71005-2

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NO. 71005-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

GERARDO ARELLANO-GAMA,

Appellant.

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

The Honorable Susan K. Cook, Judge

BRIEF OF APPELLANT

JENNIFER M. WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The trial court violated the appellant's constitutional right to a public trial by taking peremptory challenges privately.

2. Prosecutorial misconduct in closing argument denied the appellant a fair trial.

3. The probation condition prohibiting possession of drug paraphernalia is unconstitutionally vague.

Issues Pertaining to Assignments of Error

1. During jury selection, the parties made peremptory challenges privately at a sidebar. Because the trial court did not analyze the Bone-Club[1] factors before conducting this important portion of voir dire in a private proceeding, did the trial court violate appellant's constitutional right to a public trial?

2. The State told jurors, orally and via PowerPoint presentation in closing, that to have a reasonable doubt as to the appellant's guilt, they had to (1) "say why there's a reason" for any such doubt and (2) be able to explain the reasoning to fellow jurors.

Where the appellant presented a plausible defense to a firearm charge and the State violated well-established precedent with an argument

[1] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

previously held to improperly burden-shift, did flagrant, prosecutorial misconduct deny the appellant a fair trial?

3. Must the condition of probation prohibiting the appellant from possessing drug paraphernalia be stricken as unconstitutionally vague?

B. STATEMENT OF THE CASE[2]

1. Charges, jury selection, verdicts, and sentence

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

During jury selection, after the parties finished questioning potential jurors, the court directed the parties to make their peremptory challenges at a side bar. The court then called the jurors selected to serve to the box. Supp. RP at 24-25; Supp. CP ___ (sub no. 51, Trial minutes, at 3).

The court dismissed the second charge mid-trial for insufficient evidence. 2RP 98; CP 39. A jury convicted Arellano of the remaining charges. CP 36-37. It also entered special verdicts finding him guilty

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

based on driving a motor vehicle "under the influence of or affected by intoxicants" and having "a blood alcohol concentration of .08 or higher." CP 38.[3]

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

2. Trial testimony

During the early morning hours of January 6, 2013, Sylvia Alvarez saw a white car drive into the parking lot of her Mount Vernon apartment complex at a high rate of speed. 1RP 49. The car was noisily dragging its bumper and it nearly hit a parked truck. 1RP 49, 56. Alvarez called 9-1-1. 1RP 52. A man emerged from the driver's seat and a woman emerged from the passenger seat. They entered an apartment. The man's gait suggested he was drunk. 1RP 51.

The man and the woman soon emerged from the apartment. The man got into the rear seat on the passenger's side and the woman got into

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[3] Although Arellano was charged under all three prongs of former RCW 46.61.502(1) (2011), one of which involves being "under the combined influence of or affected by intoxicating liquor or any drug," the State did not proceed under that prong. CP 2, 38.

the driver's seat.[4] 1RP 53-54. Police arrived as the car was about to drive away. 1RP 54.

Officers Chester Curry and Zachary Wright both responded. 1RP 80-81; 2RP 75. Upon arrival, Curry saw a white Nissan Murano with a flat front tire and broken rim parked haphazardly in the lot. 1RP 80-81; 2RP 94.

Arellano emerged from the front passenger seat,[5] and staggered past Curry toward an apartment. 1RP 84, 86. Arellano did not respond to Curry's command to stop. 1RP 87.

Wright looked in the Murano and saw a silver revolver on the front seat. 2RP 81-82. Wright described the gun as a small .22-caliber "pocket gun." 2RP 82.

Wright alerted Curry there was a gun in the car. 1RP 87. In response to Wright's comment, Arellano said, "that's nothing" or "that's no big deal." 1RP 89; 2RP 82. Arellano then "surged" toward the door, and the officers tackled and eventually handcuffed him. 1RP 87; 2RP 82.

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[4] The woman, Arellano's fiancée, was the registered owner. 1RP 86; 52RP 106

[5] Like Alvarez, Curry initially testified Arellano got out of the rear passenger seat, 1RP 85, but later changed his testimony and said Arellano got out of the front passenger seat. 2RP 24-25, 35.

The officers arrested Arellano and, because he appeared intoxicated, took him to the police station for a breath test. 1RP 90; 2RP 8-15. Arellano tested well over the legal limit for blood alcohol. 1RP 90; 2RP 55.

Officer Wright was unfamiliar with guns of the type found in the car and gave the gun to Officer Curry to dismantle. 2RP 84, 91. Curry testified the gun was a revolver and was loaded with hollow point bullets.[6] 2RP 21-23.

