71005-2

71005-2

NO. 71005-2-I

IN THE COURT OF APPEALS – 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

RESPONDENT'S BRIEF

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I. SUMMARY OF ARGUMENT

Gerardo Arellano-Gama appeals from his convictions and sentence for Unlawful Possession of a Firearm in the First Degree and Driving While Under the Influence. He contends the exercise of peremptory challenges conducted at sidebar violated his right to open trial, the prosecutor's closing argument improperly shifted the burden of proof and a condition of community custody was unconstitutionally vague.

The jury selection was done in the open courtroom at a sidebar. Under the experience and logic test of *Sublett*, this was not a courtroom closure. The prosecutor's closing argument explaining the reasonable doubt standard did not improperly shift the burden of proof. And finally, as opposed to the term paraphernalia which case law has been determined to be unconstitutionally vague, drug paraphernalia is sufficiently precise since there is a known statutory definition for that term.

II. ISSUES

1. Does the exercise of peremptory challenges in a courtroom open to the public constitute a violation of the defendant's right to a public trial?

2. Did the prosecutor's argument explaining the term reasonable in the phrase reasonable doubt improperly shift the burden of proof to the defendant?
3. If the argument was improper, where there was no objection, could the impropriety have been cured by an instruction or was the impropriety so flagrant and ill-intentioned so as to merit mistrial?
4. Where drug paraphernalia has a statutory definition, is a community custody term prohibiting possession of drug paraphernalia unconstitutionally vague?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On January 9, 2013, Gerardo Arellano-Gama was charged with Unlawful Possession of a Firearm in the First Degree, Alien in Possession of a Firearm and Driving While Under the Influence. CP 1-2. Arellano-Gama was alleged to have been driving a vehicle which had struck an object damaging the vehicle. CP 4. Officers arrived to the defendant's home to find the defendant exiting the passenger side of the vehicle. CP 4. Officers observed a firearm in the front passenger seat. CP 4. Arrellano-Gama smelled strongly of alcohol and was stumbling and slurring his words. CP 4. He was arrested and provided breath test alcohol readings of .251 and .242.

CP 4. He was determined to have a prior conviction for Assault in the Second Degree and determined to be a Mexican National. CP 4.

On September 23, 2013, the case proceeded to trial. 9/23/13 AM RP 38.[1] At the close of the State's evidence, the trial court dismissed the charge of Alien in Possession of a Firearm based upon insufficiency of the evidence that Arellano-Gama was a resident of Mexico. 9/24/13 RP 98, CP 39

On September 25, 2013, the jury found Arellano-Gama guilty of Unlawful Possession of a Firearm in the First Degree and Driving While under the Influence of Intoxicants. 9/25/13 RP 168, CP 36, 37.

On October 10, 2013, the trial court sentenced Arellano-Gama to 24 months in prison on the Unlawful Possession of a Firearm in the First Degree charge and 364 days with 363 days suspended on the Driving While under the Influence of Intoxicants charge. 9/25/14 RP 176, CP 43. The trial court imposed five years supervision on the Driving While under the Influence of Intoxicants with supervision of conditions of the attached appendix. 9/25/13 RP 178, CP 43-4, 51-2

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[1] The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

5/15/13 RP	3.5 Hearing	(in Volume 1)
9/23/13 AM RP	Call of Case for Trial before Jury	(in Volume 1)
9/23/13 PM1 RP	MOTIONS IN LIMINE	(in Volume 1)
9/23/13 PM2 RP	Jury Selection Conclusion	(in Volume 2)
9/23/13 PM3 RP	Trial Testimony	(in Volume 1)
9/24/13 RP	Trial Testimony and Closing	(in Volume 2)
9/25/13 RP	Jury Verdict	(in Volume 2)
10/10/13 RP	Sentencing	(in Volume 2).

On October 10, 2013, Arellano-Gama timely filed a notice of appeal. CP 54, 10/10/13 RP 178.

2. Statement of Substantive Facts

i. Peremptory Challenges Exercised at Sidebar

During the jury selection process, the trial court advised the courtroom that the parties would be exercising the peremptory challenges at a sidebar hearing.

> THE COURT: Alright. So in that case, Ladies and Gentlemen, that brings us to the point where we select the jurors who are going to hear the case. **And the attorneys are going to make their way up here to the desk, and we are going to go over and select those people. After we have them selected we'll be calling jurors forward to that opening in the railing there in order to sit in the jury box.** So the people who are not selected for this trial must call the jury line again tomorrow after 4:30 because you may be needed for a trial, I think, probably in district court, if there is one later this week. Those of you who are selected for the trial obviously will be with us for a day or two longer. So feel free to stretch and get the blood circulating. But I would ask you to stay where you are in the rows vis-à-vis one another so we can look out there and remind ourselves who is who by where you're located. So go ahead and stand up if you would like but don't move out of position or go anywhere.
>
> (SIDE BAR CONFERENCE)
>
> THE COURT**: We have selected the folks who will sit on the jury in this case**. I'm going to call your name. As I call your name if you would please come forward to the opening in the railing there around where Meg is standing. She will show you where to sit in the jury box. As I said before, those people who are not selected need to call the jury line again tomorrow after 4:30.

