No. 42897-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSE VALENCIA-HERNANDEZ, AKA JAIME JOSE LLAMAS, JAIME LLAMAS-HERNANDEZ,

Defendant.

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

The Honorable John P. Wulle, Judge
Clark County Cause No. 10-1-00351-7

REPLY BRIEF OF JOSE VALENCIA-HERNANDEZ, AKA JAIME JOSE LLAMAS, JAIME LLAMAS-HERNANDEZ

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ISSUES

i. ***Whether the Court should have granted Defendant's request for continuance.***

ii. ***Whether the court should have granted Defendant's motion for severance.***

iii. ***Whether the court erred when it admitted the 7-11 and AM/PM station surveillance videos into evidence without proper foundation.***

iv. ***Whether the court erred when it allowed deputy Sofianos to testify as an expert with regard to Jesus Malverde.***

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vii. ***Whether the court erred when it refused to consider instructing the heavily armed custody officers to be seated in a more neutral location.***

viii. ***Whether the court erred when it refused to grant a mistrial when the judge rolled his eyes and gave a look of surprise when ruling on Defendant's motion to strike the surveillance videos.***

ix. ***Whether the court erred when it did not allow defense counsel to object fully when the State attempted to shift the burden of proof in its rebuttal closing argument.***

x. ***Whether the court erred when it failed to give the Defendant credit on his sentence for all of the time he spent in custody prior to trial.***

SUPPLEMENTAL STATEMENT OF THE CASE

The facts below are intended to supplement to those set forth in the Defendant's original Brief. To the extent that references may have been omitted in the original Brief, they are provided below and are presented in the same format, context, and with the same headings, as in the original so that it may be easier to track duplicate language versus new language between the original Brief and this Reply Brief.

ARSON CASE:

At a nearby AM/PM station, a police detective was instructed on how to operate the video surveillance playback system and was allowed to operate it as he saw fit[1]. RP 406, 7, 16, 17, 22. The detective copied a selection which showed a dark colored SUV pulling in and two individuals purchasing gasoline. RP 417. One of the individuals appears to be wearing a red jacket with a white stripe down the sleeve, which individual placed cash into the cash machine presumably to purchase gasoline. RP 387, 388.

1 The expression "as he saw fit" may be replaced by "as he chose to" or such other wording.

DNA testing later found a relatively [2]low quality match between one of the bottles and the sample obtained from the Defendant. RP 801.

No other evidence related to the arson was found in the apartment. (No Report of Proceedings reference exists for this factual statement as no other such evidence was found).

DRUGS AND GUNS CASE:

The apartment search also yielded just over one pound of methamphetamine (RP 926), a digital scale (RP 913), surveillance equipment (RP 888, 9), various expired forms of identification with the Defendant's picture and various names on them (RP 897, 911), and a number of firearms. RP 892. Later DNA testing established that the Defendant handled, or may have handled, several of the firearms (RP 799).

KIDNAPPING CASE:

The State played a recording for the jury, accompanied by a transcript they had prepared to assist the jury in understanding what was being said. RP 1802. Prior to playing the recording in open court, the Court reviewed the recording and transcript. RP 1812. Several minutes into the recording, Courtway characterized her "kidnapping" as "no big deal", according to the transcript. RP 1827. Detective Sofianos who [3]co-chaired

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2 "low quality" was not meant to disparage the technician who performed the testing, it was intended to convey that the DNA link between the item tested and the subject sample was not scientifically significant.

3 "co-chaired" is intended to reflect the fact that Sofianos sat at the State's counsel table and

the trial with the State told the Court that he believed the statement to have been "it's not a ... Good deal". RP 1827.

APPREHENSION AND APPEARANCE IN COURT:

The Defendant first hired an attorney from California who, it turned out, was not licensed to practice law in the State of Washington, but traveled to Vancouver Washington to attend court with the Defendant, but was not allowed to make an appearance. RP 34, CP 134. The Court then appointed an attorney to represent the Defendant. CP 134. The Defendant then hired another attorney from Seattle who failed to advance the Defendant's case or to visit with him in the many months that he had the case . RP 34, CP 134.

TRIAL PREPARATION AND TRIAL:

On the first morning of trial, two custody officers wearing guns, bulletproof vests and tasers were conspicuously seated just behind and to either side of the Defendant. When defense counsel requested of the court that the custody officers not be seated quite so close, the Court summarily dismissed the request. RP 66.

