NO. 314391

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ABRAHAM LOPEZ, Appellant,

BRIEF OF APPELLANT

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III. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS.

BBQ. On April 22, 2011, Alexis Hernandez (age 17) and two brothers, Benjamin (age 17) and Abraham Lopez (age 15), attended a barbeque together. CP 8-10; Vol. 10, RP 186-190. Benjamin and Abraham had arrived at the barbeque first. Vol. 10, RP 188. About 15 minutes after Benjamin and Abraham arrived at the party, Alexis arrived through the front door. RP 187-89.

Going to Buy Some Weed. Benjamin told Abraham and Alexis that he wanted to leave the party briefly and go buy some marijuana. RP 190. Benjamin knew a local weed dealer, Kenney Wilkins, but he had no car and no way to get to his house to pick it up. Vol. 10, RP 190. Murillo, a co-defendant, was 22 years old, had a driver's license and a car. Vol. 10, RP 189. Once Murillo arrived, all three boys got into his car and left to the party to go buy some weed. Vol. 10, RP 189. Even Alexis, the State's crucial witness, testified that they left the party to "buy bud." Vol. 7, RP 139-141; Vol. 7, RP 171.

On the way to Watkin's house, the four drove by the former home of Adan Beltran, a rival gang member. Vol. 10, RP 191-94. As they passed the house, someone in the car had said that they thought they saw Beltran in the front yard of the house. Vol. 10, RP 193. Believing that Beltran had been deported, Benjamin doubted that they had actually seen Beltran. Vol. 10, RP 193-94.

Suddenly, Benjamin, who sat in the front driver's seat, heard Alexis "rack" a gun. RP 198. Benjamin saw Alexis hand forward an object to the driver, Murillo. Vol. 10, RP 199. Although he did not get a full look at it, Benjamin

believed it was a gun because the noise he had heard moments earlier. Vol. 10, RP 199.

At that point, Murillo stopped the vehicle near the trailer where the men had thought they saw Beltran. Murillo and Alexis jumped out of the car and disappeared around the other side of the trailer when Murillo and Alexis had seen Beltran. Vol. 10, RP 201-04. Benjamin remained in the car the entire time. Vol. 10, RP 201-14. Abraham stepped out of the car but remained within only a few feet of it, until Benjamin told his younger brother to get back into the car. Vol. 10, RP 203.

At that point, Benjamin and Abraham heard multiple gunshots. Vol. 10, RP 203. Immediately after the gunshots, Alexis and Murillo were seen by the two boys running back around the trailer. They both quickly got back into the car, sitting in the same respective positions in the car as they were when they left. Murillo drove away at a high rate of speed. Vol. 10, RP 205. As they drove away, Benjamin had asked Murillo what had happened. Murillo told him to shut up and to not worry about it. Vol. 10, RP 204-06.

Police would eventually locate Murillo's vehicle driving through Quincy. The three juveniles were still in the car. Vol. 10, RP 210. Murillo tried to evade the pursuing police vehicles, but the car was eventually stopped by authorities using spike strips. Vol. 10, RP 212. Once the car was immobilized, Murillo jumped out of the car and fled the scene on foot. He was later found in an orchard 100 yards away and identified as 23-year-old Robert Murillo. CP 9. None of the juveniles fled the scene. CP 8-10. They were all taken into custody.

Because Murillo and Alexis had demanded that they stay quiet, Abraham and his brother refused to tell police what had occurred. Vol. 10, RP 210-14. Alexis initially spoke with investigators, but did not tell them who the shooter was. CP 6-11. He eventually invoked his *Miranda* rights, but it was not clear whether they were read to him before the interview started. CP 5-11.

B. **CHARGES.**

On April 25, 2011, the State charged all four defendants. Abraham was initially charged in juvenile court, but was eventually transferred to adult court to be charged with his brother as an accomplice. Originally, the State believed that Murillo was the shooter, charging him accordingly. CP 1-4. But it would later argue that 15-year-old Abraham was the shooter.

Mr. Lopez was charged with Murder in the Second Degree, Drive-By Shooting, and Unlawful Possession of a Firearm in the Second Degree. On December 29, 2011, the State amended the charges to include one Count of Premeditated Murder in the First Degree. In addition, the State alleged several aggravators, including drive-by shooting and a gang aggravator.

C. **MURILLO PLEA STATEMENT**

On December 11, 2013, Murillo pleaded guilty to second degree murder for this offense. In his plea statement, Murillo did not admit whether he was a shooter or merely an accomplice. In fact, all that his plea statement says is, On April 22, 2011, I was the driver in a drive by shooting that caused the death of another, to wit Adan Beltran."

D. **ALEXIS HERNANDEZ'S TESTIMONY.**

Hernandez claimed that at some point during the car ride, Abraham opened the door, and exited the car. Hernandez claimed he didn't see anything - he was looking the other way, "because [he] trusted these guys." Shortly thereafter, Hernandez heard two gunshots and claimed that Abraham came back into the vehicle wearing gloves, a bandana, and a hoodie, and brandishing a silver revolver. Vol. 7, RP 177-180. Hernandez's testimony is the only evidence identifying Abraham as the shooter, and was directly refuted by Abraham's brother Benjamin. Benjamin testified that upon arriving at Beltran's home, Hernandez and Murillo exited the vehicle together armed with guns. He watched as they disappeared behind the trailer, heard two gunshots, and assumed that one, or both, of his acquaintances had shot Beltran.

E. **HERNANDEZ'S IMMUNITY**

In exchange for testifying for the State at the Lopez Brother's trial, the State promised to drop all charges against Hernandez. Aside from Hernandez's bargained for testimony, no evidence was provided to corroborate Mr. Hernandez's version of the events leading up to the shooting, or made his culpability appear any less likely than those of his acquaintances.

To the contrary, the only fingerprints recovered from the firearms in the vehicle belonged to Mr. Hernandez. However, the police struck a deal with Hernandez before performing a full investigation. Police never tested the gloves or other clothing found in the car for DNA evidence, or administered a polygraph test to Mr. Hernandez.

F. **THE VERDICT**

Before deciding Abraham's guilt, the jury deliberated for several days. During that time, the jury submitted multiple jury questions. CP 207-12. The jury acquitted Abraham and Benjamin of Murder in the First Degree. In addition, it easily rejected each of the numerous aggravating allegations. However, the jury still found Abraham guilty of Drive-By Shooting and Felony Murder in the Second Degree. CP 229-30. The State did not request that the jury decide whether Abraham or his brother acted as an accomplice or a principle.

IV. ARGUMENTS

A. THE TRIAL COURT'S "TO CONVICT" INSTRUCTIONS VIOLATED DUE PROCESS, BECAUSE THEY FAILED TO ACCURATELY CONVEY THE REASONABLE DOUBT STANDARD TO THE JURY.

1. STANDARD OF REVIEW

The trial court must correctly instruct the jury as to the law. Although the specific language of the instructions is left to the discretion of the trial court,[1] the instructions as a whole must correctly state the law.[2] When reviewing whether jury instructions do that, an appellate court's review is de novo.[3]

2. THE TRIAL COURT'S "TO CONVICT" INSTRUCTIONS ALLOWED THE JURY TO CONVICT MR. LOPEZ EVEN IN THE ABSENCE OF PROOF BEYOND A REASONABLE DOUBT.

