessary for this court to decide that question, as the prosecutor in the instant case made no mention of the matter in closing argument. (See RP 4047).

Defendant complains there is no evidence he encouraged or solicited Mr. Mendez-Reyna not to testify. As a practical matter, such evidence will never be available as the extent of any such encouragement or solicitation will be known only to the defendant and his accomplice. In any event, this concern is answered by Abbott, Lowrey, and Barone, where there was also no such evidence. The Abbott court explained that the privilege against self incrimination is personal to the witness, and

when it is invoked "one cannot be sure that a truthful answer might not exculpate the defendant or at least have nothing to do with the defendant's guilt." Abbott, 552 P.2d at 240. But that is not the case where a convicted accomplice refuses to answer in the absence of such a privilege; the inference that a truthful answer would inculpate the defendant may arise from the accomplice's own efforts to protect the defendant, irrespective of the defendant's participation in procuring those efforts. Id. at 240-41. Nor does an accomplice's apparent sincere belief that he is entitled to remain silent preclude the jury from concluding he is doing so to protect the defendant. Barone, 986 P.2d at 20.

Washington law is not inconsistent with the cases from our sister state of Oregon. Defendant cites State v. Nelson, 72 Wn.2d 269, 432 P.2d 857 (1967), a plurality opinion signed by only three of the eight justices hearing the matter. The Nelson plurality did find it was improper for the prosecutor to call a witness named Patrick knowing he would invoke his Fifth Amendment privilege. However, the Nelson plurality made clear that "Patrick's claim of the privilege against self-incrimination was proper, although he had pleaded guilty to the charge of second-degree murder, since he was subject to possible prosecution on an attempted burglary or robbery charge." Id. at 277. Thus, the Nelson plurality merely states the general rule recognized by Professor Torcia in WHARTON'S CRIMINAL

LAW § 38 and in the Oregon cases that a prosecutor cannot force an accomplice to assert a valid Fifth Amendment claim in the jury's presence. However, Justice Hill noted in his concurring opinion in Nelson that Patrick could be called as a witness at the retrial following the issuance of the court's opinion; by then, the statute of limitations on any ancillary crimes would have expired and "[a] witness cannot invoke the Fifth Amendment merely to protect another from punishment." Nelson, 72 Wn.2d at 286 (Hill, J., concurring). In the instant case, Mr. Mendez-Reyna entered guilty pleas to all five counts of aggravated murder and the one count of attempted murder. (CP 769-91). The statute of limitations on any ancillary crimes arising from the 1987 incident expired decades ago; in any event, the prosecution of such crimes would be barred by the modern mandatory joinder rule. See CrR 4.3.1(b). As in the retrial in Nelson, it was proper here for the State to call the convicted accomplice as a witness.

Washington has adopted a pattern jury instruction to be given where the trial court finds a witness may refuse to answer a question based on a valid claim of privilege. WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 6.32 (WPIC) provides:

> I have decided that the witness will not answer the previous question. You should disregard the question. Do not make any assumptions about what the witness would

> have said or speculate about whether the testimony would have been favorable to a particular party.

(Emphasis added). The converse of this instruction is that if the trial court does not rule the witness may refuse to answer the question, the jury need not disregard the question and answer (or any inference arising from a refusal to answer).

Moreover, public policy reasons militate against adopting the rule advocated by defendant. It would force trial courts to allow convicted accomplices like Mr. Mendez-Reyna to benefit from their contempt of court. Knowing that the jury would not learn of their refusal to testify would only encourage their contemptuous behavior. In addition, ER 801(d)(1)(i) embodies a strong public policy that juries be allowed to consider as substantive evidence the prior inconsistent testimony of witnesses. The policy is frustrated if an accomplice who has previously implicated the defendant under oath is allowed to simply thumb his nose at the court and refuse to testify, without the jury even knowing he is doing it.

In addition, public policy favors the settlement of criminal litigation through plea agreements. State v. Perkins, 108 Wn.2d 212, 216, 737 P.2d 250 (1987). The primary reason for the plea agreement forgoing the death penalty for Mr. Mendez-Reyna was to keep him alive as a

witness in event defendant was ever apprehended. (CP 958). The record of the guilty plea does not reflect any agreement for Mr. Mendez-Ryena to testify against defendant. (CP 771-80, 862-961). Such an agreement would have been impossible since defendant was a fugitive from justice at the time, and there would be nothing to hold over Mr. Mendez-Reyna's head to assure his compliance once he was sentenced. However, the prosecutor in 1994 was undoubtedly aware that if Mr. Mendez-Reyna changed his story on the witness stand at defendant's trial, his testimony at his guilty plea hearing would become admissible as substantive evidence pursuant to ER 801(d)(1)(i). See Smith, 97 Wn.2d 856. As the trial court noted, there was no meaningful sanction it could impose on Mr. Mendez-Reyna for his contempt of court since he was already serving a life sentence. (RP 2635). If this court were to rule that someone in the position of Mr. Mendez-Reyna could assert a bogus Fifth Amendment claim without the jury even learning he was doing it, there could never again be a similar plea agreement in Washington.