At trial, rather than deliver on its promise of judicial economy, State tried each case separately, recalling many of its witnesses to testify on separate dates, as many as two or three times, a table of which is as follows:

Witness Name	Subject Matter	No Times Testifying	Reference

assisted the prosecutor throughout trial.

11-1-11				
	Dpty. Henschel	Arson	1	RP 108–150
	Dpty Spainhower	Arson	1	RP 151–162
	Dpty. Messman	Arson	1	RP 163-207
	Melquiades Carlos	Arson	1	RP 208-227
	Dpty. Yakhour	Arson	1	RP 228-254
	Richard Cox	Arson	1	RP 255-285
11-2-11				
	Bahadur Singh	Arson	1	RP 309-320
	Preet Kaur	Arson	1	RP 321-346
	Dpty. Yakhour	Arson	2	RP 352-395
	Dpty. Hoss	Arson	1	RP 397-425
	Dpty. Fox	Arson	1	RP 426-448
	Karissa Courtway	Arson	1	RP 449-473
11-3-11				
	Dpty. Fox	Arson	2	RP 514-545
	Dpty. Hill	Arson	1	RP 546-614
	Dpty. Hill	Arson	1, cont'd	RP 629-665
	Dpty. Schmidt	Evidence - all	1	RP 666-719
11-7-11				
	Jennifer Dahlberg	DNA-all	1	RP 741-862
	Dpty. Hoss	Drugs/Guns	2	RP 870-900
	Dpty. Hoss	Drugs/Guns	2, cont'd	RP 909-941
11-8-11				
	Dpty. Hoss	Drugs/Guns	2, cont'd	RP 963-1039
	Dpty. Granneman	Drugs/Guns	1	RP 1039-1053
	Dpty. Granneman	Drugs/Guns	1, cont'd	RP 1069-1097
	Dpty. Granneman	Drugs/Guns	1, cont'd	RP 1100-1116
	Dpty. Yoder	Drugs/Guns	1	RP 1120-1148
	Dpty. Phillips	Drugs/Guns	1	RP 1153-1176
11-9-11				
	Dpty. Harris	Drugs/Guns	1	RP 1185-1215
	Dpty. Muller	Kidnapping	1	RP 1249-1264
	Matt Deitemeyer	Drugs/Guns	1	RP 1289-1327
	Dpty. Sofianos	Drugs/Guns	1	RP 1328-1357
	Dpty. Sofianos	Drugs/Guns	1, cont'd	RP 1366-1395

11-10-11			
Dpty. Sofianos	Drugs/Guns	2	RP 1407-1491
J. Tapia-Farias	Arson/Kidnp	1	RP 1499-1547
Bruce Siggins	Arson/Drugs	1	RP 1549-1596
Kathleen Bleth	Drugs	1	RP 1601-1610
Dpty. Harris	Drugs	2	RP 1611-1647
11-14-11			
Karissa Courtway	Kidnap	2	RP 1666-1750
L. Tapia-Farias	Kidnap	1	RP 1756-1787
Dpty. Harris	Kidnap	3	RP 1787-1800
J. Tapia-Farias	Kidnap	2	RP 1828-1842

Defense counsel renewed his severance motion, originally heard on October 14, 2011, on November 3rd, but the judge denied the motion saying that it was "not timely". RP 499. The severance motion was renewed again at the close of the State's case based upon the fact that Defendant's prior felony conviction which came in as a predicate crime for Unlawful Possession of a Firearm would not have been allowed in separate trials on the remaining counts; and that the False Imprisonment case turned out to be substantially weaker than the other counts. RP 1849, 50. The motion was denied, the following exchange between the Court and defense counsel taking place:

> COURT: It's sort of like trying to unring a bell. They've already heard it. It's too late, so I don't believe at this time – and I think judicial economy is one of the other reasons, and that which the State has taken (sic), the court is also mindful of.
>
> DEFENSE COUNSEL: Judge, if I could just add that we've realized no judicial economy ...

> COURT: I'm denying the motion. Basis is that's like trying to unring the bell. I agree with the State on its position, and I also note that the judicial economy's part of it.

RP 1854, 5.

Defense counsel renewed his motion for severance a final time at the close of the case, which motion was denied, The Court ruling, "I already went through this, counsel. The motion is denied. No further reasoning was given. RP 1928.

ADDITIONAL FACTS:

Of the seven prior continuances referred to in the State's Brief, the first four of those occurred with prior defense counsel who did not advance the case.

