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No. 62693-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

ISRAEL VELASQUEZ-MARQUEZ,

Appellant.

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

The Honorable Deborah D. Fleck

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A. SUMMARY OF ARGUMENT

A dispute between rival gangs at the Southcenter Mall lead fellow members of the two gangs to gather for an anticipated fist fight. As the groups converged, shots rang out from the Hispanic gang to which Israel Velasquez-Marquez was a member. Wayne Molio'o, a member of the rival gang was shot and killed.

Initial police investigation lead to Mr. Marquez's fellow gang member, Israel Alacio-Bobadillo, identified as the shooter. One identification had been made by a bystander who witnessed the shooting but who disappeared after making the identification. After Bobadillo had been interviewed by the police, the investigation focused on Mr. Marquez. He was subsequently arrested and charged with first degree murder.

Bobadillo was not called as a witness by the State. Mr. Marquez sought a missing witness instruction which the trial court declined. Mr. Marquez also sought to admit the hearsay identification of Bobadillo as either an excited utterance or present sense impression. The trial court denied this motion as well. Mr. Marquez was convicted as charged.

Mr. Marquez contends on appeal his constitutionally protected right to present a defense was violated by the trial court's

denial of his proposed missing witness instruction and the refusal to allow the hearsay identification of Bobadillo. Further, Mr. Marquez contends the prosecutor violated his right to a fair trial in closing argument by expressing a personal opinion about the veracity of Bobadillo and relative guilt of Mr. Marquez.

B. ASSIGNMENTS OF ERROR

1. Mr. Marquez's Sixth Amendment and Fourteenth Amendment rights to present a defense were denied when the trial court denied his motion to admit hearsay identification of another as the shooter.

2. Mr. Marquez's Sixth Amendment and Fourteenth Amendment rights to present a defense were denied when the trial court refused to instruct the jury regarding a missing witness.

3. The trial court erred in refusing to give Mr. Marquez's Proposed Jury Instruction 7 regarding the State's failure to produce a witness.¹

¹ Mr. Marquez's Proposed Jury Instruction stated:

If a part does not produce the testimony of a witness who is within the control or peculiarly available to that party and as a matter of reasonable probability it appears naturally in the interest of the party to produce the witness, and if the part fails to satisfactorily explain why it has not called the witness, you may infer that the testimony that the witness would have given would have been unfavorable to the party, if you believe such inference is warranted under all circumstances of the case.

4. The prosecutor's argument in rebuttal denied Mr. Marquez's Fourteenth Amendment right to due process and a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. As a part of the right to present a defense under the Sixth and Fourteenth Amendments, the defendant has the right to present relevant, admissible evidence on his behalf. An eyewitness's hearsay identification of Bobadillo as the shooter was barred by the trial court despite the fact the identification was admissible either as an excited utterance or a present impression. Did the trial court's action barring Mr. Marquez from eliciting this identification infringe upon his right to present a defense entitling him to reversal of his convictions?

2. The failure to give a missing witness instruction when the State fails to call an important witness denies the defendant his right to present a defense. Shortly after the shooting of Mr. Molio's and based upon eyewitness identifications, the police focused on Israel Bobadillo as the shooter. After Bobadillo was interviewed by

Israel Alacia-Bobadilla is a witness who is within the control or peculiarly available to the plaintiff, State of Washington.

CP 69, *citing* WPIC 5.20.

the police, and as a result, Mr. Marquez became the focus of the investigation. Bobadillo, who was in the custody of the State, was not called as a witness by the State and Mr. Marquez proposed a missing witness instruction. Did the trial court's refusal to give the proposed missing witness instruction violate Mr. Marquez's right to present a defense mandating reversal of his convictions?

3. A prosecutor's misconduct during closing argument violates a defendant's Fourteenth Amendment right to due process and a fair trial. A prosecutor's expression of his or her personal opinion regarding the veracity of a witness or the guilt of the defendant constitutes reversible misconduct. Where the prosecutor vouched for Bobadillo's veracity and expressed an opinion that Mr. Marquez was guilty during closing argument, was Mr. Marquez's right to a fair trial violated entitling him to reversal of his conviction?

D. STATEMENT OF THE CASE

On September 9, 2006, a chance meeting between members of rival gangs, one a group consisting of people of Hispanic descent, and the other group consisting of people of Pacific Island descent, in the Southcenter Mall in Tukwila led to a confrontation over the showing of the gangs' relative "colors." 9/30/08RP 53-68, 10/9/08RP 26-36. The members of the Hispanic

gang were outnumbered and felt intimidated, put their colors away, and retreated feeling disrespected. 9/30/08RP 67-69, 10/9/08RP 36. Marco Marquez-Quinn, Israel Velasquez-Marquez's cousin, telephoned friends after the group left the mall and described the incident, suggesting his friends gather up others and come to the mall to engage in a retaliatory fist fight. 9/30/08RP 72-73.