> Alright. Juror Number 1, Ms. Light; Juror Number 29, Ms. Bart; Juror Number 23, Ms. Hoyt; Juror Number 17, Ms. Fair; Juror Number 12, Mr. Craner; Juror Number 9, Mr. Honomichl; Juror Number 21, Ms. Bender; Juror Number 3, Mr. Vanderen; Juror Number 30, Ms. Burkel; Juror Number 14, Mr. Medosch; Juror Number 16,Ms. Pedersen; Juror Number 2, Mr. Field and Number 5, Ms. Harrold.

9/23/13PM RP 25-6. There was no indication that any challenges for cause were made.

The clerk's minutes of the trial reflect the use of the peremptory challenges conducted at sidebar. CP 64-5. See Appendix A.

ii. Trial Testimony

Sylvia Alvarez was at home on January 6, 2013, when she heard a loud noise and saw a white crossover car coming in the parking lot dragging the bumper. 9/23/13 PM3 RP 48-9, 56. She saw the driver after the vehicle parked and identified the defendant in court as the driver. 9/23/13 PM3 RP 49-50. She saw the driver exit and said the defendant appeared to be drunk by the way he was walking. 9/23/13 PM3 RP 51.

Ms. Alvarez called 911 to report the incident. 9/23/13 PM3 RP 51. She saw a woman outside with the defendant who put the man in the back seat on the passenger side. 9/23/13 PM3 RP 52-3. As the woman started to drive off, the officers arrived stopping the vehicle. 9/23/13 PM3 RP 53.

Ms. Alvarez saw the officers take custody of the defendant. 9/23/13 PM3 RP 54.

Officer Chester Curry of the Mount Vernon Police Department responded to a report by a 911 call and found a white Nissan Murano with a broken rim and a flat right front tire, partially on the dirt, and straddling the sidewalk. 9/23/13 PM3 RP 80-1. Curry approached the passenger side and saw the defendant exiting the vehicle. 9/23/13 PM3 RP 83-4. Curry saw the defendant exiting the right front passenger door. 9/24/13 RP 24-5.

Curry saw the defendant stagger towards him and got the immediate impression that he was intoxicated. 9/23/13 PM3 RP 84. Curry told the defendant to stop, but he started to walk away to the apartment, so Curry had to put out his hand to stop him. 9/23/13 PM3 RP 85. Arellano-Gama told Officer Curry that he wanted to go inside. 9/23/13 PM3 RP 86.

Another officer who had approached the car told Curry there was a firearm in the vehicle. 9/23/13 PM3 RP 86-7. The defendant then tried to push past Officer Curry into the apartment, but the officers were able to take the defendant into custody. 9/23/13 PM3 RP 87.

When the other officer told Curry there was a gun in the vehicle, the defendant said it was no big deal. 9/23/13 PM3 RP 88-9.

Officer Curry determined the defendant was under the influence, placed him under arrest and took him to the police station to perform a

breath alcohol concentration test. 9/23/13 PM3 RP 90, 9/24/13 RP 29-30. Officer Curry, a qualified breath test examiner, followed the protocol for performing a breath test. 9/23/13 PM3 RP 91-100, 9/24/13 RP 4-8. When Officer Curry read the defendant the breath test results, the defendant said it was bullshit and he did not believe it was fair he was being treated this way in America. 9/24/13 RP 17.

Officer Curry also identified the firearm that he received from his fellow officer. 9/24/13 RP 20-2.

Officer Wright testified he responded to the 911 call shortly after midnight on January 6, 2013. 9/24/13 RP 75. He saw Officer Curry just in front of him when he arrived at the address. 9/24/13 RP 77. Wright saw the defendant leaving the passenger door of the vehicle walking toward the back of the vehicle. 9/24/13 RP 77. Wright believed he wanted to leave the area. 9/24/13 RP 77-8. While Officer Curry dealt with Arellano-Gama, Wright approached the car to make sure there was no threat to officers inside. 9/24/13 RP 80. Wright saw a .22 caliber silver hand gun sitting in the middle of the front passenger seat. 9/24/13 RP 81. Wright immediately told Officer Curry and the two of them assisted in taking Arellano-Gama into custody. 9/24/13 RP 81-2. Arellano-Gam was trying to go forward to the house, saying this is my family and that's nothing. 9/24/13 RP 82. When

Wright told Curry there was a gun, Arellano-Gama said, that's nothing. 9/24/13 RP 82.

After Arellano-Gama was taken into custody Wright took the gun from the vehicle, found it to be loaded, put it in the back of his patrol car and then gave it to Officer Curry. 9/24/13 RP 84, 90. Officer Wright testified that based upon his observations of Arellano-Gama, he believed Arellano-Gama was very intoxicated. 9/24/13 RP 88.

Agent Michael Metesh of Immigration and Customs Enforcement with the Department of Homeland Security testified to evaluating the citizenship status of Arellano-Gama. 9/24/13 RP 59-61. Defense objected to the foundation of the records and the trial court precluded Agent Metesh from testifying to the citizenship status of Arellano-Gama. 9/24/13 RP 61-71.

Copies of Arellano-Gama's prior criminal history were admitted. 9/24/13 RP 19-20.