Arellano testified he remembered only portions of the evening before his arrest. He dropped off his fiancée and child at his cousin's house and went to a birthday party at a bowling alley. 2RP 100-01. He planned to pick up his family and go back to Arlington to his fiancée's house that night. 2RP 106. But Arellano drank heavily at the bowling alley. 2RP 112, 117. He did not recall leaving the bowling alley. 2RP 103-04. He only recalled three things the rest of the night: being taken to the ground by the police officers, being instructed to breathe deeply and then blowing into the breath test machine, and, finally, waking up in jail. 2RP 104, 114. Arellano acknowledged he had a juvenile assault conviction and was prohibited from possessing a firearm. 2RP 117-18. But Arellano had never seen or handled the gun before. 2RP 106.

[6] Curry did not test the gun or have it sent out for testing. 2RP 38.

3. State's closing argument

In closing, the prosecutor argued the State was required to prove the elements beyond a reasonable doubt, although it was not required to prove other disputed matters. 2RP 127. "The reasonable doubt you're evaluating is the elements of the crime." 2RP 127. He continued:

> Instruction Number 3 . . . describes what reasonable doubt is. But it's a little bit circular. I like to look at it more of what the concept is . . . . Reasonable means there has to be reason. It's a doubt with a reason you can attach to it. In other words, *you have to say why there's a reason that this doubt exists in my mind as a particular element*. If you're going to find it's not proven beyond a reasonable doubt, *if you don't have a reason that you can attach to that, that you can explain to your [fellow] jurors[,] then it's proven beyond a reasonable doubt, if there's not something you can attach to it*.

2RP 127-28 (emphasis added). The prosecutor also showed jurors a PowerPoint slide featuring the following statements:

- It's a doubt with a REASON you can attach to it.
- A REASON you can explain to your fellow jurors.

Supp. CP ___ (sub no. 72, "State's Cover Page Closing," at 1).

C. ARGUMENT

1. THE TRIAL COURT VIOLATED THE APPELLANT'S RIGHT TO A PUBLIC TRIAL BY HAVING THE ATTORNEYS EXERCISE PEREMPTORY CHALLENGES AT A PRIVATE SIDEBAR.

a. Introduction to applicable law

The Sixth Amendment and article I, section 22 guarantee the accused a public trial by an impartial jury.[7] Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 629 (1995). Additionally, article I, section 10 provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." This latter provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

While the right to a public trial is not absolute, a trial court may restrict the right only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Before a judge can close any part of a trial, it must first apply on the record the five factors set forth in Bone-Club. In re Personal Restraint of Orange, 152 Wn.2d 795, 806-07, 809, 100 P.3d

[7] The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." Article I, section 22 provides in part that "[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury . . . ."

291 (2004). A violation of the right to a public trial is presumed prejudicial and is not subject to harmless error analysis. State v. Wise, 176 Wn.2d 1, 16-19, 288 P.3d 1113 (2012); State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006); Orange, 152 Wn.2d at 814.

b. Peremptory challenges are considered part of "voir dire," which must conducted openly.

The public trial right applies to "'the process of juror selection,' which 'is itself a matter of importance, not simply to the adversaries but to the criminal justice system.'" Id. at 804 (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). The exercise of peremptory challenges, governed by CrR 6.4, constitutes a part of "voir dire," to which the public trial right attaches. State v. Wilson, 174 Wn. App. 328, 342-43, 298 P.3d 148 (2013); see also People v. Harris, 10 Cal.App.4th 672, 684, 12 Cal.Rptr.2d 758 (1992) (state and federal authority support conclusion that "peremptory challenge process is a part of the 'trial' to which a criminal defendant's constitutional right to a public trial extends"); accord, Hollis v. State, 221 Miss. 677, 74 So.2d 747 (1954) (to comply with state constitutional mandate of a public trial, peremptory challenges must be exercised at the bar, in open court, not at a private conference); cf. State v. Sublett, 176 Wn.2d 58, 70-71, 77,

292 P.3d 715 (2012) (consistent with CrR 6.15, in-chambers discussion of jury's question posed during deliberations did not implicate public trial right); but see State v. Love, 176 Wn. App. 911, 917-19, 309 P.3d 1209 (2013) (Division Three case rejecting argument that public trial cases involving jury selection controlled the issue, and holding, based in part on case that predated Bone-Club, that "experience and logic" test did not require open exercise of peremptory challenges); State v. Dunn, __ Wn. App. ___, 321 P.3d 1283 (Apr. 8, 2014) (Division Two case following Love).[8]

