No. 45938-8-II
Consolidated cases

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

STATE OF WASHINGTON,

Respondent,

v.

JORGE PEREZ BARROSO,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable John A. McCarthy, Trial Judge

OPENING BRIEF ON BEHALF OF APPELLANT BARROSO

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1. The prosecutor committed flagrant, prejudicial and ill-intentioned misconduct, violating appellant Jorge Perez Barroso's rights to be free from self-incrimination and improperly shifting a burden to him to disprove the prosecution's case, in violation of his due process rights.

2. Barroso was deprived of his Article I, section 22 and Sixth Amendment rights to confrontation.

3. Jury instruction 2, the instruction on reasonable doubt, was given in error, because that instruction misstated the gravity of the burden of proof and misstated the jury's role and duties. Barroso assigns error to the portion of the instruction which provides, as follows:

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 151.

4. Pursuant to RAP 10.1(g) and this Court's Order of Consolidation, Barroso adopts and incorporates the arguments presented in the opening brief of codefendant Fernandez Medina.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A prosecutor improperly comments on the defendant's exercise of his right to decide not to testify when the prosecutor comments that testimony is "undisputed" and the only person who could have provided "disputing" testimony is the defendant.

Did the prosecutor commit constitutionally offensive misconduct in repeatedly telling the jury that the evidence of what happened during the incident came only from the prosecutor's witnesses and was thus "undisputed," when the only people who could have disputed the state's witnesses' claims were the defendants?

Further, did the prosecutor's misconduct improperly

reduce its constitutionally mandated burden of proving every part of its case beyond a reasonable doubt?

2. Were Barroso's rights to confrontation violated when he was seated in such a way in the courtroom where he could not see witnesses while they were visible to jurors and the prosecutor, including several times when the witnesses made meaningful gestures?

3. Was the jury instruction on reasonable doubt improper and did it misstate and improperly minimize the prosecution's constitutionally mandated burden of proof by asking the jury to find that they have "an abiding belief in the truth of the charge" in order to convict?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Jorge Perez Barroso was charged by information filed in Pierce County with first-degree burglary and second-degree assault, both charged "acting as an accomplice" to Roiland Fernandez Medina and Barbaro Gener Ono, and with a deadly weapon enhancement, "to-wit: a knife or bat." CP 1-2; RCW 9.94A.530, RCW 9.94A.533, RCW 9.94A.825, RCW 9A.36.031(1)(c), RCW 9A52.020(1)(a)(b).

After pretrial proceedings before the Honorable Judge Linda C.J. Lee on May 31, July 26, August 26 and September 6, 2013, trial was held before the Honorable Judge John A. McCarthy on December 18 and 19, 2013, January 6, 8, 9, 13-16, 21, 22 and 23, 2014. 1RP 1, 2RP 1, 3RP 1, 4RP 1, RP 1.[1] At the end of the prosecution's case, the trial judge

[1]The verbatim report of proceedings will be referred to as follows:
May 31, 2013, as "1RP;"
July 26, 2013, as "2RP;"
August 26, 2013, as "3RP;"
September 6, 2013, as "4RP;"
the chronologically paginated volumes containing the proceedings of Dec 18-19, 2013, January 6, 8, 9, 13-16, 21-23 and February 21, 2014, as "RP."

dismissed the assault charge against Barroso and Ono. See RP 1334; CP 183. The jury found Barroso guilty of the first-degree burglary but made no finding on the deadly weapon enhancement. See CP 144-45. On February 21, 2014, the judge imposed a standard range sentence. CP 186-97.

Barroso appealed and this pleading follows. See CP 228-38

2. Testimony at trial

The charges in this case stem from an incident which occurred at the Williow Village Apartments on April 7, 2013, when Roiland Fernandez Medina got into an altercation with Dijon Wiley. In his opening brief on appeal, Fernandez Medina adequately describes many of the facts relevant to the issues on appeal. See Brief of Appellant Fernandez Medina (BAM) at 3-8. Pursuant to RAP 10.1(g), Barroso adopts and incorporates Fernandez Medina's Statement of Facts.