Citing cases from other jurisdictions, defendant argues that a bogus Fifth Amendment claim by a witness is just as prejudicial to a defendant as a valid one. But in Washington, prejudicial effect alone in not a basis for exclusion; rather, the prejudicial effect must be balanced against probative value. "Nearly all evidence is prejudicial in the sense that it is

offered for the purpose of inducing the trier of fact to reach one conclusion or another." 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 403.2 at 440 (5th ed. 2007). "Virtually all evidence is prejudicial or it isn't material. The prejudice must be 'unfair'". Id. n.1 (citation omitted). Nothing authorizes the exclusion of evidence merely because it is "too probative." Id. See State v. King, 113 Wn. App. 243, 268, 54 P.3d 1218 (2002); In re Det. of Robinson, 135 Wn. App. 772, 788, 146 P.3d 451 (2006). "'[U]nfair prejudice' usually means prejudice caused by evidence that is more likely to arose an emotional response than a rational decision among the jurors." TEGLAND § 403.2 at 442. As previously noted, a legitimate claim of privilege is insolubly ambiguous and may be unfairly prejudicial to a defendant if made known to the jury. Abbott, 552 P.2d at 240. See also State v. Wilmoth, 31 Wn. App. 820, 825, 644 P.2d 1211 (1982). But the situation is significantly different where an accomplice has no privilege to remain silent but nonetheless refuses to answer questions; there the probative value outweighs the danger of unfair prejudice, and the defendant "cannot complain if the jury draws the logical inference that a truthful answer would have implicated defendant." Abbott, 552 P.2d at 241.

The cases from other jurisdictions cited by defendant are distinguishable. None of them discuss or consider the Oregon cases and

none are cited by Professor Torcia in WHARTON'S CRIMINAL LAW § 38 as suggesting a rule contrary to Barone. None of the cited case involve a situation where, as here, (1) an accomplice has previously given testimony under oath in open court implicating both himself and the defendant in the commission of the crimes; (2) the accomplice refuses to answer questions at the defendant's trial without legal justification; (2) there is reason to believe he is refusing to testify in order to protect the defendant; (3) the matter is submitted to the court outside the jury's presence to enable the court to exercise its gatekeeping role; (4) no mention is made in the jury's presence of any prior statements or testimony of the accomplice; and (5) the probative value outweighs any danger of unfair prejudice

See Morales, 788 N.W.2d at 744, 756 (Prosecutor read from witness's prior testimony and asked if he had given that testimony. Decision based solely on Minnesota evidentiary law.); Douglas, 380 U.S. at 418-21 (Prosecutor read from witness's confession and called police officers to identify the confession); Shockley v. State, 335 So.2d 659 (Ala. App. 1975) (as explained in Limbaugh v. State, 549 So.2d 582, 588 (Ala. App. 1989)) (Prosecutor asked witness about his prior statements. When he refused to answer, his statement was read back to him in front of the jury.); People v. Shipe, 49 Cal. App. 3d 343, 122 Cal.Rptr. 701, 704-05

(Prosecutor asked witnesses if they had given statements to police and prosecutors and if those statements were true, creating an inference "that the witnesses had related the events about which they were being questioned to the authorities and that their statements were true"); Martin v. United States, 756 A.2d 901, 906 (D.C. App. 2000) (Victim held in contempt outside jury's presence for refusing to testify. No indication of relationship between defendant and victim such that victim may have been protecting defendant. Case merely holds procedure did not violate defendant's rights.); Commonwealth v. DuVal, 453 Pa. 205, 307 A.2d 229, 233-34 & n.3 (1973) (Prosecutor called reluctant non-accomplice witnesses without giving trial court opportunity to rule on whether they were required to testify. Witnesses actually had valid Fifth Amendment claims. It appeared the witnesses were motivated only by fear of prosecution for perjury based on their earlier testimony. Decision based solely on Pennsylvania evidentiary law); Gearns, 577 N.W.2d at 436-38 (Witnesses were at best accessories after the fact and no indication their refusal to testify was motivated by desire to protect defendant. Court only considered prejudicial effect without balancing against probative value. Decision based solely on Michigan evidentiary law.); United States v. Griffin, 66 F.3d 68, 70-71 & n.6 (5th Cir. 1995) (Case only holds that right to compulsory process dose not guarantee a defendant may call jury's

attention to a witness's refusal to testify. "Our holding should not be taken to mean that a court may never grant such a request, but that the Sixth Amendment does not require it.").