Toxicologist Chris Johnston testified to the preparation of the simulator solution. 9/23/13 PM3 RP 58-51. He identified the breath test ticket and his preparation of the simulator solution used on the ticket. 9/23/13 PM3 RP 62-4.

Trooper Cameron Birman testified about his maintenance of the breath test machine that was used to test Arellano-Gama. 9/24/13 RP 43-50.

From review of the breath test ticket received, Birman was able to tell that the device produced accurate and reliable results. 9/24/13 RP 54-5. The breath test ticket showed Arellano-Gama's breath test readings to be .251 and .242. 9/24/13 RP 55.

Gerardo Arellano-Gama testified. 9/24/13 RP 99. He claimed he was at a bowling alley on the night of January 5th. 9/24/13 RP 100. He was driving his fiancé's car. 9/24/13 RP 106. He admitted to having two large drinks of brandy mixed with Coca Cola. 9/24/13 RP 101. He admitted that later after picking up some other friends and taking them to the bowling alley he had a couple of drinks and five to six Blue Moon beers. 9/24/13 RP 101. He believed he was at the bowling alley for an hour to an hour and a half. 9/24/13 RP 103. He could have had more beer to drink, but did not recall. 9/24/13 RP 112. He testified the next thing he remembers was being taken to the ground by the officer. 9/24/13 RP 103. He recalled taking the breath test and later waking up in a jail cell. 9/24/13 RP 104. Arellano-Gama claimed he blacked out but claimed he couldn't remember if he was drunk. 9/24/13 RP 105.

Arellano-Gama claimed the gun found in the vehicle was not his, and he had never handled it before. 9/24/13 RP 106. He did not recall anyone else being in the vehicle. 9/24/13 RP 117. Arellano-Gama admitted to his conviction for Assault in the Second Degree. 9/24/13 RP 117.

iii. Closing Argument

One of Arellano-Gama's contentions was to impropriety of the prosecutor's closing argument. The entirety of that portion of the argument reads as follows.

> Then you get the law. You get the law from the judge. You have heard that once, but you have a chance to review it in more detail when you deliberate, and you'll get a copy of the instructions. And part of my role here as a prosecutor is to show you what the application of law applies to this particular case. Then you get a reasonable doubt standard in evaluating upon now whether these things that have been shown to you, the evidence that you have, satisfies you that the law has been proven, the elements of the crime have been proven to you beyond a reasonable doubt. I will say that a second time, the elements of the crime to you have been proven beyond a reasonable doubt. You don't have to have reasonable doubt with respect to things that are not an element of the crime, but whether it was raining or not is immaterial to the elements of the crime. So you might have a reasonable doubt about that, a reasonable doubt about how bright it was outside in that parking lot. But those are not elements of the crime. The reasonable doubt you're evaluating is the elements of the crime. And then based on your evaluation of this you attempt to return a verdict and come back to court with that verdict.
>
> So in doing that, you're applying that reasonable doubt standard. And you get an instruction about reasonable doubt, Instruction Number 3, which describes what reasonable doubt is. But it's a little bit circular. I like to look at it more of what that concept is and think about it in breaking it down. Reasonable means there has to be a 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 any reason that you can attach to that, that you can explain to

your jurors then it's proven beyond a reasonable doubt, if there's not something you can attach to it.

9/24/13 RP 127-8.

The State's Closing included a PowerPoint presentation that included the following:

CONCEPT OF REASONABLE
DOUBT
Reasonable = REASON

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

CP 68. See Appendix B.

In the rebuttal closing the prosecutor again discussed the reasonable doubt standard.

> I stated in my opening once, and I repeated it a second time, what we have to prove as the State beyond a reasonable doubt the elements of the crime. It's short circuiting it the decision making process that you have to do to say you have to prove certain facts of the case beyond a reasonable doubt. It's the elements of the crime, which need to be proved beyond a reasonable doubt. And that's stated in each of the two separate instructions, which we deal with, the elements of the offense, instruction Number 8, which describes the unlawful possession of a firearm. 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. So it's the elements of the offense.
>
> Now, you can have some doubt in your mind whether or not the defendant was actually sitting on the gun or whether he placed the gun there. In fact, you may have a reasonable doubt whether or not the gun -- whether he was in

> the backseat or not. I'll submit to you I have a different explanation than the defense has about circumstances, about where the defendant was in the vehicle when the officers pulled him out.

9/24/13 RP 159-60.

No objection was made by defense to the State's argument or the content of the slide. 9/24/13 RP 127-8, 159-60.

iv. Community Custody Condition at Sentencing

The State sought conditions of supervision on the Driving While under the Influence of Intoxicants charge. 10/10/13 RP 178. The trial court imposed the Appendix B- DUI conditions. CP 51-2. Condition 13 provided: "Defendant shall not possess any drug paraphernalia." CP 51.

Arellano-Gama did not object to the appendix or any conditions. 10/10/13 RP 173-4, 178.

IV. ARGUMENT

1. Peremptory challenges at sidebar in the open courtroom do not amount to a violation of the right to public trial.

Arellano-Gama contends the exercise of the peremptory challenges at sidebar was in violation of his right to open court proceedings. Brief of Appellant at pages 7-17.