In addition, Barroso submits the following additional facts:

It was Fernandez Medina who had allegedly begun tussling with Dijon Wiley after the door was opened. RP 526-28. DeAngelo White said there were other people there, too, and identified Fernandez Medina at trial, but could not "honestly" identify Barroso or Ono as being involved. RP 528. White was clear that two other people who were standing off to the side of the door when it was opened "never actually made it into the apartment" and people only saw them outside through the window. RP 528. Kyla King said there were three people at the door including the one tussling with Wiley, and that she could not really see their features. RP 648-49. Snezhana Stetsyuk did not identify anyone but Fernandez

Medina. RP 382.

King admitted that the man knocking on the door was saying, "come on out" to the people inside. RP 664.

D. ARGUMENT

1. THE PROSECUTOR REPEATEDLY DREW A NEGATIVE INFERENCE FROM APPELLANT'S CONSTITUTIONALLY PROTECTED DECISION NOT TO TESTIFY AND SHIFTED THE BURDEN OF PROOF AND THE PROSECUTION CANNOT PROVE THE ERRORS "HARMLESS"

Prosecutors are "quasi-judicial" officers, with a duty to act in the interests of justice rather than as "heated partisans" at trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). As part of that duty, prosecutors are required to refrain from engaging in conduct which is likely "to produce a wrongful conviction." State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985).

Further, because the words of a prosecutor carry great weight with the jury, those words may ultimately deprive the defendant of his state and federal constitutional due process rights to a fair trial. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); Suarez-Bravo, 72 Wn. App. at 367.

In this case, reversal is required, because the prosecutor repeatedly committed serious, prejudicial misconduct and the result was that Barroso was deprived of a fair trial. Further, because the misconduct amounted to

drawing a negative inference from Barroso's exercise of his constitutional rights to be free from self-incrimination, the prosecution must meet the constitutional harmless standard, in order to avoid the presumption of reversal. See State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). Because it cannot do so, reversal is required.

a. Relevant facts

In closing argument, the prosecutor first told the jurors that it was their "duty to decide the facts in this case based on the evidence produced here in court." RP 1342. A few moments later, the prosecutor told the jury that the evidence about what Wiley was doing and where he was "is truly all but undisputed" and all the jury had was "the testimony of the witnesses and the cross-examination, the challenges to their testimony." RP 1351. The prosecutor declared that it was "virtually undisputed" that there was a child in the apartment, and "[t]here was no testimony from anyone" that the men at the door were given "an invitation to come into that apartment." RP 1352. The prosecutor told the jury the "real dispute here boils down to the definition of an accomplice" and whether Barroso could be "deemed to be an accomplice." RP 1358.

The prosecutor then moved on to the crucial issue for the burglary of whether the defendants were trying to get the people in the apartment to come outside or were instead, as the state claimed, trying to enter the apartment unlawfully:

> There is no evidence that Dijon Wiley, that when the door was opened, they stepped back so that he could step out and they could get it on in the parking lot, no evidence of that whatsoever. No one testified that that happened. There was no evidence that Valle-Matos backed away from the door in order to allow the fight

to be brought outside, none of them.

RP 1360. The prosecutor admitted that Barroso and Ono "didn't enter the apartment at all, but then said that "there was testimony about them crowding through the door." RP 1360.

After reviewing the testimony of the prosecution witnesses about what happened at the door, the prosecutor asked, "in that description, do you see any evidence whatsoever of just being present at the scene as though one were a bystander?" RP 1368. The prosecutor then used one of the state's witnesses as an example, saying that he was not an accomplice because he did not come to the apartment with Fernandez Medina like the others and was not "backing up" Fernandez Medina at the apartment door. RP 1368.

In arguing Barroso's guilt as an accomplice to Fernandez Medina, the prosecutor said that Barroso must have had the required "knowledge" because he and Ono "were at the door not backing away, not saying, you know, there is gonna be a fight out here in the parking lot, **no testimony of that whatsoever.** They are at the door supporting Fernandez Medina. . . and that's [an] accomplice." RP 1368 (emphasis added).