The jury must be instructed that the state has the burden to prove each essential element of the crime beyond a reasonable doubt.[4] As a corollary, the court must properly instruct the jury on the presumption of innocence and the reasonable doubt standard because it "provides concrete substance for the

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[1] *State v. Coe*, 101 Wn.2d 772, 787, 684 P.2d 668 (1984).
[2] *Boeing Co. v. Key*, 101 Wn. App. 629, 633, 5 P.3d 16 (2000).
[3] *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995).
[4] *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

presumption of innocence."[5] The importance of the reasonable doubt instruction cannot be underestimated: it is the "cornerstone" of our criminal justice system.[6]

The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error.[7] The standard provides concrete substance for the presumption of innocence -- that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law."[8] It also "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue."[9]

These vital constitutional rights are conveyed to the jury through the Court's "to convict" instructions, which provide trial courts with time-tested instructions that adequately explain to the jury how to apply the law to the facts of the case. For most crimes, our State offers pattern jury instructions.[10] These instructions "are drafted and approved by a committee that includes judges, law professors, and practicing attorneys;" and "have the advantage of thoughtful adoption and provide some uniformity in instructions throughout the state." *Id.*

Most importantly, the WPIC's define the reasonable doubt standard. This standard requires the jury's to acquit unless the evidenced at trial overcomes the presumption of innocence:

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[5] *Id.*
[6] *Id.*
[7] *Smith*, 174 Wash. App. at 368.
[8] *In re Winship*, 397 U.S. 358, 363 (1970).
[9] *Id.*
[10] *State v. Bennett*, 161 Wn. 2d 303, 307-308, 165 P.3d 1241 (2007).

> If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, *then it will be your duty to return a verdict of not guilty.*

See, e.g., WPIC 35.19 (emphasis added).

To ensure that the jury applies the reasonable doubt standard and the presumption of innocence correctly, it is vital that the Court's "To-Convict" Instruction for each crime charged because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence."[11] Consequently, when the "To-Convict" Instructions misstate the substantive elements of the criminal offense or the jury's duty to convict or acquit, reversal is the usual remedy.[12] Such an error taints the entire trial because:

> the essential connection to a "beyond a reasonable doubt" factual finding cannot be made where the instructional error consists of a mis-description of the burden of proof, which vitiates all the jury's findings. A reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done. And when it does that, "the wrong entity judge[s] the defendant guilty."[13]

These instructions convey to the jury the importance of convicting if convinced beyond a reasonable doubt, while also demanding that the jury acquit the defendant of all charges if not convinced beyond a reasonable doubt.[14] Jury instructions must convey the duty to acquit if the State's burden is not met;

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[11] *State v. DeRyke,* 149 Wn.2d 906, 910, 73 P.3d 1000 (2003) (If "To-Convict" instructions misstate the applicable law, a reviewing court may not rely on other instructions to supply the element missing from the "to convict" instruction.)
[12] *See State v. Smith*, 174 Wn. App. 359, 366, 298 P.3d 785, 789-90 (2013).
[13] *Sullivan*, 508 U.S. 281 (quoting *Rose v. Clark*, 478 U.S. 570, 578 (1986)).
[14] *Smith*, 174 Wn. App. at 366.

instructing the jury otherwise improperly relieves the state of its fundamental burden and is reversible error.[15]

In *State v. Smith*, this Court has already decided the issue at hand and, unless this court reverses that recent decision, reversal is required. In *Smith*, the same trial court and judge inappropriately modified the WPIC instructions located after every "to-convict" instruction. The trial court instructed the jury "if, after weighing all the evidence, you have a reasonable doubt ... , then *you should* return a verdict of not guilty."[16] In describing the jury's duty to acquit, this instruction altered the phrase "it will be *your duty* to find the defendant not guilty," by replacing the phrase " "will be your duty" with the phrase "you *should*." This court held that by replacing the term "your duty" with "should," the trial court's instructions relieved the State of its burden of proving all of the required elements beyond a reasonable doubt, thereby violating due process and constituting manifest constitutional error.

Here, the court's "to convict" instructions stated the jury's duty to acquit in identical language: "if, after weighing the evidence, you find [the elements] have been proven beyond a reasonable doubt, then you *should* return a verdict of not guilty." RP 18, 24; Vol 12. This instruction, like in *Smith*, clearly confused the jury and allowed them to render a guilty verdict even if they may have had a reasonable doubt as to Abraham's guilt. These instructions, therefore, failed to "make the relevant legal standard manifestly apparent to the average juror."[17]

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[15] *Id.*
[16] *Id.* at 789 (emphasis added).
[17] *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

Because this error undermined the reasonable doubt standard and Abraham's constitutional right to be presumed innocent, the error infected the jury verdict and was by its very nature structural.[18] Prejudice for such an error must be presumed.[19] Consequently, *Smith* requires reversal of Abraham's convictions. If this court does not dismiss his convictions, as argued below, this court must remand for a new trial.

B. THE PROSECUTOR'S ENTIRE CLOSING ARGUMENT WAS INFECTED WITH COUNTLESS INSTANCES OF MISCONDUCT, AND PREJUDICE SHOULD BE PRESUMED WHEN A 15-YEAR-OLD BOY IS CONVICTED OF MURDER BASED ENTIRELY ON THE TESTIMONY OF AN ACCOMPLICE WHO WAS GRANTED FULL IMMUNITY.

A prosecutor engages in misconduct during closing argument when he makes prejudicial statements that prejudice the defendant.[20] The prosecutor's comments must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.[21]

If the prosecuting attorney's statements were improper and the defendant objected to them at trial, then the court must show that there was a "substantial likelihood that the comments affected the jury.[22] If the defendant fails to object to a prosecutor's improper argument, he must show that the comments were flagrant or ill-intentioned and that the prejudice caused by those comments could not have been cured by a curative instruction.[23]

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[18] *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 (2006) (describing structural error).
[19] *State v. Strode*, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); *Smith*, 174 Wash. App. at 368 (Even if it is more likely than not the jury understood the court's use of "should" in the elements instruction as mandatory, reversal is required) *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence are drawn in favor of the State.
[20] *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).
[21] *State v. Russell*, 125 Wn. 2d 24, 85–86, 882 P.2d 747 (1994).
[22] *Reed*, 102 Wn.2d at 145.
[23] *State v. Charlton*, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

Here, as discussed below, under even the more stringent standard, the prosecutor's numerous instances of misconduct were flagrant, ill-intentioned, and appeared designed to improperly affect the jury's decision. "After a careful review of the trial record and the appellate arguments of counsel," this court will likely "arrive at the inescapable conclusion that [Abraham Lopez's] trial was marred by the prosecutor's inflammatory closing argument."[24] The inappropriate argument was so egregious as to constitute prosecutorial misconduct, the appeals to passion and prejudice therein having compromised the fairness of the trial."[25] Irrespective of his personal beliefs, every prosecutor must ensure that the defendant receives a fair trial.

1. **THE PROSECUTOR COMMITTED MISCONDUCT WHEN HE APPEALED TO THE PASSIONS AND PREJUDICES OF THE JURY BY ARGUING THAT THE JURY SHOULD CONVICT BENJAMIN BECAUSE IT WAS THE "RIGHT" THING TO DO.**

When a prosecutor relies upon evidence or argument at trial that is "irrelevant and inflammatory", such material carries a "natural tendency to prejudice the jury against the accused."[26] No prosecutor should engage in such conduct during closing argument.[27] It is therefore improper for a prosecutor to attempt to align the jury with the prosecutor's office, as if it were the "right" thing to do.[28]

Here, the prosecutor improperly aligned the jury with the prosecutor's office in precisely the same way. On several occasions, the prosecutor urged the

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[24] *State v. Perez-Mejia*, 134 Wn. App. 907, 909, 143 P.3d 838 (2006).
[25] *Id.*
[26] *State v. Miles*, 73 Wn.2d 67, 70, 436 P.2d 198 (1968).
[27] *State v. Pierce*, 169 Wn. App. 533, 537, 280 P.3d 1158 (2012).
[28] *Reed*, 102 Wn.2d at 145.

jury to convict Abraham and his brother because it was the "right" thing to do. This conduct was unmistakably improper.

In fact the prosecutor began his closing with argument that was clearly improper, stating: "I'm going to stand here and ask you to do what is *right*." Vol.12 RP 30. This statement set the theme for the State's closing argument, which can be viewed as nothing short of an obvious effort to align the jury with the State's case.