The State contends exercise of peremptory challenges at sidebar conference was not a violation of the right to open court proceedings.

Article 1, Section 22 guarantees a criminal defendant the right to a public trial. *State v. Lomor*, 172 Wn.2d 85, 90-91, 257 P.3d 624 (2011). Whether there is a right to public trial violation is a question of law reviewed de novo. *State v. Momah*, 167 Wn.2d 140, 147, 217 P.3d 321 (2009). Jury selection is considered part of a criminal trial that is subject to the defendant's constitutional right to a public proceeding. *State v. Strode*, 167 Wn.2d 222, 227, 217 P.3d 310 (2009), *State v. Bennett*, 168 Wn. App. 197, 204, 275 P.3d 1224 (2102) (public trial right encompasses "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"). The right to a public trial applies to voir dire. *In re Personal Restraint of Orange*, 152 Wn. 2d 795, 804, 100 P.3d 291 (2004).

To implicate the right to a public trial, a courtroom closure must have occurred. *State v. Njonge*, 161 Wn. App. 568, 575, 255 P.3d 753 (2011). Courtroom closures may be express, *State v. Easterling*, 157 Wn. 2d 167, 172, 137 P.3d 825 (2006), or implied. *State v. Strode*, 167 Wn. 2d 222, 227, 217 P.3d 310 (2009). "[A] 'closure' of the courtroom occurs when the courtroom is completely and purposely closed to spectators so that no one

may enter and no one may leave." *State v. Lormor*, 172 Wn. 2d 85, 93, 257 P.3d 624 (2011).

Whether a particular portion of a court proceeding is encompassed by the public trial right is determined by the application of the "experience and logic" test. *State v. Sublett*, 176 Wn.2d 58, 114, 292 P.3d 715 (2012). In *Sublett*, the court explained the "experience and logic" test requires courts to determine the necessity for closure by consideration of both history and the purposes of the open trial provision. *Sublett*, 176 Wn.2d at 73, 292 P.3d 715. The experience portion of the test asks whether the practice in question has historically been open to the public, while the logic portion of the test focuses on whether public access is significant to the functioning of the public trial right. Id. If both prongs of this test are met, then the court must apply the *Boneclub* factors before the court can close the courtroom. Id.

Applying the logic and experience test in *Sublett*, the Court found that the public trial right does not attach to counsel meeting in chambers to answer a question from a deliberating jury. *State v. Sublett*, 176 Wn.2d at 75. The Court reasoned that such proceedings have not historically been done in an open courtroom and the court's answer to the jury was recorded in writing, thus becoming part of the public record, necessarily reminding the court and counsel of their responsibilities and providing necessary oversight. *See*, *State v. Sublett*, at 75-77.

Applying the *Sublett* logic and experience test to this case there is no evidence that the courtroom was closed to anyone at the time that the sidebar occurred. The jurors and parties were all in the same courtroom and the public could enter and leave the courtroom while the sidebar occurred. Under the *Sublett* logic and experience test, the record reflects use of a sidebar in open court does not implicate public trial rights. RP 5/13/13 119-123. Jury selection in this case was completed in open court and there is a written record of all actions taken by the court and counsel pertaining to both peremptory and for cause challenges that were completed at the sidebar in open court. Arellano-Gama fails to cite to any authority that demonstrates historically for-cause and peremptory challenges have as a matter of routine, historically been done publicly.

To the contrary, in *State v. Love*, Division Three pointed out that the use of written peremptory challenges was a practice used by many counties historically and that there is little evidence to demonstrate in Washington that voir dire challenges are traditionally completed in open court within earshot of the public. *State v. Love*, 176 Wn. App. 911, 918-919, 309 P.3d 1209 (2013), *citing State v. Thomas*, 16 Wn. App. 1, 13, 553 P.2d 1357 (1976), see also, *Popoff v. Mott*, 14 Wn.2d 1, 9, 126 P.2d 597 (1942), (where the record describes a bench conference during voir dire on whether to excuse a juror for cause); *State v. Wolfe*, 343 S.W.2d 10, 14 (Missouri, 1961)

(objection during voir dire). That is not to say that the exercise of peremptory and for cause challenges should not be open to public scrutiny. Only that such scrutiny has historically been through written documentation through clerk's notes or transcripts of open court where potential venire persons are not present. In this case the transcript reflects that peremptory challenges were taken at the bench conference. These actions sufficiently provide the oversight necessary to ensure the court and counsel acted responsibly in ensuring Rodriguez obtained a fair trial by an impartial jury and in considering public trial rights.

The logic prong also does not suggest jury selection challenges should be conducted openly in public. Requiring the parties to make peremptory challenges in open court in front of the venire panel does nothing to further the underpinnings of public trial rights such as encouraging witnesses to come forward or otherwise providing public oversight of the process. It also may not be desired by the parties because they don't want the remaining jurors to draw inferences from the motives of a party exercising a particular peremptory challenge. The issues presented during voir dire challenges are legal in nature and directed to the judge to decide.