It is further noted in Gray v. State, 368 Md. 529, 796 A.2d 697 (2002), that "[o]ther courts have also held that the determination of whether a witness should be allowed to invoke his Fifth Amendment privilege in the presence of the jury is in the trial court's discretion (in some instances, even when the prosecutor calls the witness)." Id. at 716 (collecting cases). In addition:

> Government counsel need not refrain from calling a witness whose attorney appears in court and advises court and counsel that the witness will claim his privilege and will not testify. However, to call such a witness, counsel must have an honest belief that the witness has information which is pertinent to the issues in the case and is admissible under applicable rules of evidence, if no privilege were claimed.

United States v. Vandetti, 623 F.2d 1144, 1147 (6th Cir. 1980) (quoting United States v. Kilpatrick, 477 F.2d 357, 360 (6th Cir. 1973)).

It is conceivable that in exercising its gatekeeping role, a trial court may decide to exclude even an invalid Fifth Amendment claim from the hearing of the jury. For example, if it appears a convicted accomplice is actually protecting a third party rather than the defendant, it may be

unfairly prejudicial to the defendant for him to be questioned in the jury's presence.

But that is hardly the case here. Mr. Mendez-Reyna was present in court when his guilty plea was entered, and thus was aware that the reason his life was spared was to keep him alive as a witness in the event defendant was ever apprehended. (CP 957-58). He gave very specific testimony at his guilty plea hearing describing defendant's role in the murders as well as his own. (CP 876-902). He further acknowledged that his testimony was consistent with his lengthy voluntary post-Miranda statements given after his arrest. (CP 890, 925-31). He admitted in his statements opening fire with a Mini 14 rifle and that he assumed he had killed some of the people in the body shop. (CP 931). He was clearly not attempting to protect himself by refusing to testify at defendant's trial; that would have been futile given his earlier testimony and statements. Since he identified defendant as his only accomplice in his previous testimony and statements, it was equally clear who he was protecting. If he changed his story on the witness stand, his earlier testimony would have become admissible as substantive evidence under ER 801(d)(1)(i). Thus, the only way he could protect defendant was to remain silent. As noted above, neither the accomplice's apparent sincere belief that he had a right to remain silent nor the theoretical possibility that he was motivated by

something other than a desire to protect the defendant precludes a trial court from leaving the question up to the jury. Abbott, 552 P.2d at 241 n.2; Barone, 986 P.2d at 20. The trial court did not abuse its discretion in allowing Mr. Mendez-Reyna to be called as a witness and let the jury decide how to evaluate his unprivileged refusal to answer questions.

As it turned out, the trial court would have deprived the jury of highly valuable substantive testimony had it not permitted Mr. Mendez-Reyna to be called as a witness. As previously noted, the overly-exuberant Mr. Mendez-Reyna testified that he does not know defendant. (RP 2627). It is the State's position that this testimony conclusively demonstrated he was attempting to protect defendant; even Diana Garcia (the mother of defendant's two children) testified that defendant and Mr. Mendez-Reyna are first cousins. (RP 2109; 1539-41). On the other hand, if the jury had believed Mr. Mendez-Reyna's testimony, it would have completely exonerated defendant. But either way, it was highly important testimony that the jury would not have received but for the wisdom of the trial court.

Finally, the jury was instructed in Instruction No. 6:

> Questions asked of a witness that go unanswered are not substantive evidence of any matter. To the extent a question may suggest a particular answer, it should not be considered by you as proof of such matters.

(RP 3898). The jury is presumed to have followed the instructions of the court. Wilmoth, 31 Wn. App. at 824-25. Defendant was not unfairly prejudiced in any way.