This prosecutor continued this theme throughout his entire argument to the jury, including his discussion of the State's most crucial witness, Alexis Hernandez. The prosecutor told the jury that it should believe Alexis because he was doing "the right thing" by coming testifying against Abraham and his brother and by giving the authorities "an initial outline that completely fit the facts of the case." Vol.12 RP 53. By telling the jury that Alexis's testimony "completely fit" the State's theory and that this was "the right thing" to do, the prosecutor improperly aligned the prosecutor's office with Alexis's testimony and implicitly put his personal stamp of approval on his testimony.

In addition to telling the jury that convicting Abraham was the "right thing to do," the prosecutor also referenced facts not in evidence when he told the jury that Alexis came forward because "his mother wanted him to." That Statement is not at all supported by the record before us. A close look to Alexis's testimony shows that he never testified that his mother was the catalyst to his coming forward, or that she told him to do the "right thing."

In fact, the only time that Alexis's mother is mentioned throughout the entire trial is when defense counsel cross examined Alexis; still, that line of questioning does not support even a reasonable inference that Alexis's mother urged him to testify against the Lopez Brothers:

> [DEFENSE COUNSEL:] Did the [police] tell you about conversations that they had with your mom?
>
> [ALEXIS HERNANDEZ:] No. It was my mom's birthday the next day . . . they told me my mom was sad, but that's about it.

Volume 7 RP 192.

This statement was improper not only because it referenced facts not in evidence, but also because the prosecutor again vouched for Alexis's testimony. Instead of implying that both him and his office believed Alexis's testimony, this time, the prosecutor bolstered Alexis's credibility telling that his mother told him to "do the right thing" by testifying, thus implying that his mother also believed he was telling the truth.

2. **THE PROSECUTOR'S CLOSING ARGUMENT APPEALED TO THE JURY'S FEAR OF GANG VIOLENCE AND COMMITTED MISCONDUCT WHEN HE ENCOURAGED THE JURY TO CONVICT ABRAHAM TO SEND A MESSAGE TO GANGS IN THE LOCAL COMMUNITY.**

It is "unquestionably improper"[29] for a prosecutor to ask the jurors convict the defendant to "send a message" or to end violence generally.[30] Such conduct clearly improper because it encourages the jury to render its verdict based on reasons that have no bearing on the defendant's guilt:

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[29] *State v. Perez-Mejia,* 134 Wn. App. 907, 143 P.3d 838 (2006) (*State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988)).

[30] *See State v. Ramos*, 164 Wn. App. 327, 263 P.3d 1268 (2011) (reversed where prosecutor argued that jury should convict defendant to eliminate drug dealing at shopping center); *State v. Ra*, 142 Wn. App. 868, 175 P.3d 609 (2008) (reversed based on prosecutor's introduction of "gang evidence" contrary to judge's ruling to exclude); *State v. Perez-Mejia*, 134 Wn. App. 907, 143 P.3d 838 (2006).

> A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. *Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem.* The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.[31]

Applying this principals in *Perez-Mejia,* Division II reversed a defendant's convictions after the prosecutor made very similar arguments (although les egregious) as those made in this case.[32] In *Perez Mejia*, the defendant was convicted as an accomplice to felony murder, just as Benjamin was here. The prosecutors there also argued that the shooting was gang motivated.

In his closing, the prosecutor described the events leading up to the shooting. But as Division II noted, characterized the case in a way that the court called "troubling." The prosecutor argued, for instance:

> [THE STATE:] [W]hen the gang members were at the defendant's house after receiving the call they walked out of the house with their chests sticking out proudly showing their machismo.[33]

The court first noted that this statement, on its own, was "troubling." Later, the prosecutor asked the jury to render its verdict to send a message to other gang members in the community:

> [THE STATE:] Now, although you as ladies and gentlemen of the jury will not be placed in harm's way, you will not physically be in the middle of a war as Ms. Emmitt was, you will not have someone behind you pointing a loaded gun at your back as Ms. Emmitt was. But what you can do as ladies and gentlemen of the jury is send a message.

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[31] *Ramos,* 164 Wn. App. at 338 (citing *Solivan*, 937 F.2d at1153.).
[32] *Perez-Mejia,* 134 Wn. App. at 907.
[33] *Id.*

In this case, the prosecutor's closing argument, much like the improper argument in *Perez Mejia*, improperly asked the jury to convict Benjamin based off of his "gang" involvement and the dire need to bring this "gang" problem to an end. Unlike in *Perez Mejia*, though, the prosecutor here improperly used the gang evidence with far more frequency and essentially made it the theme of his entire closing argument.

Specifically, the prosecutor here improperly implied that the jury needed to convict Benjamin so that they could send a message to the gangs in Grant County and to stop gang violence in general. The prosecutor, for instance, mentioned three shootings that occurred in Grant County (prior bad acts) and implied that the jury should convict Abraham to stop these uncharged and unproved shootings:

> [THE STATE:] You heard Alexis Hernandez say that he had been shot at on three separate occasions. This is an 18 year old *who's already been shot at on three separate occasions. This is out of hand.*

Vol. 12 RP 32. Neither Abraham nor Benjamin were charged in these separate unsubstantiated shootings. But, the prosecutor implied that jury should convict them both to stop this "out of hand" violence, even though neither defendant was currently charged in those shootings. The statement inappropriately implies that Benjamin and Abraham were somehow responsible for Alexis being shot at on "three separate occasions" and it does so with no substantive evidence to support it. This is exactly the type of "send a message" arguments that prosecutors must seek to avoid. Such argument was improper and must be discouraged.

3. THE PROSECUTOR COMMITTED MISCONDUCT WHEN HE ENCOURAGED THE JURY TO USE EVIDENCE OF ABRAHAM'S AFFILIATIONS TO CONCLUDE THAT HE HAD A PROPENSITY FOR VIOLENCE.

If evidence has been admitted for a limited purpose, such as to prove motive, it is misconduct for a prosecutor to encourage the jury to use that evidence for improper purposes, such as the defendant's propensity to commit crimes.[34] In fact, such an inference is generally prohibited even without such argument a prosecutor:

> "Introducing a defendant's prior bad acts to prove current criminal intent is tantamount to telling the jury to convict the defendant of the current charges because his prior bad acts show that he has a propensity to commit crimes. ER 404(b) forbids such inference because it depends on the defendant's propensity to commit a certain crime."[35]

Preventing such improper inferences is an essential component of a fair trial because it "confines the fact finder to the merits of the current case in judging a person's guilt or innocence."[36]

Here, however, the prosecutor encouraged the jury to do just the opposite by directly and repeatedly calling attention to Abraham's status as member of a local gang. The result was to create a trial not based upon evidence, but instead on the young defendants' association with a known criminal street gang.

His closing argument is full of examples of such improper comments. This passage is especially telling:

> [THE STATE:] Let's talk for a moment about common sense and human emotion. These young men have committed their lives to this group, and we know that one their friends was murdered. And *we know from our human experience that revenge and retribution*

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[34] In *State v. Ra*, 144 Wn. App. 688, 175 P.3d 609 (2008) (published in part),
[35] *State v. Wade*, 98 Wn. App. 328, 336, 989 P.2d 576 (1998).
[36] *State v. Wade*, 98 Wn. App. 328, 336, 989 P.2d 576 (1998).

> *is a natural human* desire. Maybe not for everyone. *Maybe not for everyone in this courtroom.* Maybe not for everyone in the world. But it is *definitely fair to say* that it is a natural desire for many. *And certainly it would be a more natural desire for people who have committed their lives to a criminal street gang, people who have actively engaged in back and forth fighting.*

Vol. 12 RP 38. This argument is a classic example of arguing propensity evidence. In this passage, the prosecutor unmistakably argues to the jury that Abraham and his brother should be convicted because they, as members of a "criminal street gang," have a "natural desire" to seek "revenge and retribution."