The right to a public trial is concerned with "circumstances in which the public's mere presence passively contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny." State v. Bennett, 168 Wn. App. 197, 204, 275 P.3d 1224 (2012) (citing State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005)). Although peremptory challenges may be exercised based on subjective feelings and opinions, there are important constitutional limits on both parties' exercise of such

[8] A petition for review was filed in Love under case no. 89619-4. On April 4, 2014 this Court stayed consideration of the petition. A petition for review was filed in Dunn on May 7 and is set to be considered on August 5, 2014 under case no. 90238-1.

challenges. Georgia v. McCollum, 505 U.S. 42, 49, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992); Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Based on these constitutional limitations, public scrutiny of the exercise of peremptory challenges is essential. The procedure in this case thus violated the right to a public trial.

c. Sublett's "experience and logic test" requires open voir dire, which includes the exercise of peremptory challenges.

At issue in Sublett was whether the public trial rights of petitioners Sublett and Olsen were violated when the trial judge considered, in chambers and with counsel present, a question from the jury during its deliberations. Sublett, 176 Wn.2d at 65. During its deliberations, the jury submitted a question regarding the accomplice liability instruction. Counsel met in chambers to consider the question and agreed to the court's answer telling the jury to reread the instructions. Id. at 67.

The Court of Appeals held the right to a public trial does not extend to hearings on purely ministerial or legal issues that do not require the resolution of disputed facts. Because the jury's question involved a purely legal issue, consideration of the inquiry was not subject to the right to a public trial, so the defendants' rights were not violated. Id. at 67-68.

In a plurality opinion, the Supreme Court affirmed under a different theory. Id. at 72. Applying the "experience and logic" test, the

majority of justices held that resolution of the jury's question did not implicate the core values the public trial right serves. Id. (lead opinion); id. at 99-100 (Madsen, J., concurring); id. at 141-42 (Stephens, J., concurring). The right to a public trial serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. Id. at 72 (citing Brightman, 155 Wn.2d at 514).

Under the "experience" prong, the court asks whether the place and process have historically been open to the press and general public. The "logic" prong asks whether public access plays a significant positive role in the functioning of the particular process in question. If the answer to both is yes, the public trial right attaches. Sublett, 176 Wn.2d at 73.

Applying this test to the jury inquiry addressed in chambers in Sublett and Olsen's cases, the Court observed that, historically, proceedings involving jury instructions have not been conducted in an open courtroom. Id. at 75. Moreover, by court rule, jury inquiries are to be submitted in writing. Id. at 76. Accordingly, the Court found the proceeding did not satisfy the first part of the test and concluded petitioners' public trial rights were not implicated. Id. at 77.

In contrast, voir dire is at issue in this case. It is well established that the right to a public trial extends to voir dire. Id. at 71; Strode, 167

Wn.2d at 226. The process of jury selection "is itself a matter of importance, not simply to the adversaries but to the criminal justice system." Orange, 152 Wn.2d at 804.

Moreover, the openness of jury selection clearly enhances core values of the public trial right, i.e. "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Sublett, 176 Wn.2d at 75. Peremptory and for-cause challenges are an integral part of voir dire. Wilson, 174 Wn. App. at 342-43 (unlike potential juror excusals governed by CrR 6.3, exercise of peremptory challenges, governed by CrR 6.4, constitutes part of "voir dire," to which the public trial right attaches); see also Strode, 167 Wn.2d at 230 (for-cause challenges of six jurors in chambers not de minimus violation of public trial right).

In summary, although cases clearly hold that voir dire must be open, the experience and logic test is also satisfied because historically, voir dire has been conducted in open court. Moreover, openness clearly enhances the basic fairness of the proceeding.

The State may nonetheless rely on Division Three's decision in Love, 176 Wn. App. 911, for the proposition that under the experience and logic test, exercising peremptory challenges privately does not violate the right to public trial. The Love decision, however, is poorly reasoned.

Regarding the experience prong, the Court noted the absence of evidence that, historically, peremptory challenges were made in open court. Love, 176 Wn. App. at 917-18. But history would not necessarily reveal common practice unless the parties made an issue of the employed practice. History does not tell us these challenges were commonly done in private, either. Moreover, before Bone-Club, 128 Wn.2d 254, there were likely many common, but unconstitutional, practices that ceased with issuance of that decision.