Regarding the state's witnesses, the prosecutor asked the jury "[i]s there any evidence that they all got together and got all their stories straight? None whatsoever." RP 1370.

A moment later, again trying to establish that Barroso had the required "knowledge" to find him guilty of burglary as an accomplice, the prosecutor said knowledge was also proven by an intentional act and that

the men had "intentionally walked toward that apartment," then "[i]ntentionally positioned themselves at the door" and that there was "[n]o dispute about that." RP 1371.

b. The prosecutor's comments were constitutionally offensive and drew a negative inference from Barroso's constitutionally protected decision not to testify

These arguments repeatedly implying that the jury should find guilt because the prosecution's version of the events was "undisputed" were flagrant, prejudicial and constitutionally offensive misconduct. Under the state and federal due process clauses, the prosecution has the burden of proving all essential elements of its case, beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 361-64, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995). Further, both constitutions guarantee the accused the right to remain silent and to be free from self-incrimination. State v. Easter, 130 Wn.2d 228, 242, 922 P.3d 1285 (1996); see Doyle v. Ohio, 426 U.S. 610, 619-20, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); 5th Amend.; Art. I, section 9.

When a prosecutor comments in a way which invites the jury to draw a negative inference from a defendant's exercise of a constitutional right, it "chills" the defendant's free exercise of that right. See State v. Belgarde, 110 Wn.2d 504, 512, 755 P.2d 174 (1988); United States v. Jackson, 390 U.S. 570, 581, 88 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). It is therefore not just serious but "grave" misconduct for a prosecutor to make such arguments. See State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984); see Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L.

Ed. 2d 106 (1965). And such comment may be raised as manifest constitutional error for the first time on appeal. See State v. Curtis, 110 Wn. App. 6, 37 P.3d 1274 (2002); see also, State v. Romero, 113 Wn. App. 779, 54 P.3d 1255 (2002).

In this case, the prosecutor committed just such misconduct. The right to remain silent and be free from self-incrimination is enshrined not only in the federal but also the state constitution. See Easter, 130 Wn.2d at 242; Doyle, 426 U.S. at 619-20; Fifth Amend.; Art. I, § 9. Put simply, the accused is constitutionally spared "from having to reveal, directly or indirectly his knowledge of facts relating him to the offense or from having the share his thoughts and beliefs with the Government." Easter 142 Wn. App. at 594-95.

And these rights extend to trial, ensuring that a defendant is entitled to chose whether to testify at a trial in which he is the accused. See, State v. Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987); Griffin, 380 U.S. at 614-15.

Because the prosecution bears the burden of proof at trial, a prosecutor's argument that parts of its case are "undisputed" may amount to an improper comment on the defendant's exercise of his right to decide not to testify even if the prosecutor does not explicitly declare that the defendant should have taken the stand in his own defense. See Ramirez, 49 Wn. App. at 336. Improper comment is made when the prosecutor simply makes arguments which are "of such character that the jury would naturally and necessarily accept it as a comment on the defendant's failure to testify." State v. Crawford, 21 Wn. App. 146, 152, 584 P.2d 442,

review denied, 91 Wn.2d 1013 (1978); State v. Sargeant, 40 Wn. App. 340, 346, 698 P.2d 595 (1985).

Comments are of such character when the prosecutor talks about the lack of evidence on a particular issue and the defendant is the only person who could have provided the missing testimony. See State v. Ashby, 77 Wn.2d 33, 38, 459 P.2d 409 (1969); see also, State v. Fiallo-Lopez, 78 Wn. App. 717, 728, 899 P.2d 1294 (1995).