**(c) The prosecutor merely asked Mr. Mendez-Reyna the questions, suggested by the testimony of other witnesses, which the jurors would have wanted to ask if they had the opportunity.**

Citing State v. Yoakum, 37 Wn.2d 137, 222 P.2d 181 (1950), State v. Babich, 68 Wn. App. 438, 842 P.2d 1053 (1993), and State v. Miles, 139 Wn. App. 879, 162 P.3d 1169 (2009), defendant claims the prosecutor's questioning of Mr. Mendez-Reyna was improper because it was supposedly not connected with other evidence. The issue was not raised in any way in the trial court. "With the exception of jurisdictional and constitutional issues, appellate courts will review only issues which the record shows have been argued and decided at the trial court." State v. Barton, 28 Wn. App. 690, 693, 626 P.2d 509 (1981) (citing RAP 2.5(a)).

Apparently realizing that he is raising the issue for the first time on appeal, defendant attempts to couch his argument in terms of prosecutorial misconduct. However, Yoakum, Babich, and Miles all involved situations where the prosecutor sua sponte asked witnesses about the statements or events in question. As previously noted, the prosecutor's line of questioning here was authorized in advance by the trial court. (RP 2606-

07, 2617-18). As also previously noted, it is not misconduct for a prosecutor to obtain and rely upon a ruling from the trial court. Colton, 663 A.2d at 347 n.15. The prosecutor's questioning was not misconduct and the issue is thus not of constitutional magnitude. If defendant believed the questioning should have been limited to items associated with other evidence, he had ample opportunity to so argue when the matter was addressed outside the jury's presence. His failure to raise the argument when any error could have been averted precludes consideration now.

Even if the issue is considered, it has no merit. Yoakum, Babich, and Miles all involved witnesses who when asked about statements or events, denied making the statements or witnessing the events, or stated they did not know whether they had done so (which was the equivalent of a denial). See Yoakum, 37 Wn.2d at 139-41; Babich, 68 Wn. App. at 441-42; Miles, 139 Wn. App. at 882-84. A denial does not create an inference of anything. It was the State's failure to rebut those denials that was error. Yoakum, 37 Wn.2d at 143-44; Babich, 68 Wn. App. at 443-46; Miles, 139 Wn. App. at 887-88.

In contrast, Mr. Mendez-Reyna's only substantive testimony was to deny he was defendant's first cousin and to claim he does not even know defendant. (RP 2627). This denial was completely rebutted. (RP 2109; 1539-41). Otherwise, Mr. Mendez-Reyna did not deny anything;

rather, he refused to answer the questions. (RP 2629-33). As explained above, a refusal to answer by an already convicted accomplice gives rise to a reasonable inference that a truthful answer would have implicated the defendant. Abbott, 552 P.2d at 241. The extent of additional evidence merely goes to the weight to be given the inference. For example, in Barone, 986 P.2d 5, the accomplice Darcell was asked whether he had seen Barone attempt to rape the victim Ms. Woodman, whether he had seen Barone shoot Ms. Woodman, and whether after shooting Ms. Woodman, Barone had threatened Darcell with a gun. Id. at 19-20. Since Ms. Woodman died, Darcell and Barone were the only surviving witnesses to the events. Id. at 10. Thus, there was obviously no corroboration that Barone threatened Darcell with a gun. Nonetheless, Darcell's unprivileged refusal to answer gave rise to an inference that a truthful answer would have confirmed Barone's criminal conduct. Id. at 19-21. In other words, the distinction is one between an innuendo and an inference.

Even when the witness denies things suggested by the prosecutor's questions, the jury need not receive substantive evidence of the matters. It is sufficient if impeachment evidence shows the source of the questions. See Yoakum, 37 Wn.2d at 143.

Moreover, Yoakum and Babich involved witnesses being asked whether they had made certain statements. As repeatedly noted above,

here there was no reference made to the prior statements and testimony of Mr. Mendez-Reyna. (RP 2627-33).

In Miles, the witness was asked whether the defendant had engaged in specific boxing matches, which the witness denied. Since there was nothing in the evidence about the boxing matches, the jurors were left with the impression that the prosecutor's questions were derived from inside information to which they were not privy. Miles, 139 Wn. App. at 885-89.

But nothing similar occurred here. Even though Mr. Mendez-Reyna never denied witnessing the things asked by the prosecutor, the fact remains those questions were suggested by other testimony heard by the jury. Since one of the shooting victims survived, this was not primarily a circumstantial case. The jury heard extensive evidence of the results of the investigation by the Pasco Police Department. The surviving victim identified defendant and Mr. Mendez-Reyna as being the two assassins who came to Medina's Body Shop on October 13, 1987. (RP 1492-93; 1864-65; 3219; 3231; 3338). He stated that upon their arrival, defendant and Mr. Mendez-Reyna first had contact with two mechanics who then left before the shootings. (RP 3220). One of the mechanics, Gilbert Rodriguez, later identified defendant as arriving at the body shop immediately before the time of the homicides, and also reported seeing an