Love cites to one case, State v. Thomas, 16 Wn. App. 1, 553 P.2d 1357 (1976), as "strong evidence that peremptory challenges can be conducted in private." Love, 176 Wn. App. at 918. Thomas rejected the argument that "Kitsap County's use of secret – written – peremptory jury challenges" violated the defendant's right to a fair and public trial where the defendant had failed to cite to any supporting authority. Thomas, 16 Wn. App. at 13.

Notably, Thomas predates Bone-Club by nearly 20 years. Moreover, the fact that Thomas challenged the practice suggests it was atypical even at the time.[9] Labeling Thomas "strong evidence" is an overstatement.

Regarding logic, the Court could think of no manner in which exercising peremptory challenges in public furthered the right to fair trial, concluding instead that a written record of the challenges sufficed. Love, 176 Wn.2d at 919-20. But the Court fails to mention or consider the increased risk of discrimination against protected classes of jurors resulting from private exercise of peremptory challenges. As discussed below, the later filing of a written document from which the source of peremptory challenges might be deciphered is not an adequate substitute for simultaneous public oversight. See State v. Sadler, 147 Wn. App. 97, 116, 193 P.3d 1108 (2008) ("Few aspects of a trial can be more important . . . than whether the prosecutor has excused jurors because of their race, an issue in which the public has a vital interest.").

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[9] Citing to a Bar Association directory, the Thomas court noted that "several counties" had employed Kitsap County's practice. Thomas, 16 Wn. App. at 13 n. 2. Ignoring the questionable methodology of what appears to an informal poll, that only "several counties" had used the method certainly leaves open the possibility a majority of Washington's 39 counties did not use it, even before Bone-Club and later cases requiring an open process.

d. The procedure in this case was, in fact, closed to the public.

Even if the procedure occurred in an otherwise open courtroom, any assertion that the procedure was, in fact, public, should be rejected. The procedure was an unreported sidebar, which occurs outside of the public's scrutiny, and thus violates the appellant's right to a fair and public trial. State v. Slert, 169 Wn. App. 766, 774 n. 11, 282 P.3d 101 (2012) (rejecting argument that no violation occurred if jurors were actually dismissed not in chambers but at a sidebar and stating "if a side-bar conference was used to dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reasons and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview"), review granted, 176 Wn.2d 1031 (2013); see also Harris, 10 Cal.App.4th at 684 (exercise of peremptory challenges in chambers violates defendant's right to a public trial). The procedure the court utilized was as closed to the public as if it had taken place in chambers.

e. A record made after-the-fact record does not cure the error.

Despite an after-the-fact record, the trial court violated the right to a public trial in the first instance by taking peremptory challenges in the manner described the above.

First, generally speaking, the availability of a record of an improperly closed voir dire fails to cure the error. State v. Paumier, 176 Wn.2d 29, 32, 37, 288 P.3d 1126 (2012); see also Harris, 10 Cal.App.4th at 684 (holding, based on application of federal law, that after-the-fact availability of transcripts of peremptory challenges conducted in chambers does not cure public trial violation or render those proceedings "public); cf. People v. Williams, 26 Cal.App.4th Supp. 1, 6-8, 31 Cal.Rptr.2d 769 (1994) (peremptory challenge could be held at sidebar if challenge and party making it was then *immediately* announced in open court).

Second, while parties need give no rationale for such challenges, their open exercise is essential, considering the important limits on such challenges, which may be triggered solely by a juror's appearance. While in most cases peremptory challenges are not subject to a ruling by the trial court, it is the very lack of court control that makes it crucial they be open to public scrutiny in all cases. See State v. Saintcalle, 178 Wn.2d 34, 46, 88-95, 118-19, 309 P.3d 326 (2013) (notwithstanding majority of justices' affirmance of denial of Batson challenge, lead opinion, concurrence and dissent underscoring harm resulting from improper race-based exercise of peremptory challenges and highlighting difficulty of obtaining appellate relief even where discriminatory exercise may have occurred). Saintcalle

highlights the need for public scrutiny, which encourages parties to police themselves and enhance the fairness of the trial process. Thus, an after-the-fact written record of such challenges is inadequate, given the need for scrutiny in the first instance.