Thus, in State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997), a case involving a sex crime, the prosecutor argued that there was "absolutely no evidence" that the victim had "fabricated any of this or that in any way she's confused" about what she said occurred, "[a]nd because there is no evidence to reasonably support either of those theories, the defendants are guilty as charged." 83 Wn. App. at 213-14. On review, the Fleming Court held that these arguments were improper comments on the defendant's rights to remain silent, because the defendants had not testified and were the only other people who were present when the crime allegedly occurred, so only they could have provided the "missing" evidence. Id.

In addition, the Fleming Court found, the comments shifted a burden to the defendants to disprove the state's case, in violation of their due process rights. The comments implied that the defendants had to provide evidence to prove that the victim had fabricated or was confused and that the absence of such evidence meant the defendants should be found guilty - thus forcing them to should the burden of providing evidence to disprove the victim's claims or be found guilty. 83 Wn. App.

at 213-14.

Here, the arguments went even further than those in Fleming. In this case, the prosecutor repeatedly drew the jury's attention to the fact that the only "evidence" admitted was that of the state and that the prosecution's case was largely undisputed. RP 1342, 1351. More egregious, however, the prosecutor repeatedly drew the jurors' attention to the fact that "[t]here was no testimony from anyone" about such things as whether the defendants had an "invitation to come into that apartment" (and thus could not be guilty of burglary unless they later unlawfully remained" and "no evidence whatsoever" to support the idea that the men outside were stepping back and trying to get the fight to outside, and that "[n]o one testified that that happened." RP 1360. The jurors were asked if the description of the events showed "any evidence whatsoever of just being present at the scene as though one were a bystander" and implied there was not such evidence for Barroso (and Ono) because they had gone to the apartment with Fernandez Medina to "back him up." RP 1368. Questions about the credibility of the state's witnesses were dismissed by saying there was no evidence they "all got together and got all their stories straight." RP 1370.

And the prosecutor argued that the jury should find the required "knowledge" because there was "no testimony of" Barroso and Ono "backing away" or saying anything about fighting in the parking lot and were at the door and "no dispute" that they had "intentionally walked" towards the apartment and "intentionally" been at the door. RP 1368, 1371.

Thus, unlike the single improper argument made by the prosecutor in Fleming, here the prosecutor used the lack of evidence to disprove crucial parts of its case as a theme.

In addition, there can be no question that the prosecutor's repeated arguments about the lack of anything to contradict or "dispute" the evidence of what the state's witnesses claimed had happened was an improper comment on the defendants' failures to testify. Fiallo-Lopez, supra, is instructive. In Fiallo-Lopez, the defendant was accused of having been involved in a drug deal someone else negotiated at two separate locations. 78 Wn. App. at 717, 728. In closing argument, the prosecutor pointed out that there was "absolutely no evidence" to explain why Fiallo-Lopez had been present and had contact with the person negotiating the deal at both locations and no attempt by Fiallo-Lopez to rebut the evidence which showed that he had been involved in the deals. 78 Wn. App. at 717, 728. The prosecutor also told the jury, however, that the defense "had no burden to explain Fiallo-Lopez' actions." 78 Wn. App. at 717.

On appeal, the Court found that, despite the prosecutor's attempt at later minimization, his arguments were improper and misconduct, in violation of the defendant's rights to remain silent and be free from having to take the stand in his own defense. 78 Wn. App. at 728. No one other than the state's witnesses and Fiallo-Lopez were present at the relevant times, the Court noted, so that "no one other than Fiallo-Lopez himself could have offered the explanation the State demanded." 78 Wn. App. at 728. As a result, the Fiallo-Lopez Court noted, the prosecutor's arguments "improperly commented on the defendant's constitutional right not to

testify," as well as impermissibly" shifting a burden of proof to the defendant to disprove the state's case. 78 Wn. App. at 728.

Reversal is required. Where, as here, the prosecutor makes improper comments drawing a negative inference from the lack of evidence which only the defendants could provide, the defendants' rights to due process and to be free from self-incrimination are violated and the constitutional harmless error standard applies. See, Lewis, supra, 130 Wn.2d at 705. Under that standard, the error is presumed prejudicial and the prosecution bears the burden of showing it harmless beyond a reasonable doubt. See State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). To meet that burden, the prosecution must show that the constitutional error could not have had *any* effect on the fact-finder's decision to convict. See, Easter, 130 Wn.2d at 242.