Division Three of the Court of Appeals in *State v. Love*, expressly found that conducting peremptory challenges did not violate the defendant's right to an open public trial because it did not close the courtroom. *State v.*

Love, 176 Wn. App. at 920, 309 P.3d 1209 (2013). Similarly, in *State v. Dunn*, Division Two of the Court of Appeals followed the same reasoning:

> We agree with Division Three that experience and logic do not suggest that exercising peremptory challenges at the clerk's station implicates the public trial right. Accordingly, we hold that the trial court did not violate Dunn's public trial right and we affirm.

State v. Dunn, 180 Wn. App. 570, 575, 321 P.3d 1283 (2014).

Petitions for review have been filed by the defendants in both *Love* and *Dunn*. The Supreme Court has deferred ruling on the petitions for review pending a final decision in Supreme Court No. 85809-8, *State of Washington v. William Glen Smith*.[2]

Decisions on the petitions for review in the cases of *State v. Love*, and *State v. Dunn*, have been deferred by the Supreme Court pending the issuance of a decision in the case of *State v. Smith*.[3] The oral argument date on that case was October 15, 2013. The issue the Supreme Court concerned itself with in that case was whether sidebars in general are subject to open courtroom claims.

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[2] *See State v. Love*, Wa. Supreme Court No. 89619-4, 2014 Wash. LEXIS 304, 1 (Wash. Apr. 4, 2014), *State v. Dunn*, Wa. Supreme Court No. 90238-1, 2014 Wash. LEXIS 597, 1 (Wash. Aug. 6, 2014).

[3] See Supplemental Brief filed in the that case:

Petitioner:

http://www.courts.wa.gov/content/Briefs/A08/858098%20supplemental%20brief%20of%20Petitioner%20William%20Smith.pdf

Respondent:

http://www.courts.wa.gov/content/Briefs/A08/858098%20supplemental%20brief%20of%20respondent.pdf

Meanwhile, the preponderance of the present case law supports the conclusion that the trial court did not close the courtroom by conducting use of peremptory challenges at sidebar in an open courtroom.

2. Closing argument explaining what reason is does not amount to misconduct.

Arellano-Gama also contends the prosecutor's closing argument amounted to misconduct[4] by improperly shifting the burden of proof to the defendant. Brief Appellant at page 20-1.

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[4] The State believes the term prosecutorial misconduct is misleading. Although a term of art, it is misleading to members of the general public. Misconduct should be reserved for intentional or at least reckless conduct.

> "Prosecutorial misconduct" is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial. If prosecutorial mistakes or actions are not harmless and deny a defendant fair trial, then the defendant should get a new one. Attorney misconduct, on the other hand, is more appropriately related to violations of the Rules of Professional Conduct.

State v. Fisher, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Courts in other jurisdictions have recently recognized the unfairness of labeling every mistake made by a prosecutor as "misconduct." *See State v. Fauci*, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); *State v. Maluia*, 107 Haw. 20, 108 P.3d 974, 979-981 (2005); *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *rev. denied*, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009). The more appropriate term would be prosecutorial error.

> [T]he American Bar Association and NDAA urges trial and appellate courts reviewing the conduct of prosecutors, while assuring that a defendant's rights are fully protected, to use the term "error" where it more accurately characterizes that conduct than the term "prosecutorial misconduct."

National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010)

The State contends that the argument properly expressed an evaluation of what the term "reason" means in the reasonable doubt standard. Furthermore, there was not a shifting of the burden of proof.

In reviewing the claim, this Court must be viewed in the context of the entire argument, the issues, evidence and instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003), citing, *State v. Brown,* 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Contrary to that requirement, Arellano-Gama parses out the comment by removing sections of the argument, infers certain additional terms and shows only a part of the PowerPoint slide shown. Brief of Appellant at page 6.

Although the full closing argument must be evaluated, just the portion of the paragraphs before shows the prosecutor was contrasting reasonable doubt applies to elements of the offenses and explaining reason in terms of logic.

> Then you get a reasonable doubt standard in evaluating upon now whether these things that have been shown to you, the evidence that you have, satisfies you that the law has been proven, the elements of the crime have been proven to you beyond a reasonable doubt. I will say that a second time, the elements of the crime to you have been proven beyond a reasonable doubt. You don't have to have reasonable doubt with respect to things that are not an element of the crime, but whether it was raining or not is immaterial to the elements of the crime. So you might have a reasonable doubt about that, a reasonable doubt about how bright it was outside in that parking lot. But those are not elements of the crime. The reasonable doubt you're evaluating is the elements of the

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>
> So in doing that, you're applying that reasonable doubt standard. And you get an instruction about reasonable doubt, Instruction Number 3, which describes what reasonable doubt is. But it's a little bit circular. I like to look at it more of what that concept is and think about it in breaking it down. Reasonable means there has to be a 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 any reason that you can attach to that, that you can explain to your jurors then it's proven beyond a reasonable doubt, if there's not something you can attach to it.

9/24/13 RP 127-8.

The State's Closing included a PowerPoint presentation that included the following:

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Reasonable = REASON

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

CP 68. See Appendix B.

When viewed in context, the prosecutor was explaining reason in terms of something that can be explained. It did not suggest the jury was required to convict if they did not find a reason.