RX-7 fastback through the shop door. (RP 3070-71, 2971-73). The surviving victim testified that after firearms were displayed by the intruders, all six men in the shop were rounded up into one room. (RP 3222-24). Defendant was heard to say, "se acabo", which translated to, "it's over." (RP 3222). Under the circumstances, it was reasonable to ask whether these actions provoked any argument. Defendant was holding two handguns (a .357 in his right hand and a .38 in his left hand) and Mr. Mendez-Reyna was armed with a Mini 14 rifle. (RP 3221-22, 3231-33). The ballistic evidence was consistent with these weapons having been used. (RP 2481, 2486-87, 2495, 2519, 2569, 2573, 3105-06). Both men opened fire. (RP 3224). After getting up off the floor, the surviving victim saw that the other men were all lying motionless on the floor. (RP 3224). Since one of the victims survived his wound, it is obvious that the perpetrators left hurriedly without checking to see whether everyone was dead. (RP 3224-25). They utilized an RX-7 automobile to escape; this vehicle was obviously also used to transport the perpetrators and their weapons to the scene. (RP 3225). The Mazda RX-7 was found parked outside defendant's apartment in the early morning hours of October 14, 1987. (RP 1295-96, 1866). A receipt from Phil's Sporting Goods in Pasco for the purchase of rifle ammunition of a type used in the homicides was found in the vehicle, dated and time-stamped less than an hour before

the homicides. (RP 1778-80, 2295-97). Since the ammunition receipt was in the vehicle used by the perpetrators, it was reasonable to infer they were also the ones who bought the ammunition; there would be no reason for the receipt to be in the car unless they had just left the store and carried the receipt and the purchased ammunition with them when they returned to the vehicle. Defendant's fingerprint was found on window glass of the vehicle. (RP 1783, 3014-15). Mauricio Ortiz indentified defendant as the person to whom he had entrusted the Mazda RX-7 for a test-drive on October 13, 1987. (RP 1534-36, 1712). David Gamino, the apartment manager, identified defendant as the renter of the apartment where the getaway car was left behind. (RP 1996, 2048-49). Police shot teargas into defendant's apartment in the early morning hours of October 14, 1987, only to find he had hurriedly abandoned the apartment. (RP 1298-99). A search of defendant's apartment disclosed 16 pounds of marijuana, a drug scale, packaging material, and a .223 rifle round. (RP 1764-72, 3191-93). Defendant also left behind a large amount of furnishings and personal property. (RP 1765, 2015). The apartment manager stored these items for a time before eventually releasing them to defendant's girlfriend, Diane. (RP 2016-18). After the homicides occurred, the surviving victim was able to drive himself to the police station to report what happened, arriving there at one minute before 7:00 p.m. on October 13, 1987. (RP 1123).

Diana Garcia identified defendant and Mr. Mendez-Reyna as coming to her apartment in Kennewick shortly after 7:00 p.m. on October 13, 1987. (RP 1555-56). An empty ammunition box consistent with that used in the homicides was found in the kitchen garbage at Ms. Garcia's apartment. (RP 2851-54, 2569). In October 1987, Ms. Garcia and defendant had a young son and she was pregnant with their second child. (RP 2107-08). She never saw or heard anything from defendant again after October 13, 1987, until after his arrest more than 20 years later. (RP 2114-15). Ms. Garcia said defendant had called her earlier in the day on October 13, 1987, and told her that he and his friend had been jumped and robbed of some money, and that they were going to be taking care of the situation or problem; while this statement was admitted for impeachment, it nonetheless showed the jury the source of the prosecutor's question to Mr. Mendez-Reyna. (RP 2424-25). Since six people were shot, it was reasonable to ask if there were six involved in the earlier confrontation. Defendant admitted that he left Pasco for Mexico on October 13, 1987. (RP 1561; 1563). A logical route from Pasco to Mexico would be via U.S. Highway 395 to Reno, Nevada, and then on to Los Angeles. Since Mr. Mendez-Reyna participated in the homicides along with defendant and accompanied defendant when defendant said farewell to the mother of his children on his way out of town, it was reasonable to ask if he was enlisted