In response to the telephone call, a group of several Hispanic gang members went to the mall to engage in a fist fight. 10/2/08RP 109. This group included Israel Velasquez-Marquez and Israel Alacio-Bobadillo. 9/30/08RP 85-88, 179. Marco directed the group to the members of the Pacific Island gang members, who were now standing at a nearby bus stop. 9/30/08RP 92. As the groups converged, shots rang out. 9/24/08RP 8-19, 10/9/08RP 52-55. Wayne Molio'o, a member of the Pacific Island gang, was shot five times and subsequently died from his wounds. 9/30/08RP 104, 114-19, 136.

Responding police officers detained several of the Hispanic gang members, including Bobadillo. 9/22/08RP 25-38. Bobadillo was initially identified as the shooter. 9/22/08RP 90-94. After Bobadillo's detention and subsequent police interview, the focus of the investigation turned to Mr. Marquez. 9/23/08RP 8-15. Mr.

Marquez was later arrested and charged with first degree murder and unlawful possession of a firearm in the first degree. CP 16-17. Following a jury trial, Mr. Marquez was convicted as charged. CP 130-31.

E. ARGUMENT

1. MR. MARQUEZ'S RIGHT TO PRESENT A DEFENSE WAS DENIED WHEN THE TRIAL COURT REFUSED TO ALLOW THE HEARSAY IDENTIFICATION OF BOBADILLO AS THE SHOOTER

Immediately after the shooting, Tukwila Police Officer Karen Sotace, who was working at Southcenter Mall in an off-duty capacity, responded to the area of the shooting. 9/8/08RP 74. Officer Sotace detained three individuals she observed running from the scene. 9/8/08RP 76-78. Sotace subsequently detained two more individuals, the last identified as Israel Alacio-Bobadillo. 9/8/08RP 86. Sotace noted what appeared to be blood droplets on Bobadillo's pants. *Id.*

From the crowd emerged a person Sotace identified as "Crazy Mike," who approached Sotace and said he saw everything and Bobadillo was the shooter. 9/8/08RP 92. "Crazy Mike" left the area shortly thereafter and the police were never again able to contact him. *Id.* at 94.

Prior to trial, Mr. Marquez moved *in limine* to admit “Crazy Mike’s” prior identification of Bobadillo as the shooter under either the present sense impression hearsay exception or the excited utterance hearsay exception. CP 36-37. The trial court ruled the foundation for the two hearsay exceptions was lacking and denied the motion. 9/11/08RP 32-33.

a. A defendant has the constitutionally protected right to present a defense which encompasses the right to present relevant testimony. It is axiomatic that an accused person has the constitutional right to present a defense. U.S. Const. Amend. VI; *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). The right to present witnesses in one's defense is a fundamental element of due process of law. *United States v. Whittington*, 783 F.2d 1210, 1218 (1986), *citing Washington*,, 388 U.S. at 17-19; *State v. Ellis*, 136 Wn.2d 498, 527, 963 P.2d 843 (1998). *Washington* defines the right to present witnesses as a right to present material and relevant testimony. Const. Art. I § 22; *State v. Roberts*, 80 Wn.App. 342, 350-51, 908 P.2d 892 (1996) (reversing conviction where defendant was unable to present relevant testimony). The defense bears the burden of proving materiality, relevance, and admissibility. *Id.*

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington, 388 U.S. at 19.

b. The prior spontaneous hearsay identification of Bobadillo as the shooter was relevant and admissible testimony that went to heart of Mr. Marquez's defense.

i. "Crazy Mike's" identification constituted an excited utterance. The hearsay rule generally excludes an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c); ER 802. However, such statements may be admitted if they are excited utterances. ER 803(a)(2). In order to be admitted as an excited utterance, the statement must satisfy the following conditions: (1) a startling event or condition must have occurred, (2) the statement must have been made while the declarant was under the stress of the excitement caused by the event or condition, and (3) the statement must have been made in relation to the startling

event or condition. *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). The rule is based upon the premise that:

“under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control.” 6 J. Wigmore, *Evidence* § 1747, at 195 (1976). The utterance of a person in such a state is believed to be “a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock”, rather than an expression based on reflection or self-interest.