During trial, the Court allowed two police officers to testify as experts regarding the significance of a figure known as Jesus Malverde, and about how, in their opinion, the evidence found at the apartment was instruments of a drug dealing operation, the court reasoning, "oh, by the way, every police officer's an expert, about what his experience has been." RP 1626.

When defense counsel attempted to impeach officer Harris with his breach of department policy during voir dire officer Harris admitted that he had been suspended for a violation of the Department's informant policy. RP 1632.

Defendant was booked into the jail on June 30, 2010, and was sentenced on November 28, 2011. RP 47, 48, 2188.

REPLY ARGUMENT

A. Whether the Court should have granted Defendant's request for continuance.

Whether to grant a continuance is within the trial court's discretion, and will not be overturned unless the court abuses that discretion. *State v. Downing*, 151 Wn.2d 265, 272,87 P.3d 1169 (2004). A court abuses its discretion when it is manifestly unreasonable or rests its decision on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12,26, 482 P.2d 775 (1971). In exercising its discretion for a motion to continue, a court should consider factors such as diligence, due process, surprise, the need for orderly procedure, materiality, and redundancy. *Downing*, 151 Wn.2d at 273.

Defense counsel had been preparing this case for approximately 8 ½ months prior to trial. With nearly three dozen witnesses scheduled, in a case involving three wholly separate causes of action, and with expert testimony expected regarding DNA, forensic arson testimony, and crime scene investigation techniques, more time was required.

The trial court in this case abused its discretion by forcing the defendant to go to trial without adequate preparation rather than grant a short continuance.

B. The court should have granted Defendant's motion for severance.

The four factors which should be considered by the court, namely:

> (1) the jury's ability to compartmentalize the evidence,
>
> (2) the strength of the State's evidence on each count,
>
> (3) the cross admissibility of evidence between the various counts, and
>
> (4) whether the trial court can successfully instruct the jury to decide each count separately.

all indicate that the separate, broad categories of crimes charged in this case should have been severed, especially after trial where the factors are no longer used as a prediction, but rather as an application to actual circumstances.

By the State's own admission, there was never any intent to help the jury to compartmentalize the evidence; the State affirmatively admits that the purpose of trying the cases together was to blend all of the conduct into one "seamless" series of events in the minds of the jurors.

Moreover, there was little, if any, cross admissibility of evidence, and the fact that the state withdrew the Felony Harassment charge for "lack of evidence"; the Court dismissed the Intimidating a Witness charge, for lack of evidence; and the jury acquitted the Defendant on the charge of Unlawful Imprisonment, presumably for lack of evidence, all make a compelling argument that the different charges were of significantly different relative strength and never should have been tried together. The prejudicial effect of all of the unrelated counts tried together was simply too high in this case and the judicial economy realized, if any at all, was slight. The State rather tried the three cases as three separate trials, back to back, recalling several of the witnesses a number of times for that purpose.

C. The court erred when it admitted the 7-11 and AM/PM station surveillance videos into evidence without proper foundation.

The surveillance videos were admitted without a crucial reliability step as set forth in the original Brief. No further argument will be provided.

D. The court erred when it allowed deputy Sofianos to testify as an expert with regard to Jesus Malverde not being a saint accepted by any church.

ER 702 allows opinion testimony from qualified experts if it `will assist the trier of fact to understand the evidence or to determine a fact in issue.

A Trial court's ruling upon whether to admit expert testimony is reviewed for abuse of discretion. *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193. A trial court abuses its discretion if its exercise of that discretion is manifestly unreasonable or based on untenable grounds. *State v. Stenson*, 132 Wn.2d 668,701, 940 P.2d 1239 (1997). A trial court's decision is manifestly unreasonable or its grounds for a decision are untenable if the trial court relied on facts not in the record, applied an improper legal standard, or adopted a view "that no reasonable person would take." *State v. Rohrich*,149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v.Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990)).

As stated in the original Brief, Sofianos did not have special, well-rounded experience that is required of an expert. Making rulings based upon the belief that "every police officer's an expert" does not provide sufficient foundation for expert testimony. To allow him to testify as an expert was an abuse of discretion, and therefore error.

E. Whether the court erred when it denied defense counsel's request to impeach Detective Harris with his suspension for a breach of Department policy.

ER 608 provides that specific instances of the conduct of a witness may be introduced for the purpose of attacking or supporting the witness' credibility. A trial court's ruling on whether to allow impeachment evidence is

reviewed for abuse of discretion. *State v. Bashaw*, 169 Wn.2d 133,140, 234 P.3d 195 (2010).