to assist with taking care of the situation or problem and whether he went with defendant in his flight to Mexico. Moreover, defendant introduced a theory that Javier's Seafood Restaurant was a front for drug trafficking and that the homicides at Medina's were in retaliation for things that occurred at Javier's. (RP 3684-3711). Javier's was owned by Alex DeLeon and Medina's by Clifford Medina; both were brothers to the surviving victim, Aldo Montes. (RP 3423-24). There had been a homicide at Javier's about a month and a half before the homicides at Medina's. (RP 3425). There was also testimony that immediately before the homicides at Medina's, defendant and two other men were driving around looking for Aldo Montes. (RP 3694, 3696-98). One of the three vehicle occupants came to the door at the house where Cecelia Rivera was and asked for Aldo Montes; Ms. Rivera replied that he was at Medina's Body Shop. (RP 3696). The vehicle then left and afterwards she heard the gunfire coming from the body shop. (RP 3696-97). Ms. Rivera identified defendant as the driver of this vehicle. (RP 3710-12). Given all, it was reasonable to ask whether defendant and Mr. Mendez-Reyna also went to Javier's looking for persons before proceeding to Medina's (which was owned by the same family). Finally, defendant's flight provided further support for the prosecutor's questions. Defendant left Pasco for Mexico on October 13, 1987, never to voluntarily return, leaving

behind a pregnant girlfriend, a young son, an apartment full of belongings, and 16 pounds of marijuana, and without making arrangement for the disposition of his property or completion of his ongoing automobile transaction with Mauricio Ortiz. (RP 1294-99, 1702-1814, 1763-70, 1866, 1995-99, 2001-04, 2018-49).

Unlike Miles, this is not a case where the jury had to speculate as to the source of the prosecutor's questions. They were obviously derived from the investigation conducted by the Pasco Police Department, to which the jury was privy. In short, the prosecutor merely asked the questions that the jurors themselves would have wanted to ask if they had the opportunity. Even if something in the questioning was not suggested by the testimony, it was so minor compared to the vast amount that was consistent with the evidence that it was not prejudicial.

In addition, while Mr. Mendez-Reyna's prior testimony was not made known to the jury, it shows the prosecutor had a good faith basis for asking the questions. (CP 876-902). If Mr. Mendez-Reyna refused to answer the questions, it would give rise to an inference that a truthful answer would have implicated defendant. If he had begun answering the questions and testified inconsistently with what he said before, his prior testimony would have become admissible as substantive evidence under ER 801(d)(1)(i). In either event, the prosecutor did nothing improper.

### (d) Defendant had no right to introduce irrelevant or inadmissible evidence.

Defendant next argues he should have been allowed to introduce the identification of Antonio Mendez, made by Phil Van Hoy from a photo montage, as being one of the subjects who purchased ammunition at Phil's Sporting Goods prior to the homicides. ER 801(d)(1)(iii) provides a statement is not hearsay if the declarant "testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . one of identification of a person after perceiving the person[.]" Since Mr. Van Hoy was deceased at the time of trial (RP 2294), this statement was clearly not admissible.

Defendant does not appear to dispute that the statement was inadmissible under rules of evidence, but nonetheless argues he had some right to offer it. This contention is completely answered by State v. Hilton, 164 Wn. App. 81, 261 P.3d 683 (2011). There this court stated that while a defendant generally has a right to introduce evidence in his or her own defense, "[t]here is, however, no right to present irrelevant or inadmissible evidence." Id. at 98-99 (citations omitted). Like the defendant here, the defendant in Hilton cited Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 164 L.Ed.2d 503 (2006). However, this court noted in Hilton that "[n]othing in Holmes changes the law of

Washington, which the Holmes opinion cited favorably." Hilton, 164 Wn. App. at 101. "Instead, Holmes addressed a situation where South Carolina state law allowed a trial judge to exclude third party perpetrator evidence when the State's case was forensically strong," thereby radically changing the common law and denying the defendant the ability to present his defense. Id. at 101-02. In contrast, ER 801(d)(1)(iii) merely incorporates the long-established and universally recognized rules making most hearsay inadmissible.

Moreover, it would have been especially unfair in this case to admit the hearsay from the late Mr. Van Hoy since the State was unable to admit the testimony of Pedro Mendez-Reyna, given at the time of his guilty plea, that he and defendant were the two men who purchased the ammunition at Phil's Sporting Goods. (CP 881-82). Since Mr. Van Hoy was deceased, it was impossible to ask him (1) how certain he was of his identification from the photo montage, and (2) whether it changed his opinion knowing that Mr. Mendez-Reyna had testified the ammunition was purchased by him and defendant. Admitting the hearsay would have only allowed defendant to raise a red herring that the State would have been unfairly prevented from rebutting.