Arellano-Gama cites primarily to two cases in support of a contention of misconduct.

In *State v. Anderson* a number of questionable arguments were noted by the reviewing court. One which Arellano-Gama compares to the argument in the present case was determined to improperly shift the burden of proof.

> The prosecutor's statement 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," was improper. 4 RP at 327-28. The jury need not engage in any such thought process. **By 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.** Because we begin with a presumption of innocence, this implication that the jury had an initial affirmative duty to convict was improper. Furthermore, this argument implied that Anderson was responsible for supplying such a reason to the jury in order to avoid conviction.

State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009) (bold emphasis added).

In contrast, here there was no urging to have the jury find something in order to find him not guilty.

Furthermore, despite this and a number of other improper closing arguments in *Anderson*, the Court of Appeals determined in that case it was not reversible error.

> Despite the impropriety of these comments, however, Anderson failed to object below and has failed to demonstrate that these comments were so flagrant or ill intentioned that an instruction could not have cured the

> prejudice. The trial court's instructions regarding the presumption of innocence minimized any negative impact on the jury. Again, we presume the jury follows the trial court's instructions. 8 *Hopson*, 113 Wn.2d at 287.

State v. Anderson, 153 Wn. App. 417, 432, 220 P.3d 1273 (2009).

Similarly, *State v. Emery* cited by Arellano-Gama was not a case with an argument similar to the present case.

In *Emery*, the prosecutor made a number of improper arguments including a "fill in the blank" argument of reasonable doubt.

> The prosecutor made the following statements in closing:
>
> > [I]n order for you to find the defendant not guilty, you have to ask yourselves or you'd have to say, quote, I doubt the defendant is guilty, and my reason is blank. A doubt for which a reason exists. If you think that you have a doubt, you must fill in that blank.

State v. Emery, 174 Wn.2d 741, 750-51, 278 P.3d 653 (2012). The court went on to find both this "fill in the blank" argument as well as another argument requiring the jury to "speak the truth" were improper. *State v. Emery*, 174 Wn.2d at 760-1, 278 P.3d 653 (2012).

However the court found that the defendants failed to show the requisite prejudice where there was no objection to the argument.

> If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). Under this heightened standard, the defendant must show that

> (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." *Thorgerson*, 172 Wn.2d at 455.

State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). The *Emery* court went on to find the misconduct did not warrant reversal.

> If either Emery or Olson had objected at trial, the court could have properly explained the jury's role and reiterated that the State bears the burden of proof and the defendant bears no burden. Such an instruction would have eliminated any possible confusion and cured any potential prejudice stemming from the prosecutor's improper remarks. Emery's and Olson's claim necessarily fails, and our analysis need go no further.

State v. Emery, 174 Wn.2d 741, 764, 278 P.3d 653 (2012).

Thus, even should this court find the argument was improper, as in Emery that does not merit reversal.

3. Given the statutory definition of "drug paraphernalia" in RCW 69.50.102, the condition prohibiting possession of drug paraphernalia is not unconstitutionally vague.

Arellano-Gama contends the condition 13 of his supervision is unconstitutionally vague. Brief of Appellant at page 24. The condition reads: "Defendant shall not possess any drug paraphernalia." CP 51.

The State contends that the condition prohibiting possession of "drug paraphernalia" is not unconstitutionally vague given the statutory definition of drug paraphernalia in RCW 69.50.102.

To support this contention, Arellano-Gama cites to *State v. Sanchez Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010). In *Valencia*, the Supreme Court determined condition of possessing or using "any paraphernalia" was unconstitutionally vague. The actual condition read:

> Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, police scanners, and hand held electronic scheduling and data storage devices.

State v. Sanchez Valencia, 169 Wn.2d 782, 785, 239 P.3d 1059 (2010).

In *Valencia,* the Supreme Court criticized the Court of Appeals for reading the word "drug" in front of the word paraphernalia.

> The Court of Appeals came to its conclusion that the condition is sufficiently specific by misreading the plain language of the condition, erroneously stating that the condition prohibits the petitioners from possessing "'drug paraphernalia.'" Supp'l Br. of Appellant at 8 (quoting *Sanchez Valencia*, 148 Wn. App. at 321). In fact the condition does not specify that the petitioners are prohibited from possessing "drug paraphernalia." Rather, it proscribes possession or use of the much broader category "any paraphernalia." "Paraphernalia" is defined to include the "property of a married woman that she can dispose of by will," or "personal belongings," or "articles of equipment," or "appurtenances." Webster's Third New International Dictionary 1638 (2002).

State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

In determining that the condition did not provide fair notice of what a defendant could or could not do, the court reasoned that the condition referred very broadly to "paraphernalia," as opposed to the more specific term "drug paraphernalia." Id. at 794. It also explained that the condition failed to tie potential violations to the defendant's intent. Id.

The court then concluded that the condition did not provide ascertainable standards of guilt to protect against arbitrary enforcement because an inventive probation officer could envision any common place item as possible for use as drug paraphernalia, such as sandwich bags or paper. *State v. Sanchez Valencia*, 169 Wn.2d at 794. It explained that another officer might not arrest the defendant for the same type of violation and that a condition that leaves that much discretion to individual corrections officers is unconstitutionally vague. *State v. Sanchez Valencia*, 169 Wn.2d, at 794-95.