Then, the prosecutor went on to say that it is "certainly" a "more natural desire for people who have committed their lives to a criminal street gain." This brash statement is made without any factual or empirical evidence with which to support it. Again, the prosecutor used this argument in order to attempt to lower the burden of proof the state needed to prove. This was the exact type of inference that 404(b) seeks to prevent, and the prosecutor here specifically told the jury that it should make that improper inference. This argument, like the similar arguments made in *Perez Mejia*, was undeniably improper.

In fact, the prosecutorial misconduct in Lopez's trial was far more prejudicial than in *Perez-Mejia* because, in that case, "much of the prosecutor's closing argument *was* properly based on the evidence."[37] Here the exact opposite occurred: most of the State's argument was *not* based on facts or reasonable inferences at all. Even a cursory reading of the State's opening argument revealsl how the prosecutor seemingly made almost no effort to connect these generalizations to the law or the facts of the case.

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[37] *State v. Perez-Mejia*, 134 Wn. App. 907, 920, 143 P.3d 838 (2006).

But, just as in *Perez-Mejia*, the judicial impact of these improper arguments was immense:

> The misconduct at issue encouraged the jury to base its verdict on the powerful emotions, concerns, or prejudices that arise from the facts of the case, rather than on the facts themselves. The evidence addressed by the improper argument increases the likelihood that it affected the jury's verdict.[38]

Given the abundance of time the prosecutor spent discussing Abraham's gang involvement, and the extremely limited time that he spent discussing the other, very limited facts connecting Abraham to the shooting, the jury almost certainly considered the gang evidence for improper propensity purposes. It was, a near certainty that the jury could have "missed the [prosecutor's] message."[39]

4. **THE PROSECUTOR REPEATEDLY VOUCHED FOR THE CREDIBILITY OF THE STATE'S MOST CRUCIAL WITNESS BY PERSONALLY SUPPORTING HIS TESTIMONY AND BY REFERENCING FACTS THAT DID NOT APPEAR IN THE RECORD.**

Prosecutors may not "vouch" for the credibility of any witness.[40] Vouching occurs when the prosecutor either (a) places the prestige of the government behind the witness, or (b) states or implies that information not presented to the jury supports the witness's testimony.[41]

Vouching for a witness's credibility invades the province of the jury to determine the facts of the case and the credibility of the witnesses.[42] Vouching for or against a witness's credibility undermines the fairness of the defendant's trial

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[38] *State v. Perez-Mejia*, 134 Wn. App. 907, 920, 143 P.3d 838 (2006) ("Although gang-related evidence was central to the State's theory of culpability, this evidence was, by its nature, highly prejudicial.").
[39] *Ra*, 144 Wn. App. 688.
[40] *State v. Ish*, 170 Wn. 2d 189, 241 P.3d 389 (2010); *State v. Heaton*, 149 Wash. 452, 271 P. 89 (1928).
[41] *Coleman*, 155 Wn. App. at 957.
[42] *Thorgerson*, 172 Wn.2d at 443 ("Whether a witness testifies truthfully is an issue entirely within the province of the trier of fact.").

because the "prosecutor's opinion carries with it the imprimatur of the Government" and is likely "*induce the jury to trust the Government's judgment rather than its own view of the evidence.*"[43] It can "easily skew proper jury deliberation" and unfairly tip the scales against the defendant and deny him a fair trial.[44] Such risk is at its greatest in cases—such as this one—in which "the credibility of the witness and defendant comprised the principal issue of the case."[45]

The prosecutor improperly impliedly vouches for a government witness when he attempts to bolster a witness's credibility with facts not in evidence.[46] In *State v. Jones,* the defendant Jones was convicted of one count of unlawful delivery of cocaine. On appeal, he argued that he was denied the right to a fair trial when the prosecutor improperly vouched for the credibility of the State's most crucial witnesses during closing argument.[47] The court found these statements to be improper and prejudicial because the prosecutor (1) bolstered the credibility of the confidential informant, and (2) did so by using highly prejudicial "facts" not in evidence.[48]

Similarly, a prosecutor improperly vouches for a witness's credibility if he urges the jury to trust a particular witness based upon the prosecutor's unsubstantiated personal opinions as to how young children think and that they

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[43] *United States v. Young*, 470 U.S. 18-19 (1985).
[44] *Alexander,* 254 Conn. at 305.
[45] *Id.*
[46] *State v. Jones,* 144 Wn. App. 284, 287, 183 P.3d 207 (2008).
[47] *Id.* at 292.
[48] *Id.* at 294.

cannot lie.[49] In *State v. Alexander,* Connecticut's Supreme Court reversed a conviction on grounds of improper vouching when a prosecutor told the jury to trust the young victims because they cannot lie and "[t]hat's how little kids think ... children 'can't make this [sexual abuse] up.' "[50] With these statements, the prosecutor bolstered the victim's credibility in several ways. First, the prosecutor "implied that the victim testified truthfully because she is young and therefore honest."[51] Second, as noted by the *Alexander* court, this argument improperly "suggested that a[n] eight year old is not 'sophisticated' enough to conjure up a story of sexual abuse."[52] In addition, the record contained no evidence of the victim's level of intelligence (i.e. a low I.Q. or learning disability) so that the prosecutor could argue that the particular victim actually lacked the intelligence to conjure up a story of sexual abuse.

These arguments amounted to misconduct because they had no basis in the facts of in evidence and they asked the jury to convict the Alexander based upon the prosecutor's unfounded personal belief that all children were honest and not intelligent enough to lie. The *Alexander* Court had no problem holding that these statements constituted improper vouching because "statements such as these are likely to sway a jury in favor of the prosecutor's argument without properly considering the facts in evidence."[53]

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[49] *State v. Alexander,* 254 Conn. 290, 304, 755 A.2d 868 (2000) (prosecution for sexual abuse of a child).
[50] *Id.*
[51] *Id.* at 306.
[52] *Id.*
[53] *Id.*

In this case, the prosecutor attempted to "sway" the jury with improper arguments very similar in nature to the improper arguments in *Alexander* and *Jones*.

First, just as in *Alexander* and *Jones*, the prosecutor argued that the jury should find the State's most crucial witness credible by encouraging the jury to believe the prosecutor's own personal prejudices about particular classes of people (i.e. children, confidential informants, and police officers) without a basis in evidence or proper inferences from that evidence. Without a basis in the facts, the obvious conclusion the jury must draw is simply that the prosecutor personally believed the witness's crucial testimony.

But such vouching is clearly improper, as shown in *Alexander*, where the prosecutor argued that the jury should believe the victim because she was *young and therefore honest.*[54] And in *Jones,* the prosecutor urged the jury to reject the defendant's testimony and believe the detectives and the confidential informant because they are "smart individuals, they are not fools," and "if they believe[d] for one second, one second that the [the CI] wasn't up to par, that he was under the influence or that he couldn't be trusted, do you think they would have continued to use him? I submit to you they would not."[55]

Similarly, in this case, the prosecutor improperly vouched for Alexis's credibility by expressing his personal opinion about Alexis's intelligence and his inability to lie because he was not "bright" and therefore unable lie and implicate Benjamin and his brother in the murder of Adan Beltran; therefore, according to

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[54] *Alexander,* 254 Conn. at 305.
[55] *Jones,* 144 Wn. App. at 293.

the prosecutor, Alexis must be telling the truth and the defendants must be lying. During closing argument, the prosecutor argued:

> And there's one other thing that the jury probably picked up on. Alexis is ***not real bright.*** He's just not ***a real bright guy. He just doesn't have the ability to make up a complex story and be consistent with it. He just doesn't.***" Vol. 12, RP 54.

In all three cases, the prosecutors improperly vouched for their witness and argued prejudicial facts not supported by the evidence. In both cases, the prosecutor argued that the witness was credible based upon the prosecutor's assessment of the witness's intelligence, i.e. the witness was either "not bright enough" to lie, "too smart" to employ an unreliable CI, or too "young" to lie.