**(e) Testimony was properly admitted that defendant's photograph and fingerprints were taken following his arrest for a traffic matter.**

The trial court properly admitted testimony from Officer Dwight Davidson that he arrested defendant following a "traffic stop," which explained the source of the fingerprints and photograph of defendant that were used for comparison purposes. (RP 1086). Since defendant was a fugitive from justice for 20 years following the homicides, investigators had no other source for his fingerprints and photograph besides arrest records. Defendant was identified by witnesses from photo montages. (e.g., RP 2048-49, 3233, 3070-71). Another important item of evidence was a fingerprint found on the Mazda RX-7 automobile used by the perpetrators; this fingerprint matched the set of fingerprints on file for defendant. (RP 1783, 3014-15). It was essential for the State to show that the fingerprints and photograph used for comparison purposes were in fact those of defendant. This was accomplished by calling the arresting officer. The fact that the fingerprints and photograph were taken as part of the meticulous documentation associated with the arrest process showed they were actually those of defendant.

Defendant argues this evidence violated ER 404(b), which precludes admission of a person's prior acts to show character or general propensity. But here there was no testimony at all concerning the prior acts of defendant. The acts admitted were those of Officer Davidson in

arresting defendant based on a traffic stop. (RP 1086). At the very most, the jury may have inferred that Officer Davidson had some reason to think defendant committed a traffic violation (otherwise, he wouldn't have stopped and arrested him). But no evidence was admitted of the nature or outcome of the traffic case. The testimony was certainly not admitted to show defendant's character or general propensities.

The instant case is controlled by State v. Dennison, 115 Wn.2d 609, 801 P.2d 193 (1990). That case involved a prosecution for felony murder based on a homicide occurring during a burglary:

> A month prior to the decedent's death, the police took photographs in Dennison's home of possible items from [an unrelated] burglary. A pillowcase in one photograph was similar to a pillowcase found at the scene of the decedent's death. Dennison conceded the relevance and admission of the photograph; however, Dennison sought to prohibit the State from explaining how and why the picture was taken.

Id. at 627 n.18. "The court allowed the photograph and police explanation to be admitted reasoning: 'the jury is going to know perfectly well that police weren't there visiting him for social purposes when they took a picture of the pillowcase . . . the statement of circumstances isn't any worse than the implication is going to be, anyway.'" Id. at 628 n.19. The Supreme Court observed that the trial court "noted the potential probative value of allowing the evidence against the prejudicial effect" and that its

decision "was not manifestly unreasonable and it did not abuse its discretion." Id. at 628.

The same rationale applies here. The jury was going to know perfectly well that the Pasco Police Department did not have defendant's fingerprints and photograph on file as the result of a social call. The statement of circumstances was no worse than the implication was going to be, anyway. Any danger of unfair prejudice was eliminated by Officer Davidson's testimony that the arrest was for a traffic stop. The jury was not left to speculate that the arrest may have been for an assault or other violent crime that may have implied a propensity relevant to the instant case.

In State v. Morrow, 968 S.W.2d 100 (Mo. 1998), the trial court admitted into evidence a fingerprint card for defendant that had been taken several years earlier. The fingerprints on these cards matched prints lifted from a motor vehicle associated with the current crime. The fingerprint cards were introduced by a police officer who testified that as an "intake officer" he would obtain the subject's name for the fingerprint card off the "booking sheet". The card showed defendant used an alias name. The Missouri Supreme Court found no abuse of discretion in admitting this evidence; while it clearly showed a prior arrest and booking, it did not constitute prejudicial evidence of a prior crime. Id. at 111-12. The court

distinguished Manor v. State, 223 Ga. 594, 157 S.E.2d 431 (1967), where the fingerprint card included three alias, the defendant's FBI number, and listed charges of rape and possession of whiskey. Id. The testimony in the instant case was even less prejudicial than that in Morrow. Since Officer Davidson testified the arrest was for a traffic stop, there was no room for speculation that it may have been for a violent crime. In any event, there was no testimony on the nature of any alleged traffic violation or the outcome of any court proceedings. Specifying the arrest was for a traffic stop worked to defendant's own benefit.

**(f) Even if error occurred, it was harmless.**

Even if some error took place during the course of the trial, such error was harmless. See State v. Chiariello, 66 Wn. App. 241, 245, 831 P.2d 119 (1992) (non-constitutional error is grounds for reversal only if reasonably probable it affected outcome); State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985) (constitutional error harmless if overwhelming untainted evidence necessarily leads to finding of guilt). Specifically, the improper calling of a witness who refuses to answer questions in the jury's presence may be harmless error. Gearns, 577 N.W.2d at 438; WHARTON'S CRIMINAL LAW § 38. While there were two prior mistrials in this case, the first occurred during jury selection and the second during the State's case in chief. (09/09/08 RP 95-99; 06/22/10 RP

16-19). Thus, the case has been deliberated by only one jury, which reached the only reasonable result.