Unlike "paraphernalia," "drug paraphernalia" is a statutorily defined term. The definition in the Uniform Controlled Substances Act provides:

> "[D]rug paraphernalia" means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance.

RCW 69.50.102. The statute further provides a lengthy, non-exhaustive list of items that constitute "drug paraphernalia." RCW 69.50.102. That definition ameliorates each of the concerns raised by the Supreme Court in *Sanchez Valencia*. It refers to the specific term of art "drug paraphernalia," instead of the general term "paraphernalia." Indeed, the ordinary meaning of "paraphernalia" is simply "personal belongings" or "articles of equipment." Webster's Third New International Dictionary 1638 (2002). Also unlike the condition in *Sanchez Valencia*, the statutory definition contains an explicit intent requirement. RCW 69.50.102. That intent requirement alleviates the Supreme Court's concern that the condition in that case would lead to arbitrary enforcement. Although the condition here did not specifically refer to the statute, "drug paraphernalia" is a term of art with a specific legal meaning which can reasonably be interpreted to apply to give fair notice of the requirements of the condition.

Thus, the condition against possession of drug paraphernalia is not unconstitutionally vague.[5]

---

[5] The concurring opinion in *Sanchez Valencia* indicated the error could be corrected by change to the language used here.

> On remand, the sentencing court can easily correct its error by changing the prohibition on "paraphernalia" to "drug paraphernalia." A ban on "drug paraphernalia" is sufficient to inform the petitioners of what is proscribed and prevent arbitrary enforcement.

State v. Sanchez Valencia, 169 Wn.2d 782, 795, 239 P.3d 1059 (2010) (J.M. Johnson, concurring).

V. CONCLUSION

For the foregoing reasons Gerardo Arellano-Gama's convictions and sentence must be affirmed.

DATED this 20th day of August, 2014.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: _____

ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [X]United States Postal Service; [ ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Jennifer M. Winkler, addressed as Neilsen, Broman & Koch, PLLC, 1908 E Madison Street, Seattle, WA 98122. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 20th day of August, 2014.

_____

KAREN R. WALLACE, DECLARANT

APPENDIX A

Judge's List

Judge: **SUSAN K COOK**
Event: **13-1-00034-1**

Date: **9/23/13**
Time: **9:10 AM**

	Random No.	Part No.	Pool Seq.	Name	Code (see legend)
*	1	100203522	02- 0017	LIGHT,SARAH LYNN MOUNT VERNON	J1
*	2	100112453	02- 0101	FIELD,KENNETH E BURLINGTON	J12
*	3	100188069	02- 0078	VANDEREN,RICHARD DEAN ANACORTES	J8
*	4	100164442	02- 0127	BURKE,CHRIS SEDRO WOOLLEY	CP
*	5	100032263	02- 0112	HARROLD,DEBORAH A BOW	J13
*	6	100078998	02- 0001	TORSET,DIANE G SEDRO WOOLLEY	PD2
*	7	100131787	02- 0132	WEBSTER,PATRICIA A ANACORTES	PP1
*	8	100056003	02- 0008	NEFF,ERNEST J MOUNT VERNON	PD1
*	9	100139327	02- 0184	HONOMICHL,EARL D ANACORTES	J6
*	10	100200112	02- 0162	COX,DEBRA M MOUNT VERNON	CP
*	11	100025758	02- 0005	FREY,JAMES LYMAN MOUNT VERNON	PD5
*	12	100199906	02- 0133	CRANER,ISAAC AARON MOUNT VERNON	J5
	13	100096817	02- 0029	PELLAND,ELIZABETH ANN MOUNT VERNON	PP3
	14	100119016	02- 0130	MEDOSCH,JOHN C ANACORTES	J10
	15	100090162	02- 0179	ADAIR,ROBIN M ROCKPORT	CP
	16	100096378	02- 0003	PEDERSEN,DEBORAH L HAMILTON	J11
	17	100165842	02- 0066	FAIR,KIRA DAWN MOUNT VERNON	J4
	18	100179797	02- 0074	KUBE,MELISSA L ANACORTES	PP2
	19	100140334	02- 0041	LAMB,SUSAN MONIQUE MOUNT VERNON	CP

Legend: J=Jury A=Alternate NU=Not Used BC=By Court
PP=Peremptory Challenge Prosecutor/Plaintiff PD=Peremptory Challenge Defense
CP=Challenge For Cause Prosecutor/Plaintiff CD=Challenge For Cause Defense
JO=Joint Peremptory Challenge H=By Court - Hardship NS=Not Sent to Court

Note: Return to Jury Assembly Room each evening during Panel.