Lastly, in our case, the prosecutor told the jury:

> If a witness were bought and paid for, ***wouldn't his testimony have been a little bit better?*** If this was really a situation of *say what we want you to say,* ***wouldn't he have said,*** I actually saw Abraham shoot the gun? *He didn't say that.* ***Because he didn't see it. He testified to what he knew, no more, no less.***

Vol. 12 RP 162. In turn, the jury was to believe that: Alexis wasn't lying because, if he had been lying, his story would have been much better. RP 162. These statements are very similar to those statements made in *Alexander*—the prosecutor told the jury that young children are honest and that no child would possibly make up a story regarding sexual abuse—and the statements in *Jones*—the prosecutor improperly argued that the CI was trustworthy because the detectives chose to use him on multiple occasions.[56]

Second, the prosecutor committed misconduct here because he attempted to bolster Alexis's testimony by telling the jury that if he had been lying, he

[56] *Alexander,* 254 Conn. at 305; *Jones,* 144 Wn. App. at 293-94.

would have concocted more damaging stories in order to curry favor with the government.[57] *See* Vol. 12 RP 162. Federal courts have held that such statements are "*clearly* improper," and have warned all prosecutors to abstain from using such improper argument.[58] This is exactly what happened here when the prosecutor paradoxically told the jury that Alexis was not bright enough to concoct a story like the one he told and even if he was lying, he would have come up with a better story.

Third, the prosecutor implied that he personally believed Alexis when he told the jury that Alexis had risked his life to tell *the truth.* Vol 12 RP 54; 53, 162. This statement is tantamount to explicitly telling the jury that the prosecutor *believes* the witness and is clearly improper.

Fourth, the prosecutor again affirmed his own personal belief in Alexis's testimony when he told the jury that "*[t]he only way* [Alexis] *could know that the story he was telling wouldn't be disproven by other evidence is if he told the truth.* Vol. 12, RP 54. This Statement bolstered Alexis's testimony in two ways. First it implied that the prosecutor personally believed Alexis. Second, because no testimony was introduced as to the possible "ways" that Alexis would "know that the story he was telling was the truth," the prosecutor's statement was not based in the evidence of the case.

Finally, the prosecutor's statements here were especially detrimental to Benjamin's case because "*the credibility of [Alexis was] crucial*" for the State

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[57] *See U.S. v. Martinez-Medina,* 279 F.3d 105 (1st Cir. 2003). Improper for prosecutor to argue that "If a witness were bought and paid for, *wouldn't his testimony have been a little bit better?* If this was really a situation of *say what we want you to say, wouldn't he have said,* I actually saw Abraham shoot the gun? *He didn't say that.*"

[58] *Id.*

to obtain convictions against Benjamin as an accomplice.[59] Even if the State did present enough evidence to sustain a conviction here, the prosecutor's improper arguments on credibility clearly appear to be cheap and improper attempts to make up for a lack of credible evidence in an extremely weak case, one in which credibility was *crucial.*

Much of the prosecutor's closing argument was obviously designed to unfairly bolster Alexis's credibility while simultaneously casting doubt on Benjamin's testimony through improper innuendo and impressionable inferences of bad character. No court should allow a prosecutor to engage in such egregiously unfair arguments during closing argument. The court should fashion a remedy, as argued below, that will actually discourage the type of misconduct that occurred here, i.e. implying that Alexis was credible by relying on facts not in evidence to bolster his credibility to fill the gaps in an incredibility weak case.

5. **THE PROSECUTOR COMMITTED MISCONDUCT WHEN HE TOLD THE JURY THAT THE LAW ALLOWED THEM TO CONVICT ABRAHAM AS AN ACCOMPLICE TO AN ASSAULT BECAUSE HE WAS IN A GANG WITH AND RELATED TO THE ALLEGED SHOOTER.**

It is serious misconduct for a prosecutor, with all the weight of the prosecutor's office behind him, to misstate the applicable law when explaining it to the jury.[60] If the prosecutor does misstate the law, Washington courts consider it a "serious irregularity" because it has "the grave potential to mislead

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[59] *United States v. Wilkies,* 662 F.3d 524, 536 (9th Cir.2011) (emphasis added).
[60] *State v. Davenport,* 100 Wn.2d 757, 675 P.2d 1213 (1984); *State v. Fleming,* 83 Wn. App. 209, 214-16, 921 P.2d 1076 (1996); *State v. Gotcher,* 52 Wn. App. 350, 759 P.2d 1216 (1988).

the jury."[61] It is especially egregious if the prosecutor's tell the jury that they may convict based upon less evidence than the law requires (lowering the burden of proof). Such a misstatement of the law constitutes misconduct because it "insidiously" disadvantages the defendant and to prosecutorial misconduct.[62]

In this case, as he discussed the State's burden of proof to the jury, the prosecutor "insidiously" lowered his burden of proof by telling the jury that it could convict Abraham based upon far less evidence that I required by Washington's accomplice statute, as discussed below.

a) ACCOMPLICE LIABILITY IN WASHINGTON

The accused's presence at the scene of the crime is not enough to prove accomplice liability, even if the defendant is fully aware of the ongoing criminal activity.[63] The accused presence at the scene is only sufficient if the jury also finds that the defendant was present at the scene of the crime and was "ready to assist" in the crime.[64]

To prove that the defendant is present and "ready to assist" in the commission of the crime, the State must be able to point to specific facts that tend to show that the defendant's *presence* at the scene indicated that he was also *ready to assist* in the commission of *the* crime.[65]

In *State v. Collins*,[66] for instance, the defendant was convicted of possession of cocaine with intent to deliver, based upon accomplice liability or

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[61] *Davenport*, 100 Wn.2d at 763.
[62] *See Glasmann*, at 713.
[63] *In re Welfare of Wilson*, 91 Wash.2d at 492, 588 P.2d 1161 (1979).
[64] *Id.* at 487.
[65] *In re Welfare of Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979).
[66] *State v. Collins*, 76 Wn. App. 496, 502, 886 P.2d 243 (1995).

alternatively on principal liability through constructive possession.[67] The court first noted that the evidence was sufficient to convict him as a principal and thus is was reasonable to conclude that he constructively possessed the cocaine in an apartment that he did not live in. Then, the Court recognized that mere presence was not enough to establish accomplice liability.

However, the court noted that there was much more than Collins' mere presence in the apartment from which infer his complicity. First, Collins admitted to having a conversation with someone over the phone in which tended to show that he was involved in drug trafficking. Second, Collins admitted at trial that he had previously told a friend named Bliss that he "could buy drugs at the apartment" Third, Bliss later did in fact call the apartment and asked for Collins. Fourth, after speaking with Collins, Bliss actually came to the apartment.

This consistent trail of facts allowed the jury to "***reasonably*** infer that Collins knew of the underlying crime (possession of cocaine with intent to deliver) *and* that he actively participated in the distribution of cocaine by soliciting his friend Bliss to come buy drugs from the apartment. Therefore, the evidence was sufficient to convict Collins as an accomplice based upon his presence, plus knowledge of the drugs in the apartment **and** his apparent agreement "to aid the possessor in the delivery of a controlled substance" established his "active involvement" in the underlying offense.

On the other hand, when the evidence does not allow the jury to reasonably infer knowledge of the crime and a willingness to actively participate in the crime, the evidence is insufficient to hold the accused

[67] *State v. Collins*, 76 Wn. App. 496, 502, 886 P.2d 243 (1995).

responsible for his passive actions, as held in *In re Wilson.*[68] In that case, Wilson, a juvenile, was charged with theft and reckless endangerment in juvenile court. The reckless endangerment charge was premised on accomplice liability.

The charges alleged that Wilson and several other juvenile accomplices stole weather stripping from various businesses and tied the weather-stripping into a rope. Some of these juveniles tied the road around a tree and strung across a road to a fairway on an adjacent golf course. Occasionally, one or more of the juveniles would pull the rope taught across the road, causing the risk of injury that stood as the basis for the reckless endangerment charge.