The State may also argue that the "Judge's List," which is attached to the clerk's minutes and sets for the names of jurors, along with related codes, comprises an adequate record. Supp. CP ___ (sub no. 51, supra, at "Judge's List," page 1). But the mere opportunity to find out, sometime after the process, which side eliminated which jurors cannot satisfy this right. For example, members of the public would have to know the sheet documenting peremptory challenges had been filed *and* that it was subject to public viewing. Moreover, even if members of the public could recall which juror number was associated with which individual, they also would have to recall the identity, gender, and race of those individuals to determine whether protected group members had been improperly targeted. In Arellano's case, this would have required members of the public to recall the specific features of 13 individuals. Supp. RP at 24-25. This is not realistic, and public access to a sheet of paper after the fact is simply inadequate to protect the right to a public trial.

In summary, peremptory challenges are part of voir dire, to which the public trial right applies. Wilson, 174 Wn. App. at 342-43. The

multitude of cases prohibiting closed voir dire controls the result here. Because the error is structural, prejudice is presumed, and reversal of both of Arellano's convictions is required. Wise, 176 Wn.2d at 16-19.

2. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DENIED THE APPELLANT A FAIR TRIAL AS TO THE FIREARM CONVICTION.

Due process requires that the State bear the burden of proving every element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970;) State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). Prosecutors, like judges, are servants of the law. State v. Gorman, 219 Minn. 162, 175, 17 N.W.2d 42 (1944).

When a prosecutor commits misconduct, he or she may deny the accused the fair trial that is guaranteed by the state and federal constitutions. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005); U.S. Const. amend. 14; Const. art. 1, § 3. A prosecutor's argument must be confined to the law. State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). When the prosecutor mischaracterizes the law, and there is a substantial likelihood that the misstatement affected the jury verdict, the accused is denied a fair trial. State v. Gotcher, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988).

This Court reviews the State's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. Boehning, 127 Wn. App. at 519. Generally if the defendant fails to object or request a curative instruction at trial, the issue of misconduct is waived unless the conduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). In applying this standard, courts should "'focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.'" State v. Lindsay, ___ Wn.2d ___, __ P.3d ___, 2014 WL 1848454 at fn. 2 (May 8, 2014) (quoting State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012))

In State v. Anderson, the Court held a prosecutor's closing argument was improper because it implied that jurors needed to articulate the reason for any reasonable doubt. 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010). The prosecutor had informed the jury that "in order to find the defendant not guilty, you have to say 'I don't believe the defendant is guilty because,' and then you have to fill in the blank." Id. The Court explained that "[b]y implying that the jury had to find a reason in order to find Anderson not guilty, the prosecutor made it seem as though the jury had to find Anderson guilty

unless it could come up with a reason not to," thereby undermining the presumption of innocence. Id.

In Emery, such "fill-in-the-blank" arguments were again found to be improper. 174 Wn.2d at 759-60. The Court noted that "although the argument properly describes reasonable 'doubt as a doubt for which a reason exists,' it improperly implies that the jury must be able to articulate its reasonable doubt." Id. at 760 (internal quotation marks omitted). This "subtly shifts the burden to the defense." Id. But finding the error could have been cured by a proper instruction, and that the evidence of guilt was so overwhelming as to mitigate any possible prejudice, the Court declined to reverse the defendants' convictions. Id. at 764, 764 n. 14.

Here, the prosecutor made arguments similar to those held improper in Anderson and Emery. In this case, however, the State did so in even less subtle terms. The prosecutor stated, "[Y]ou have to say why there's a reason that this doubt exists in my mind as a particular element." 2RP 127. Perhaps more significantly, the prosecutor also argued that, "if you don't have a reason that you can attach to that, that you can explain to your [fellow] jurors[,] then its proven beyond a reasonable doubt." 2RP 128. While the prosecutor did not use the precise words "fill in the blank," his argument explicitly informed jurors they were required to articulate any doubt for it to be valid. This impermissibly shifted the

burden to the defense to prove the accused was innocent. Emery, 174 Wn.2d at 760.

As in Emery, there was no objection to this argument. Id. at 751. Thus, Arellano must show that the argument was so flagrant and ill-intentioned it could not have been cured by an instruction. Stenson, 132 Wn.2d at 719. He must also demonstrate the comments affected the jury's verdict. Emery, 174 Wn.2d at 764 n. 14. He can make this showing.

Washington requires unanimous jury verdicts in criminal cases. Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). To protect this right, however, each juror must reach his or her own verdict uninfluenced by facts outside the evidence and proper instructions and argument. State v. Boogaard, 90 Wn.2d 733, 736, 585 P.2d 789 (1978). "[H]owever subtly the suggestion may be expressed," an instruction that suggests that a juror who disagrees with the majority should abandon his opinion for the sake of reaching a verdict invades the right to jury unanimity. Id. Moreover, the presumption of innocence can be "'diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve.'" State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008) (quoting State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007)).