Judge's List

Judge: **SUSAN K COOK**
Event: **13-1-00034-1**

Date: **9/23/13**
Time: **9:10 AM**

Random No.	Part No.	Pool Seq.	Name	Code (see legend)
20	100072073	02- 0081	SKEELS,TRACY L SEDRO-WOOLLEY	PD3
21	100136114	02- 0151	BENDER,MICHELE P ANACORTES	J7
22	100061502	02- 0170	PETRISH,MICHAEL J ANACORTES	Excused H
23	100012375	02- 0142	HOYT,DEBRA L SEDRO-WOOLLEY	J3
24	100121224	02- 0173	PETRICH,JONATHAN I ANACORTES	PP 4
25	100129470	02- 0178	WILLEY,ALYSSA R MOUNT VERNON	PD4
26	100078545	02- 0095	TINCHER,DENISE MARIE SEDRO-WOOLLEY	CD
27	100008203	02- 0165	BOWIE,SUE M ANACORTES	PP5
28	100066592	02- 0062	ROETCISOENDER,MARY MOUNT VERNON	CP
29	100004668	02- 0013	BART,ELISABETH M BOW	J2
30	100010616	02- 0089	BURKEL,DEANN BURLINGTON	J9
31	100087151	02- 0011	YOUNT,NANCY A ANACORTES	NU
32	100073906	02- 0077	SPENCER,DOREEN L CONCRETE	NU
33	100042770	02- 0006	KNUTZEN,MARILYN E BOW	NU
34	100160499	02- 0160	NELSON,NANCY J SEDRO-WOOLLEY	NU
35	100097142	02- 0025	WALKER,SUSAN B MOUNT VERNON	NU
36	100204301	02- 0084	PACIOTTI-OKA,PENNY LYNN SEDRO WOOLLEY	NU
37	100006271	02- 0167	BERLIN,DANIEL KENNETH ANACORTES	NU

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CP=Challenge For Cause Prosecutor/Plaintiff CD=Challenge For Cause Defense
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Note: Return to Jury Assembly Room each evening during Panel.

APPENDIX B

FILED
SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA

2013 OCT 11 AM 9:00

SUPERIOR COURT OF WASHINGTON

COUNTY OF SKAGIT

STATE OF WASHINGTON, Plaintiff, v. GERARDO ARELLANO-GAMA, Defendant.	NO. 13-1-00034-1 **COVER PAGE FOR STATE'S CLOSING POWERPOINT**

5

Attached hereto is a copy of the State's PowerPoint presentation used for closing argument at trial.

RESPECTFULLY SUBMITTED Friday, October 11, 2013.

Erik Pedersen, WSBA#20015
Senior Deputy Prosecuting Attorney

ORIGINAL

SKAGIT COUNTY PROSECUTING ATTORNEY
605 S. 3RD ST. -- COURTHOUSE ANNEX
MOUNT VERNON, WASHINGTON 98273
PH: (360) 336-9460

STATE OF WASHINGTON

v.

GERARDO ARELLANO-GAMA

ROLE OF JURY

- LISTEN TO EVIDENCE
- EVALUATE CREDIBILITY
- DECIDE EVIDENCE
- APPLY LAW
- APPLY REASONABLE DOUBT STANDARD
- RETURN VERDICT

REASONBLE DOUBT STANDARD

CONCEPT OF REASONABLE DOUBT

Reasonable = REASON

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

JANUARY 6, 2013

1:45 A.M.

1917 N. Laventure

Mount Vernon, Washington

Sylvia Alvarez

OFFICER CURRY

Defendant tried to walk past and get inside

Defendant:

- Smell strongly of alcohol
- Was unsteady on his feet
- Appeared to be under the influence

OFFICER WRIGHT

Saw a handgun on the front passenger seat

UNLAWFUL POSSESSION OF FIREARM IN THE FIRST DEGREE

Elements – Instruction No. 8:

- On or about January 6, 2013
- Knowingly had a firearm
- In his Possession or Control
- Previously guilty of Assault in the Second Degree
- In the State of Washington.

Defendant's Statements at scene:

- "That's nothing."
- "That's no big deal."
- "This is my family."

ARELLANO-GAMA

POSSESSED

THE HANDGUN

Possession Instruction 11:

Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.

Possession Instruction 11:

Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.

Possession Instruction 11:

In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the item, and whether the defendant had dominion and control over the premises where the item was located. No single one of these factors necessarily controls your decision.

Knowing Instruction 10:

A person knows or acts knowingly or with knowledge with respect to a fact when he or she is aware of that fact. It is not necessary that the person know that the fact is defined by law as being unlawful or an element of a crime.

Knowing Instruction 10:

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

Defendant's Statements at scene:

- "That's nothing."
- "That's no big deal."
- "This is my family."

ARELLANO-GAMA

HAS A PRIOR CONVICTION FOR

ASSAULT IN THE SECOND DEGREE

THE EVIDENCE WILL SHOW THAT ARELLANO-GAMA

WAS UNDER THE INFLUENCE OF ALCOHOL

Elements – Instruction No. 15:

- On or about January 6, 2013
- Drove a motor vehicle
  - Under the influence or affected by OR
  - Above .08
- In the State of Washington.

WITNESSES REGARDING INTOXICATION:

- OFFICER CURRY
- OFFICER WRIGHT
- TOXICOLOGIST JOHNSTON
- TROOPER BIRMAN
- SYLVIA ALVAREZ

GERARDO ARELLANO-GAMA IS

GUILTY
OF

UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE

GERARDO ARELLANO-GAMA IS

GUILTY
OF

DRIVING UNDER THE INFLUENCE

OK