At trial, the State's called one eye-witness to support its case against Wilson on the reckless endangerment charge. The eye witnesses testified, in pertinent part, as follows:

> When we went outside, we saw several kids on top of the fairway. Down on the highway was a rope that was tied to a tree, and strung across the highway up onto the fairway. At certain times, the rope would be pulled when cars were coming down the street. It looked like it could cause an accident.

The eyewitness further testified that the rope was pulled taut once during the time that Wilson was present on the hill, where the crime had occurred. Although the witness could not see who was pulling the rope, she testified that Wilson was standing where the rope ended. Our Supreme Court held that knowledge of the crime, when coupled with presence at the scene of the crime and a personal relationship with the co-defendants, did not constitute sufficient evidence to prove Wilson was an accomplice to the crime.

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[68] *In re Welfare of Wilson*, 91 Wn.2d 487, 492, 588 P.2d 1161 (1979).

b) THE PROSECUTOR'S CLOSING ARGUMENT MINIMIZED THE STATE'S BURDEN WITH REGARD TO ACCOMPLICE LIABILITY.

In this case, the prosecutor told the jury that, even if the jury believed that Abraham was not the shooter, they could still find him guilty if it found that Abraham was present at the scene and also "ready to assist" in the crime, which is perfectly permissible, but only if the jury applies the law correctly, consistent with *Wilson* and its progeny. But here the prosecutor told them that they could find Abraham (and Benjamin) guilty on far less evidence than is required by Wilson. Specifically, the prosecutor told the jury that it could convict Abraham because it was his "obligation" as a gang member to assist a fellow gang member in his endeavors:

> [THE STATE:] Of course, they were ready to assist, that is their obligation as a fellow gang member.

Vol. 12 RP 49. The prosecutor makes no attempt to connect the "facts" of the case to being "ready to assist", as required by *Wilson* and exemplified in *Collins*. Rather, he tells the jury, quite explicitly, that it should find each defendant guilty as an accomplice based entirely on some vague, unexplained duty to commit crimes because they are brothers and in a gang. When paired with the fact that Hernandez was a member of the same gang, yet avoided charges altogether, the impropriety is clear.

The prosecutor continued to minimize his burden to prove accomplice liability throughout his closing argument and into his rebuttal argument. In closing argument, both attorneys pointed out how Alexis's testimony was no more trustworthy than that of Benjamin because each of them had the same reason to lie

about their involvement. The only difference was that Alexis was granted immunity, but the brothers were not.

In rebuttal, the prosecutor's argument went even further in minimizing his burden of proof and even told the jury, falsely, that the Abraham and Benjamin had in fact admitted, legally, to being an accomplice to the charged crimes:

> But it cuts both ways. Because if [Alexis] is guilty, as [defense counsel] say, for simply being there, these two are in the exact same boat. If Mr. Hernandez is guilty as they say, and he getting the benefit of a deal, that may be true, ***but what that tells you is that their clients are guilty and they have just told you that***. As a matter of law, ***they have told you their clients are at a minimum accomplices to this murder***.

Vol. 12 RP 159.

This statement was improper for several reasons. First, the prosecutor implies that the defendants can be guilty "as a matter of law" "simply for being" at the scene of the crime. As stated above, this is clearly insufficient to prove accomplice liability.[69] By telling the jury that Abraham could be convicted as an accomplice merely because he was in the car when the shooting occurred, the prosecutor clearly misstated the law and minimized the State's burden by telling the jury that "simply being there" was all that was necessary to convict Abraham of accomplice to murder.

Second, the prosecutor explicitly misstated the defendants' arguments and twisted them to suggest that the defendants' attorneys admitted to their own client's guilt. Defense counsel never said that Alexis was guilty for "simply being" at the scene of the crime, and the prosecutor's statement went beyond the

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[69] *See id.*

"wide latitude" permitted in drawing inferences from the record by claiming that defense counsel believed "as a matter of law" that Abraham was also guilty.

Finally, even though defense counsel objected almost immediately to the above comments and accurately pointed out that defense counsel never made the above statements, the trial court inexplicably *overruled* the objection. Apparently, the court thought that, although the prosecutor maliciously manipulated defense counsel's words and flipped the entire defense theory on its ear, such conduct is acceptable because it was done during or as "argument." Vol. 12 RP 159-160.

By failing to sustain defense counsel's meritorious objection, the Court did more than allow extremely prejudicial and misleading argument in front of the jury. By over-ruling the defense's objection to such "argument," which was undoubtedly an abuse of discretion, the trial court propounded the prejudicial effect of the prosecutors repeated misconduct by lending an "aura" of legitimacy to the prosecutor's argument.[70] In effect, the jury was thus allowed to believe that defense counsel *did in fact admit to their client's own guilt as an accomplice.*

6. **THE PROSECUTOR COMMITTED MISCONDUCT WHEN HE ENCOURAGED THE JURY TO "STEP INTO THE SHOES" OF THE DEFENDANTS AND SPECULATED AS TO THEIR STATE OF MIND WITHOUT FACTUAL SUPPORT IN THE RECORD.**

It is well settled that prosecutors cannot appeal to the passion and prejudice based on facts not in evidence.[71] While prosecutors have wide latitude in drawing inferences from the evidence, they cannot step into the defendant's

[70] *See Davenport*, 100 Wn.2d at 764 (court's ruling lent aura of legitimacy to prosecutor's misconduct).
[71] *State v. Pierce*, 169 Wn. App. 533, 554-55, 280 P.3d 1158 (2012).

shoes and effectively testify about his thought process.[72] It is, therefore, improper for a prosecutor to ask the jury to "step into the shoes" of *the victim* because the prosecutor implied becomes the victim's "representative." Still, "it is *far more improper* for the prosecutor to step into the *defendant's* shoes during [ ] and, in effect, become the *defendant's* representative."[73] However, that is exactly what the prosecutor did in this case.

Continuing the endless stream of misconduct that permeated his closing argument, the prosecutor argued that the jury should put themselves in the shoes of both Benjamin and Abraham and pretend to be a gang member like them:

> *And every time you see his house, it's going to be a reminder of how the rival gang killed your friend.* Think of how that would affect a 16-year-old or a 17-year-old *young man's mind, gang member's mind*...and here is one of their leaders on the main street in town for everyone to see wearing his colors, full display. Folks, that would probably drive anyone over the edge.

Vol. 12 RP 39; Vol. 12 RP 42.

When he made this statement, the prosecutor effectively testified as to Benjamin and Abraham's thought process, he argued facts not in evidence, and ultimately, he improperly tried to inflame the jury's passions and prejudices so that it would be easier to obtain a conviction.

The statement encouraged the jury to "step into the shoes" of the defendants and speculate as to how gang members think and consequently impressed prejudicial images of gang habits in the jurors' minds. The State may attempt to justify this improper argument by arguing that these facts were relevant to prove the gang motive, but this argument went beyond what was necessary to

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[72] *Id.*
[73] *Id.*

prove motive and served no legitimate purpose but to inflame the jury's prejudice against the defendant.[74]

7. **THE PROSECUTOR COMMITTED MISCONDUCT WHEN HE DISPARAGED DEFENSE COUNSEL BY INSINUATING THAT DEFENSE COUNSEL BELIEVED HIS CLIENT WAS GUILTY, REFERENCING FACTS NOT IN EVIDENCE, AND SIMULTANEOUSLY IMPROPERLY BOLSTERING ALEXIS'S CREDIBILITY, YET AGAIN.**

"It is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity.[75] When a prosecutor attacks the integrity of the defendant's attorney, he can violate the defendant's constitutional right to the assistance of counsel. Prosecutorial attacks on defense counsel usually take three forms: remarks about counsel's reasons for interposing objections; *insinuations that defense counsel believes his client is guilty;* and attacks on counsel's ethics and integrity.