The prosecutor told jurors that any reservations regarding the State's proof had to be articulated to fellow jurors in order to be valid. Such an argument undermines the right of an accused to have each juror decide the case on his or her own terms. While the court could have explained, once again, that the State carried the full burden of proof, the implication that a private, yet sincerely held, doubt was invalid would have remained.

The effect of the State's misconduct in this respect was also exacerbated by the fact that the argument was put into writing. Although the prosecutor in Emery also showed jurors a PowerPoint slide, that slide only set forth the prohibited fill-in-the-blank argument. Emery, 174 Wn.2d at 751 n. 7. Here, the PowerPoint set forth an analogous argument, but also asserted that any individual juror's doubt must withstand articulation to fellow jurors. As discussed above, this is patently incorrect.

Finally, Anderson was decided in 2009 and Emery, a Supreme Court case, was decided over a year before the prosecutor made his argument in this case.[10] The prosecutor was on notice that such argument was off limits. This Court may consider prior prohibitions on an argument in determining whether a prosecutor's conduct is "flagrant and ill-

[10] Emery was decided in June 14, 2012 and the State's argument in this case occurred on September 24, 2013.

intentioned." See State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996) (deeming prosecutor's argument "flagrant and ill-intentioned" where argument -- that to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken -- was made two years after opinion declaring similar argument impermissible). The State had a duty to the public and to the accused to know the law and the limitations on permissible argument and, in this case, failed in that duty.

The improper argument affected the jury's verdict. Arellano had a plausible defense that he associated with a number of people on the night in question and was so inebriated that he was incapable of knowingly possessing a firearm. 2RP 139-59 (defense closing argument); CP 25 (Instruction 8, to-convict instruction requiring that possession of firearm be "knowing"). A reasonable juror could have found that, in his state, he may have been unaware there was a gun in the car until he was already out of the car. 1RP 89; 2RP 82. The State's case was further weakened by the fact that the gun was found in the front passenger seat, yet neighbor Alvarez saw Arellano get out of the back seat, undermining theories of both actual and constructive possession. 1RP 85.

The State's argument in this case, which shifted the burden to the defense in violation of well-established case law, was so flagrant and prejudicial that a curative instruction could not have remedied it. And

while the argument was somewhat similar to the one prohibited by Emery, given the relative strength of the evidence, it was more likely to have affected the jury's verdict in this case. This Court should, accordingly, reverse Arellano's UPFA conviction.[11]

3. THE CONDITION PROHIBITING POSSESSION OF DRUG PARAPHERNALIA IS UNCONSTITUTIONALLY VAGUE.

Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

Here, Condition 13 of "Appendix B," listing conditions of probation on the DUI conviction states, "Do not possess drug paraphernalia." CP 51. In State v. Sanchez Valencia, 169 Wn.2d 782, 785, 239 P.3d 1059 (2010), the Court addressed a sentencing condition that prohibited possession of "any paraphernalia" used to ingest, process, or facilitate the sale of controlled substances. The court concluded the provision was vague because it failed to provide fair notice and to prevent arbitrary enforcement. Id. at 794-95. Condition 13 here is even less specific and must likewise be stricken.

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[11] In arguing that Arellano was not guilty of UPFA, the defense conceded in that Arellano was guilty of DUI. 2RP 151 (closing argument).

D. CONCLUSION

This court should reverse Arellano's convictions based on the public trial violation. In any event, prosecutorial misconduct in closing argument denied Arellano a fair trial as to the UPFA conviction. Finally, this Court should strike the probation condition prohibiting possession of drug paraphernalia.

DATED this 13TH day of June, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

JENNIFER WINKLER, WSBA No. 35220
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 71005-2-I
	)	
GERARDO ARELLANO-GAMA,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF JUNE 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] SKAGIT COUNTY PROSECUTOR'S OFFICE
COURTHOUSE ANNEX
605 S. THIRD
MOUNT VERNON, WA 98273
karenw@co.skagit.wa.us
criminalappeals@co.skagit.wa.us

[X] GERARDO ARELLANO-GAMA
A88736079
NORTHWEST DETENTION CENTER
1623 EAST J STREET
TACOMA, WA 98421

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 JUN 13 PM 4:39

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF JUNE 2014.

x Patrick Mayovsky