Further, this standard is far different than the question asked when the challenge is one of sufficiency of evidence, where the question is whether any rational trier of fact could have convicted. See e.g., Romero, 113 Wn. App. 779 at 783-85. For constitutional harmless error, the issue is whether *every* rational trier of fact would *necessarily* have reached the same result absent the error. Id.

Thus, to prove the errors here harmless, the prosecution must show that every possible jury would necessarily have convicted even if the prosecutor had not repeatedly drawn attention to the lack of evidence to disprove its claims on the most disputed part of its case - whether Barroso had the required intent to aid, encourage or otherwise act as an accomplice

to Fernandez Medina, knowing that this aid would facilitate the commission of the first-degree burglary. There was absolutely no testimony whatsoever of anyone hearing anything on this point; the prosecution's entire argument was based on what it assumed a person must have known in being in the same position as the defendant. Barroso's "knowledge" was based on his simple presence, having "intentionally" walked to the apartment and "intentionally" been standing at the door. But either of those acts would have occurred whether Barroso went there with intent to encourage Fernandez Medina to start a fight, as the prosecution claimed, or went there with intent to stand behind his friend to defend him if the need arose. In one situation, he could be arguably an accomplice to the first-degree burglary, while in the other, he would not. The misconduct in this case could well have affected the jury's determination of whether the prosecution had proven "knowledge" sufficient to uphold the conviction, and the prosecution thus cannot meet its burden of proving the untainted evidence so overwhelming that the constitutional error in this case can be deemed "harmless." This Court should so hold and should reverse.

2. BARROSO WAS DEPRIVED OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO CONFRONTATION AND CROSS-EXAMINATION

Both our state and federal constitutions guarantee the accused in a criminal case the right to confront the witnesses against them. See State v. Jasper, 174 Wn.2d 96, 108-109, 271 P.3d 876 (2012); Sixth Amendment; Article 1, section 22 (amend. 10). In this case, this Court should reverse, because Barroso's rights to confrontation was violated when he was

deprived of face-to-face confrontation of all of the witnesses at trial and the prosecution cannot prove this constitutional error "harmless."

a. Relevant facts

Before trial, counsel objected to the arrangement of the courtroom, "for purposes of conducting voir dire and for purposes of conducting trial." RP 227. He argued that the arrangement of tables was inadequate for the number of defendants and attorneys, given the space they needed for materials needed for trial, as well. RP 227-28. Counsel stated that, while there had been an effort "informally to accommodate by bringing in a larger folding table that's perpendicular to the fixed counsel table," it was still not enough. RP 227. Counsel said "the allowed space and working area among the defendants who once the defendants join us" would be inadequate. RP 227-28.

The court suggested that some proposed jurors would sit in a place in the courtroom where they could be seen if counsel turned their chairs. RP 230. At that point, one codefendant's counsel asked to be allowed to have her intern stand to assist during voir dire, because it was "very crowded." RP 230. The court said, "[g]et as close as you can, but no, we have enough people up here." RP 230-31. The court recognized that with defendants, interpreters and others at the table, it was crowded but joked that it was "not as big a crowd as I had for Christmas." RP 230-31.

A few minutes later, counsel again objected:

> I would like to make the Court aware that the greater part of the jury panel is blocked visually for me and my client. And looking across the array of attorneys and because of the architecture and the placement of the prosecutor, et cetera, much of the panel in the box is blocked out from view. I have a perfect view of the general

audience area.

RP 235. The judge told counsel, "I invite you to stand at any point in time . . .[i]f you are unable to see a particular juror as opposed to the whole panel[.]" RP 235-36. The judge also said that, if counsel reminded him, he would "ask jurors in the box to stand when they respond to a question." RP 235-36.