During their closing arguments, both defendant's case theories of course relied upon discrediting Alexis's testimony. In many respects, defense counsel did an excellent job, by pointing out the inconsistencies in his testimony and his clear motive to fabricate his version of the events before and after the shooting, namely, to protect himself from criminal liability. Both defense counsel properly argued reasonable inferences and facts from the record, also pointing out where facts were lacking.

In response, the prosecutor resorted to unfair and desperate tactics in his reply argument. Just one except from the prosecutor's closing argument puts on

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[74] *See Id.*
[75] *Thorgerson,* 172, Wn.2d at 451.

display an array of misconduct that his clearly improper and certainly prejudicial to Abraham's case:

> [THE STATE:] They called Alexis a liar 20 times. You can tell where *an attorney is concerned about a case* based upon what they focus on. *They are scared to death of the testimony of Alexis Hernandez. Because it is the truth*, it is consistent, it is corroborated by other witnesses and other facts. *They don't want you to believe him, because they know what it means.*

Vol. 12 RP 161.

Again, the prosecutor's argument was improper and prejudicial for three reasons. First, the prosecutor disparaged defense counsel by misstating their arguments and insinuating that they believed Alexis is telling the truth. Second, that same statement was also improper because it referenced facts not in evidence[76]—the defense attorneys' alleged personal opinions about their client's guilt—which is of course not and should never be considered as evidence by the jury. Third, the prosecutor committed misconduct by introducing this testimony in such a way that made it impossible for defense counsel to pre-emptively object and minimize the prejudicial effect.[77] Finally, the prosecutor again vouched for the Alexis credibility by telling the jury that Alexis's testimony "was the truth."[78]

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[76] *See State v. Lindsay*, 171 Wn. App. 808, 831-832, 288 P.3d 641 (2012) (Although counsel will have a great deal of latitude during closing argument, it is improper to refer in ***closing argument*** to matters that are not in the record).

[77] *State v. Jones*, 144 Wn. App. 284, 295, 183 P.3d 307 (2008) (A prosecutor has engaged in misconduct when he intentionally introduces inadmissible evidence in a manner that denies the defendant a fair the opportunity to object to the inadmissible evidence).

[78] *State v. Traweek*, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986) (concluding it was error for a prosecutor to tell the jury he "'knew'" the defendant committed the crime).

8. **THE PROSECUTOR COMMITTED MISCONDUCT WHEN HE REPEATEDLY ARGUED FACTS NOT IN EVIDENCE.**

It is misconduct for the prosecutor to argue from facts not in evidence.[79] Such conduct is improper, "not because the facts are inadmissible, but because no witness is willing and available to testify as to those facts."[80] In

Here, the prosecutor, throughout his closing argument, repeatedly created facts not in evidence. He not only vouched for the State's most crucial witness (again), but he stepped beyond the permissible limit of inferring facts from the record and appealed to the passion and prejudice of the jury. The prosecutor, for instance, stated:

> [THE STATE:] Now, that may be true that Alexis Hernandez isn't going to go to prison for this. But that's not all he gets. Lets be right up front about this. **He gets to never, ever walk down the streets in the city of Quincy again. Ever. He doesn't get to go to a movie theater or a pizza parlor in Quincy or probably Ephrata or Moses Lake. He doesn't get to those things because, as they have testified**, as evidence has shown, if you testify against one of these guys, there's going to be a mark out on you. That's **pretty powerful disincentive to testify. You don't do that**.

Vol. 12 RP 162.

While a prosecutor can certainly argue that retaliation was a possible risk because the witness is testifying, the prosecutor here went far beyond that by generating facts that were not at all supported by the record, namely all of the activities that Alexis Hernandez could never do again, none of which were made part of the record. No evidence supported the assertion that Alexis will "never" "ever" be able to walk the streets of Quincy. Nor did any evidence support the

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[79] *Lindsay*, 171 Wn. App. at 831-32; *Miles*, 139 Wn. App. at 888.
[80] *Id.*

inferences that Alexis will never be able to walk the streets of Ephrata or Moses Lake—again, these are purely prejudicial "facts" not supported by the evidence. No witness, including Alexis himself ever testified that, as a result of his testimony, he would never be able to do these things.

Looking at the prosecutor's entire closing argument it is very clear that he rarely argued facts in evidence; even when he did argue evidence within the four corners of the record, he typically argued these facts in-conjunction with improper argument—either he appealed to the passion and prejudice of the jury or vouched for Alexis Hernandez's credibility.

C. IN LIGHT OF THE TRULY RARE CIRCUMSTANCES OF THIS CASE, THE ONLY APPROPRIATE REMEDY FOR THE IMPROPER CONDUCT DETAILED ABOVE IS DISMISSAL OF THE CONVICTIONS WITH PREJUDICE.

1. RAP 12.2 ALLOWS THE COURT TO DISMISS A CONVICTION AS "THE INTERESTS OF JUSTICE REQUIRE." APPLYING THE RULES FOR DISMISSAL REQUIRED UNDER CRR 7.5 BY ANALOGY, THIS COURT SHOULD DISMISS MR. LOPEZ'S CONVICTIONS WITH PREJUDICE.

Under RAP 12.2, the appellate court may reverse, affirm, or modify the decision being reviewed and ***take any other action as the merits of the case and the interest of justice may require.*** Once the conviction is dismissed, the dismissal order will be "effective and binding the parties." [81] The Washington State Supreme Court recently reaffirmed the court of appeals broad authority to, in rare circumstances, exercise its discretion to act in "the interests of justice under RAP 12.2 and its related counterpart RAP 2.5.[82]

[81] *State v. Schwab*, 163 Wn.2d 664, 185 P.3d 1151 (2008).
[82] *Id.*

In *State v. Schwab*, the defendant had a previous conviction for manslaughter vacated, but the court held that the court of appeals had the authority under these rules to "revive" a conviction that was previously vacated and dismissed in the "interests of justice." Nothing in the rules specifically allowed for the revival of the vacated conviction, but the court held that it was necessary in "the interests of justice," as authorized by RAP 12.2. If an appellate court may "revive" an already dismissed conviction under RAP 12.2, it logically follows that it may also dismiss a case with prejudice for the same reason, when "the interest of justice may require."

Similarly, Washington's criminal trial rules contain a similar provision that specifically authorizes a trial court to dismiss a conviction "in the interests of justice."[83] Under CrR 8.3(b) a trial court "may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect[s] the accused's right to a fair trial." CrR 8.3(b).

First, the defendant must show arbitrary government action or misconduct, which may include simple mismanagement, i.e. through mere negligence.[84] Second, the defendant must show actual prejudice affecting his fair trial rights.[85].

In *State v. Martinez*, this Court upheld a trial court's dismissal when the trial court dismissed the defendant's multiple convictions (all as an accomplice)

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[83] CrR 8.3(b). The rule reads in full:

> On Motion of Court. The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

[84] *State v. Oppelt*, 172 Wn.2d 285, 296-297, 257 P.3d 653 (2011).

[85] *Id.*

because the State intentionally withheld exculpatory evidence until nearly the end of the defendant's trial.[86] In *Martinez,* the State had a witness who identified both of the weapons used in the crime as weapons the defendant had shown her in December 1999. However, the State determined during pre-trial investigation that the witness could not have correctly identified one of the guns because it belonged to a third party until October 2000.[87] The State did not inform the defense about this evidence and noted in its opening statement that it expected the witness to identify the guns in some fashion: "she can't tell you that these are the same guns, I think she will say that they just looked the same."[88] However, the State later informed the defense that it would not question the witness about the gun lineup, which made the defense suspicious.[89] During trial, it was eventually revealed that the gun identified by the witness could not have been the same gun used in the robbery. Nevertheless, the State again tried to suggest a connection between the guns.[90]

The prosecutorial misconduct that occurred in this case was at least as egregious as that in *Martinez*, but unlike in Martinez, a factual hearing by the trial court is not necessary here because the prosecutor's incredibly egregious misconduct is clearly evident from the record on appeal. Here, just as in *Martinez*, Abraham can easily show both elements required for reversal: government misconduct and prejudice.