In this case, the police officer's admission during voir dire that he had been suspended for violation of the police department informant policy, provided sufficient verification that such evidence existed. That Officer Spencer had been suspended for such a violation, after presenting himself to the jurors as a highly qualified and well-trained officer, could well have been used to impeach his credibility. This impeachment should have been allowed.

Under the cumulative error doctrine, reversal of a defendant's conviction may be warranted if the combined effect of trial errors effectively denied the defendant a fair trial, even if each error standing alone may be considered harmless. *State v. Weber*, 159 Wn.2d 252,279, 149 P.3d 646 (2006).

This error by the Court, though not sufficient by itself to warrant a new trial, when combined with all of the other errors in this trial, does warrant a new trial.

F. Whether the court erred when it gave the jury its impression of what had actually been said in the jailhouse recording.

Defense counters the State's assertion that the record was insufficient by pointing out that it was sufficiently developed in the trial record to support this argument.

Article 4, section 16 of our Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The purpose is to prevent the jury from being influenced by knowledge conveyed to it by the trial judge. *State v. Swan,* 114 Wn.2d 613, 657, 790 P.2d 610 (1990), *cert. denied,* 498 U.S. 1046, 112 L.Ed.2d 772, 111 S.Ct. 752 (1991).

"An impermissible comment on the evidence is one which conveys to the jury a judge's personal attitude toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed particular testimony. ' *Hamilton v. Department of Labor & Indus.,* 111 Wn.2d 569, 571, 761 P.2d 618 (1988); *Egede-Nissen v. Crystal Mt.,Inc.,* 93 Wn.2d 127, 139, 606 P.2d 1214 (1980).

This constitutional provision is violated if a court's statements indicate to the jury the court's opinion concerning the truth or falsity of evidence or the court's lack of confidence in the integrity of a witness." *Statev. Lampshire,* 74 Wn.2d 888, 447 P.2d 727 (1968); *Balandzich v.Demeroto,* 10 Wn. App. 718, 725, 519 P.2d 994 (1974).

Here, the Judge did more than just comment on the evidence or, by his words, influence the decision-making process of the jury. The judge affirmatively and expressly told the jurors what they were to believe the evidence to be. Such an act by the judge is completely unacceptable. Moreover, by adopting, and instructing the jury to accept his negative interpretatoin of the recording in question, the judge unmistakably conveyed his attitude and opinion about the case to the jurors. This is constitutionally prohibited conduct by the judge which contributed to denying the Defendant a fair trial and requires reversal.

Under the cumulative error doctrine, reversal of a defendant's conviction may be warranted if the combined effect of trial errors effectively denied the defendant a fair trial, even if each error standing alone may be considered harmless. *State v. Weber*, 159 Wn.2d 252,279, 149 P.3d 646 (2006).

Though the Defendant was acquitted of the underlying charge for which the recording was offered as evidence, the evidence itself, combined with the judge's negative bias toward the case was a portion of the cumulative error which ultimately denied Defendant a fair trial.

G. Whether the court erred when it refused to consider instructing the heavily armed custody officers to be seated in a more neutral location.

As the State points out, the issue of uniformed and armed law enforcement in the courtroom has been dealt with by our courts. Our case here, however, is distinguishable from *Holbrook* and further demonstrates the constitutional error in this case.

In *Holbrook*, "four uniformed state troopers, sitting in the first row of the spectators' section; the officers were not far behind, but were separated by the "bar" from, the seats assigned to the defendants for the duration of the trial" *Holbrook* was also a trial with six codefendants being tried for a bank robbery where Approximately $4 million was taken and hostages were held at gunpoint . The reviewing court found that the four officers sitting quietly behind the bar and behind the parties was relatively unobtrusive and likely construed by the jurors as routine courthouse security. Under these facts, no constitutional error was found. *Holbrook v. Flynn*, 475 U.S. 560 (1986) 106 S.Ct. 1340.

In our case, however, in a single-defendant case, two "heavily armed [officers] ... wearing bulletproof vests, guns and tasers were seated directly behind the Defendant, one to each side, and in front of the "bar". The appearance here had much less the appearance of routine courthouse security than it had of actually closely guarding a dangerous criminal. This is a violation of the principles set forth in *Holbrook*. Moreover, there had been

absolutely no allegations of threats, gang activity or any other information surrounding the trial which could have justified such a clear showing of caution toward the Defendant.