But the judge also said that, if Mr. Barroso could not see a particular juror, he was not permitted to stand but should "slide one direction or another a short distance" so that he could "see that particular juror." RP 235-36. The judge opined that, while the courtroom probably did not come "near the standards of the many courtrooms" which were better, it was still one of the best in Pierce County. RP 236.

During trial, there was a concern raised by codefendant's counsel about how some pictures were shown and the court noted how crowded it was with the attorneys and interpreters, saying, "I need the cooperation of attorneys and not just complaints, if you will, to make a record." RP 357. The judge also told counsel, "[i]f you have a specific suggestion, I'd certainly welcome it," and "[t]his is one of the biggest courtrooms in the courthouse[.]" RP 357-58. The judge said that was why he had come in and tried to move furniture with them to try to work with them. RP 358. The court said if problems came up, "you can bring it up one at a time." RP 359.

At one point, when a witness was describing what she saw and how she said the men were approaching the apartment, counsel had to object because he could see shoulders moving and knew there was some

kind of description but could not see it and it was not clear from what was said. RP 380.

Later, during trial, when DeAngelo White was testifying and showing where he said the incident had occurred, counsel had to object, because he could not see the gesture. RP 492. A few moments later, when counsel asked to have the witness stand to the side while he was drawing on an exhibit, the judge said counsel could get "as close as you'd like" after the witness had finished. RP 498. The judge also said that, after the witness had drawn, if counsel was "confused as to where he's drawn, please clarify." RP 498.

Counsel responded, "I am not confused. My client needs to be able to see." RP 498. The court said that Barroso did not "need to see it exactly at the moment that it's drawn" and told the witness to stand wherever he wanted to draw. RP 498.

A few moments later, the witness was describing what he said he saw and heard, and counsel again raised the issue:

> Your Honor, I will object to the testimony as it was entirely blocked from view of my client. No drawing was made. It was demonstrated by movement of an object in a hand while speaking. We couldn't see where he was talking about. My client was blocked by the witness's back.

RP 501-502. The court said, "[c]ertainly," and also told counsel he could "clarify" on cross-examination anything using a pointer. RP 502.

A little while later, White was describing what he did that night and counsel again objected, saying "I am gonna object to the demonstrative testimony by the witness when he is blocked from view of the jury," and that the jury could not see it "because he's behind the

pillar." RP 519. The court itself had to stop the witness, telling the prosecutor if he just wanted the witness to point, the witness could stay there but "if you are asking him to explain things, I really prefer the jury be able to see him." RP 521. The court had to repeat that admonishment a moment later, still to no avail. RP 521.

The court itself got involved, saying, "[w]e are gonna try again," and telling the witness where to stand because "that way the jury can see you clearly." RP 522.

b. Barroso's rights to confrontation were violated

Barroso's confrontation clause rights were violated by the trial court's continuation of the trial with Barroso unable to view and thus have face-to-face confrontation of the potential jurors, witnesses and testimony at times during trial.

The right to physically face those who testify against you is an essential part of the right of confrontation. See Coy v. Iowa, 487 U.S. 1012, 1016, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988). Indeed, the U.S. Supreme Court has described the "literal right to 'confront' the witness at the time of trial" as "the core of the values furthered by the Confrontation Clause." See California v. Green, 399 U.S. 149, 157, 90 S. Ct. 1930, 1943, 26 L. Ed.2d 489 (1970).

The elements of confrontation are physical presence of the witness, having the witness under oath, subjecting him or her to adversarial testing through cross-examination and observation of the witnesses' demeanor serve the purposes of the Confrontation Clause by ensuring that only reliable evidence is admitted, after it had been "subject to the rigorous

adversarial testing that is the norm of Anglo-American criminal proceedings." Maryland v. Craig, 497 U.S. 836, 845-86, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990).