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[86] *State v. Martinez*, 121 Wn. App. 21, 25, 86 P.3d 1210 (2004),
[87] *Id.* 121 Wn. App. at 25-26.
[88] *Id.* 121 Wn. App. at 26.
[89] *Id.* 121 Wn. App. at 26-27.
[90] *Id.* at 28.

a. THE MISCONDUCT THAT OCCURRED IN THIS CASE WAS AT LEAST AS EGREGIOUS AS THAT IN *MARTINEZ* AND IT APPEARS TO BE THE MOST EGREGIOUS MISCONDUCT DURING CLOSING ARGUMENT OF ALL REPORTED WASHINGTON CASES.

Just as in *Martinez*, the prosecutor here engaged in conduct that was clearly governmental misconduct. Not only did the prosecutor in *Martinez* withhold favorable evidence, but even when this evidence came to light during the trial, the prosecuting attorney continued to improperly imply that there was a connection between the defendant and the gun. In many ways, then, *Martinez* was just as much a case of prosecutorial misconduct during cross examination and closing argument, as it is one of misconduct for failing to produce exculpatory evidence.

In comparison to *Martinez,* here the Prosecutor's misconduct was far more egregious, as it permeated the State's entire closing argument. Even worse, the prosecutor used that improper argument to tip the scales in the State's case, which hinged almost entirely on a historically unreliable witness - an accomplice who testified against his codefendants but denied any true involvement in the crime charged.

The arguments made above reveal that the misconduct in this case reached a level more egregious than any of the leading prosecutorial misconduct cases in Washington. His misconduct was both flagrant and continuous. He made little to no attempt to confine himself to the facts of the case or to argue from those facts. He argued that the jury should convict Abraham based upon countless improper purposes, including the prosecutor's own personal belief in the justness of the

case and the veracity of its *only eye witness*. He misstated the law on numerous occasions in a concerted effort to lower his burden of proof in a case that was weak, and supported almost entirely by one government witness who had struck a deal with the prosecution.

b. The PREJUDICE IN THIS CASE WAS AT LEAST AS GREAT AS THAT IN *MARTINEZ*. THE LIKELIHOOD THAT THE EGREGIOUS MISCONDUCT CAUSED THE JURY TO CONVICT RATHER THAN ACQUIT DENIED BENJAMIN HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL.

In *Martinez*, the court concluded that the failure to disclose exculpatory evidence until mid-trial was prejudiced in his right to counsel because the late discovery compromised his attorney's ability to adequately prepare for trial, as well as in his right to effective assistance of counsel because suppression of the evidence hindered his attorney's ability to defend.[91] The court concluded that the prosecutor's withholding of exculpatory evidence until the middle of a criminal jury trial was "so repugnant to principles of fundamental fairness that it constitutes a violation of due process."[92]

Likewise here, the prosecutor's repeated misconduct during misconduct clearly violated Abraham's due process rights and denied him of a fair trial. The risk that a prosecutor's misconduct will unfairly prejudice the defendant is at its greatest during closing argument. In *In Re Glasmann*, our Supreme Court reversed charges for second degree assault, attempted second degree robbery, first degree kidnapping, and obstruction, after the prosecutor showed a slideshow at trial which consisted of images of the defendant with the words "guilty" and "do

[91] Martinez, 121 Wn. App. at 34-35.
[92] Martinez, 121 Wn. App. at 35.

you believe him?" superimposed over the defendant's face. The Court emphasized the unique significance of closing argument in a criminal trial and the great prejudice that can result from a prosecutor's misconduct during his argument:

> The prosecutor's argument is likely to have significant persuasive force with the jury. Accordingly, the scope of argument must be consistent with the evidence and marked by the fairness that should characterize all of the prosecutor's conduct. Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.[93]

Similarly here the prosecutor improperly used the prestige of his title and office to unfairly tilt the trial in his favor. Moreover, as argued above, the trial court's erroneous rulings that allowed the prosecutor to continue his improper argument only added to the prosecutor's improper swaying of the jury.

2. DISMISSAL, ALTHOUGH AN EXTREME REMEDY IN MOST CASES, IS REQUIRED IN THIS CASE BECAUSE SIMPLY REVERSING THE CONVICTION AND ALLOWING THE STATE TO RE-TRY BENJAMIN IS AN INADEQUATE REMEDY.

"In the drive to achieve successful prosecutions, the end cannot justify the means."[94] If the State knows that the most severe consequence that can follow from [intentionally committing any type of egregious misconduct" late in the trial is that it may have to try the case twice, it will hardly be seriously deterred from such conduct in the future.[95] In *State v. Charlton*, a case decided 35 years ago, the Court recognized that prosecutorial misconduct during closing argument was a

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[93] *In re Personal Restraint Petition of Glasmann*, 175 Wn.2d 696, 706, 286 P.3d 673 (2012)
[94] *State v. Martinez*, 121 Wn. App. 21, 35-36, 86 P.3d 1210 (2004).
[95] *Id.*

prevailing problem, yet prosecutors appeared to be undeterred by the reversal of otherwise valid convictions. Specifically, the court noticed that "[i]n spite of [its] frequent warnings that prejudicial prosecutorial tactics will not be permitted," the Supreme Court found "that some prosecutors continue to use improper, sometimes prejudicial means in an effort to obtain convictions. *In most of these instances, competent evidence fully sustains a conviction.*"[96]

In cases where the evidence of guilt is substantial, a "trained and experienced prosecutor" will presumably "not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics." However, a prosecutor with weak case, such as the case against Abraham, has a great incentive to use unfair trial tactics if they appear "necessary to sway the jury in a close case."[97] The issue is whether the comments deliberately appealed to the jury's passion and prejudice and encouraged the jury to base the verdict on the improper argument "'rather than properly admitted evidence.'"[98]

To determine whether misconduct occurred, the focus must be on the misconduct and its impact, not on the evidence that was properly admitted.[99] To determine the prejudice to the defendant, the court sometimes looks to the evidence produced at trial when determining whether the misconduct denied the appellant of a fair trial.[100] To determine the remedy, the court should look to deterrence. Here, reversal of Abraham's conviction is clearly an inadequate

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[96] *State v. Charlton*, 90 Wn.2d 657, 665, 585 P.2d 142 (1978),
[97] *Fleming*, 83 Wn. App. at 213.
[98] *State v. Furman*, 122 Wn.2d 440, 468-69, 858 P.2d 1092 (1993) (quoting and discussing *Belgarde*, 110 Wn.2d at 507-08).
[99] *Glasmann*, 175 Wn.2d at 706.
[100] *See id.*

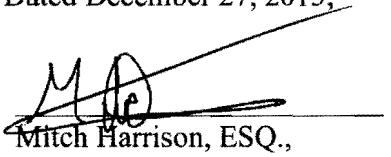
remedy. In a close case such as this, the only way to deter the prosecutor from engaging in such conduct is to threaten such egregious conduct with dismissal of the case. There is no legal or moral reason to make a distinction here between a case in which the prosecutor intentionally withholds exculpatory evidence, such as in *Martinez*, and the case in which the prosecutor intentionally tries to sway the jury with countless improper arguments during his summation to the jury.

When the numerous and extremely prejudicial instances of misconduct is considered in light of the scintilla of evidence that somehow resulted in Abraham's conviction for murder, it risk that the prosecutor's comments unfairly swayed the jury is far too great to allow the prosecutor a second chance is incarcerate the defendant. The prosecutor's closing argument was filled with egregious misconduct. This misconduct, taken in the context of the entire argument, amounted to irreparable prejudice. Due to the severity of prosecutorial misconduct in conjunction with the lack of evidence against Abraham Lopez, the appellant requests that this court dismiss with prejudice.

VII. CONCLUSION

Abraham Lopez respectfully requests that this court grant he relief as requested in this brief.

Dated December 27, 2013,



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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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