The *Holbrook* court went on to say,

> [t]he conspicuous, or at least noticeable, presence of guards in a courtroom during trial is not the sort of inherently prejudicial practice that should be permitted only where justified by an essential state interest. Such presence need not be interpreted as a sign that the defendant is particularly dangerous or culpable. Jurors may just as easily believe that the guards are there to prevent outside disruptions or eruptions of violence in the courtroom. Reason, principle, and human experience counsel against a presumption that any use of identifiable guards in a courtroom is inherently prejudicial. In view of the variety of ways in which such guards can be deployed, a case-by-case approach is more appropriate.

Holbrook at 568.

In this case, a presence of the armed police officers was conspicuous, noticeable and was not justified by any essential state interest. In this case, no juror or other person would interpret the presence of these two heavily armed officers sitting directly behind the Defendant as being there to prevent outside distractions. The Court in this case could have instructed the officers to sit behind the bar or to be otherwise less conspicuous rather than simply deferring to the judgment of law enforcement. The error here was of a constitutional magnitude

which, if not requiring reversal on its own, combined with the other errors of this trial, warrants reversal.

H. The court erred when it refused to grant a mistrial when the judge rolled his eyes and gave a look of surprise when ruling on Defendant's motion to strike the surveillance videos.

There is no practical way to make an adequate record of a judge rolling his eyes in response to an objection posed by defense counsel. With a voice activated system, the judge is not being captured on videotape at a time when he is not speaking, but merely silently rolling his eyes. Further, other than the defense counsel's observations and the judge's tepid claim that he did not "remember" rolling his eyes, there can be no other proof. This error on the part of the judge was unfortunate, but wholly avoidable and highly prejudicial. This too adds to the errors which combined to deprive the Defendant of a fair trial.

I. The court erred when it did not allow defense counsel to object fully when State attempted to shift the burden of proof in its rebuttal closing argument

A criminal defendant has a Sixth Amendment right to the effective assistance of counsel. In furtherance of that right, the attorney has the duty to make all necessary and reasonable objections on the defendant's behalf. When the judge curtly denied the objection without hearing it at

all, he denied Defendant of his Sixth Amendment right to the effective assistance of counsel, and his Due Process right to a fair trial.

This error prevented the Defendant from objecting when the State was attempting to shift the burden by pointing out that the defendant presented no evidence that he had moved from the apartment where the drugs and guns were found. This was a constitutional violation requiring reversal and, at the very least, combined with the other errors at this trial had the cumulative effect of denying the Defendant a fair trial.

J. The court erred when it Failed to give the Defendant credit for each day he spent in custody prior to sentencing.

A criminal defendant is allowed credit from his sentence for each day he serves in custody prior to conviction and sentencing. RCW 9.94A.505(6).

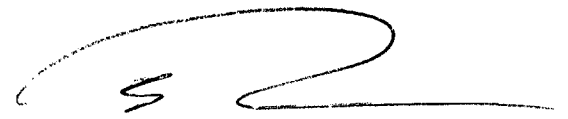
The Defendant was booked into the Clark County jail on June 30, 2010 and was sentenced on November 28, 2011 – a total of 516 days later. Defendant was given credit for only 172 days served, 344 days short of the credit he should have been given. This case should be remanded for resentencing to reflect the actual number of days Defendant spent in custody prior to sentencing.

CONCLUSION

For all of the foregoing reasons, the Defendant should be granted a new trial before a different judge, or at least this matter should be remanded for resentencing.

DATED this 6 day of March, 2013.

Respectfully Submitted,



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WASHINGTON STATE COURT OF APPEALS
DIVISION II

JOSE VALENCIA-HERNANDEZ, AKA JAIME JOSE LLAMAS, JAIME LLAMAS-HERNANDEZ, Plaintiff, v. STATE OF WASHINGTON, Respondent.	**NO. 42897-1-II** **Clark County Superior No. 10-1-00351-7** DECLARATION OF MAILING

STATE OF WASHINGTON)
) ss.
COUNTY OF CLARK)

THE UNDERSIGNED, states that on the 6th day of March, 2013, declarant deposited into the mail of the United States of America, a properly stamped envelope directed to Jaime Llamas Hernandez, DOC# 301220, 191 Constantine Way, Aberdeen, WA 98520, and to Abigail Bartlett, Clark County Prosecutor, PO Box 5000, Vancouver, WA 98666; and that said envelope contained the following: Reply Brief of Appellant.

I DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 6 day of March, 2013.

BRIAN A. WALKER

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