The importance of actual, physical confrontation as part of the constitutional guarantee was explained by the country's highest court:

> The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. A witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. . . The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions. **Thus the right to face-to-face confrontation serves much the same purpose as. . . the right to cross-examine the accuser; both "ensur[e] the integrity of the fact-finding process."**

Coy, 487 U.S. at 1019-20 (emphasis added). Put another way, "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" 487 U.S. at 1017 (quoting, Pointer v. Texas, 380 U.S. 400, 404, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965)). The right to face-to-face confrontation may be limited only in the extraordinary circumstances where "considerations of public policy and necessities of the case" require, and then only if the reliability of the testimony is "otherwise ensured." Maryland, 497 U.S. at 845.

Here, several times during trial, Mr. Barroso was denied face-to-face confrontation. And counsel specifically objected. RP 227-28. Barroso and his counsel were largely blocked from viewing the "greater part of the jury panel" during voir dire. RP 235. Counsel was blocked

from full view of a witness who was describing how she said the men were approaching the apartment. RP 380. He could not see when White was gesturing as he was describing the incident. RP 492, 498, 499. And Barroso was unable to see when a witness was drawing on a diagram. RP 498. That same witness testified in front of the jury but Barroso could not see him at all. RP 501-502. The jury could not see "demonstrative testimony" of gestures from a witness who was "behind the pillar," RP 519, and the court itself ultimately had to move a witness because the jury could not see him because the court "really prefer[red] the jury be able to see" the witness who testified. RP 519, 521-22.

Once again, Mr. Barroso's constitutional rights to confrontation were violated. And again, the prosecution cannot prove the constitutional error harmless, beyond a reasonable doubt. It is difficult to conceive how the failure to allow the defendant to physically confront a crucial witness against him can be deemed "harmless" when the entire point of confrontation is to allow that very thing to occur. The Supreme Court has recognized that the right to face-to-face confrontation is important, that a witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts," and that seeing the demeanor of the witness as the confrontation occurs is important for the trier of fact and helps ensure the integrity of the "fact-finding process." Coy, 487 U.S. at 1019-20. Further, the evidence of Barroso being an accomplice depended upon the jury accepting the prosecution's claim that he had the required "knowledge" - otherwise he would not have been an accomplice to burglary.

Based upon this further constitutional error, this Court should also reverse.

3. THE TRIAL COURT ERRED IN GIVING AN IMPROPER REASONABLE DOUBT INSTRUCTION WHICH REDUCED THE PROSECUTION'S CONSTITUTIONALLY MANDATED BURDEN OF PROOF

Under the state and federal due process clauses, the prosecution bears the burden of proving every essential element of the crime, beyond a reasonable doubt. Winship, 397 U.S. at 361-64. The "beyond a reasonable doubt" standard is complex and even learned judges have disagreed about how best to explain it to juries. See, e.g., State v. Bennett, 161 Wn.2d 303, 315-18, 165 P.3d 1241 (2007). The concept, however, is the very foundation of our entire criminal justice system. See Cage v. Louisiana, 498 U.S. 39, 40, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), overruled in part and on other grounds by, Estelle v. McGuire, 502 U.S. 62, 73, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Indeed, correct application of the burden of proof of beyond a reasonable doubt is in fact the "prime instrument for reducing the risk of convictions resting on factual error." Id.

Thus, it is extremely important that the jury is properly instructed on the prosecution's burden and what is actually required to satisfy that burden, in order to ensure a constitutionally valid conviction. State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977).

In this case, the trial court erred in giving a reasonable doubt instruction which told the jury that the prosecution had met its burden of proof if the jury simply had "an abiding belief in the truth of the charge,"

and in rejecting the proposed defense instruction which would have omitted that language. See CP 114.

Pursuant to RAP 10.1(g) and this Court's Order of Consolidation, Barroso adopts the arguments presented by codefendant Fernandez Medina on this point in Fernandez Medina's opening brief on appeal. See MAB at 24-28.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand for a new trial.

DATED this 1st day of December, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel by efiling this date to this Court's upload portal at pcpatcecf@co.pierce.wa.us, to codefendant's counsel at cathyglinski@wavecable.com, and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows: to Mr. Barroso, DOC 868249, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA. 98520.

DATED this 1st day of December, 2014.

Respectfully submitted,

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