The surviving victim gave eyewitness testimony that defendant was one of the two assassins who committed the murders and the attempted murder at Medina's Body Shop on October 13, 1987. (RP 3211-31). As acknowledged in the Brief of Appellant at 14, defendant at trial pursued the only possible defenses under the circumstances: "that this was a case of misidentification, mistaken or deliberate" on the part of the surviving victim. Neither defense is rational.

The surviving victim first identified defendant while lying in a hospital bed the night of the homicides. (RP 1484-86, 1491-93, 1864-65). If he was deliberately misidentifying defendant, he would have had no way of knowing at the time whether defendant had an iron-clad alibi. He also could not have anticipated that the identification would be corroborated by the extensive evidence described in section (c).

The theory of an unintentional misidentification fares no better. Even if one accepts that the shock of the events may have led the surviving victim to make an incorrect identification, the same is not true of defendant's girlfriend Diana Garcia. In October 1987, Ms. Garcia identified defendant as coming to her apartment in Kennewick along with Pedro Mendez-Reyna within minutes after the homicides. (RP 1555-56).

Her 1987 statement was recorded on tape. (RP 1538-39). In addition, apartment manager David Gamino identified defendant as the renter of the apartment where the Mazda RX-7 was found and that was hurriedly abandoned on October 13-14, 1987. (RP 1995-96, 2048-49). Finally, Mauricio Ortiz identified defendant as the person to whom he had entrusted the Mazda RX-7 for a test-drive on October 13, 1987. (RP 1534-36). The correctness of this identification is shown by (1) the fact that he drove defendant's Toronado vehicle (which he had been using while defendant test-drove the Mazda RX-7) to defendant's apartment on the morning of October 14, 1987, hoping to complete the automobile transaction but only to find the police were on the scene from executing a search warrant the night before (RP 1709-11); (2) that he later returned the Toronado to defendant's girlfriend, whom he knew from a church youth group as Diane (RP 1706, 1712-14, 1747-48); and (3) that Diana Garcia stated in her testimony that after the homicides she received defendant's Toronado along with the keys from one of defendant's friends, whom she acknowledged may have been Mauricio Ortiz, and that she eventually sold the vehicle. (RP 2117-18). Moreover, these identifications were further corroborated by evidence outlined above in section (c).

Finally, any theory of misidentification by the surviving victim does not explain his identification of Pedro Mendez-Reyna, which no one

ever disputed. It would make no sense that he would correctly identify one assailant and not the other.

## CONCLUSION

It is respectfully requested that the trial court be affirmed.

Dated this 23rd day of October, 2012.

Respectfully submitted,

SHAWN P. SANT
Prosecuting Attorney

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Deputy Prosecuting Attorney

NO. 29645-8-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

| | | |
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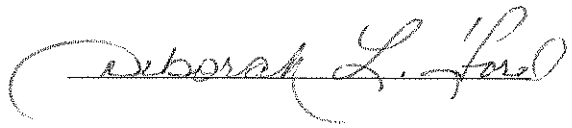
| STATE OF WASHINGTON<br><br>Respondent,<br><br>vs.<br><br>VINCENTE RUIZ,<br><br>Appellant. | ) | AFFIDAVIT OF SERVICE |

STATE OF WASHINGTON )
) SS.
County of Franklin )

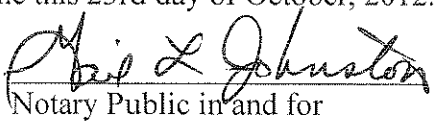
COMES NOW Deborah L. Ford, being first duly sworn on oath, deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity. I hereby certify that on the 23rd day of October, 2012, a copy of the Amended Brief of Respondent was delivered to Vicente Ruiz #740324, Appellant, Washington State Penitentiary, 1313 N 13th Avenue, Walla Walla, WA 99362, by depositing in the mail of the United States of America a properly stamped and addressed envelope; and to Casey Grannis

& Eric J. Nielsen, opposing counsel, 1908 E Madison Street, Seattle, WA 98122 (nwattorney.net) by email per agreement of the parties pursuant to GR30(b)(4).



Signed and sworn to before me this 23rd day of October, 2012.



Notary Public in and for
the State of Washington,
residing at Pasco
My appointment expires:
September 9, 2014

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