Chapin, 118 Wn.2d at 686, quoting 6 J. Wigmore, *Evidence* § 1747, at 195 (1976).

The statement need not be spontaneous or contemporaneous. See *State v. Thomas*, 150 Wn.2d 821, 855, 83 P.3d 970 (2004) (one and one-half hours after shooting, co-defendant’s statement that defendant killed the victim admissible where codefendant still soaked in victim’s blood and visibly shaken); *State v. Woods*, 143 Wn.2d 561, 598-99, 23 P.3d 1046 (2001) (statements made in response to paramedic’s questions 45 minutes after the event were admissible); *State v. Flett*, 40 Wn.App. 277, 287-88, 699 P.2d 774 (1985) (statement made seven hours after a rape was admissible due to a finding of “continuing stress” between the rape and the statement). The only question is whether the declarant was still under the stress of the event. ER 803(a)(2);

State v. Strauss, 119 Wn.2d 401, 416, 832 P.2d 78 (1992) (where the statements of a child who had been raped, made three and a half hours after the rape, were admissible as excited utterances as the child was plainly distressed).

Crazy Mike's statement to Detective Sotace was made mere minutes after the shooting. At the time that Crazy Mike approached Detective Sotace, she was detaining people she thought were involved in the shooting. Crazy Mike's identification related to the startling event; the shooting of Mr. Molio'o. As a consequence, contrary to the trial court's conclusion, Crazy Mike's statement to Detective Sotace was admissible as an excited utterance.

ii. "Crazy Mike's" identification of Bobadillo was admissible as a present sense impression. A present sense impression is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or *immediately thereafter.*" ER 803(a)(1) (emphasis added).

[T]he rule as adopted, declared and followed by this court requires that the statement or declaration concerning which testimony is offered must, in order to make such evidence admissible, possess at least the following essential elements: (1) The statement or declaration made must relate to the main event and must explain, elucidate, or in some way characterize

that event; (2) it must be a natural declaration or statement growing out of the event, and not a mere narrative of a past, completed affair; (3) it must be a statement of fact, and not the mere expression of an opinion; (4) it must be a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design; (5) *while the declaration or statement need not be coincident or contemporaneous with the occurrence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation*, and (6) it must appear that the declaration or statement was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made.

Beck v. Dye, 200 Wash. 1, 9-10, 92 P.2d 1113 (1939) (emphasis added). See also Tegland 5C *Washington Practice*, § 803.3 fn 3 (5th ed. 2009).

Under similar conditions to the case at bar, in *State v. Odom*, a North Carolina trial court admitted a hearsay identification made by an eyewitness to an abduction approximately 10 minutes after the offense occurred. 316 N.C. 306, 312, 341 S.E.2d 332 (1986). In *Odom*, Willie Hartell, an eyewitness to the abduction of the victim, immediately after the abduction, went into the post office, told a clerk what had occurred and asked him to call the police. *Id.* A Durham Police Officer responded to the call and arrived on the scene ten minutes later. *Id.* Mr. Hartell described the abduction,

the victim's car, and the appearance of the two assailants. *Id.* The officer testified that Mr. Hartell did not appear excited or upset. *Id.* Mr. Hartell died before the trial, and the officer was allowed to testify to the content of Mr. Hartell's statement to him under North Carolina Rule of Evidence 803(1), the exception to the hearsay rule for present sense impressions. *Id.* The North Carolina Supreme Court ruled:

Mr. Hartell went to notify the police immediately after the abduction. The officer was on the scene in ten minutes; Mr. Hartell then gave him a statement about the event. Under the facts of this particular case, Mr. Hartell's statement was not too remote to be admissible under Rule 803(1).

Odom, 316 N.C. at 313.

Here, Crazy Mike contacted Detective Sotace *immediately after* he observed the shooting of Mr. Molio'o. Similar to the *Odom* decision, Crazy Mike's statement occurred within minutes of his "perceiving the event," and his statements described the event he had observed. Thus, Crazy Mike's identification was admissible as a present sense impression under ER 803(a)(1).

c. The court's error in refusing to admit Crazy Mike's identification of Bobadillo as the shooter was not a harmless error.

Where the court's error infringes a constitutional right, the State bears the burden of proving beyond a reasonable doubt the error was harmless. *Chapman v. California*, 386 U.S. 18, 21-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Maupin*, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996).

Crazy Mike's statement to Detective Sotace went the heart of Mr. Marquez's defense; that Bobadillo was the person who shot Mr. Molio'o. Nora Mateo initially positively identified Bobadillo as the shooter then later changed her mind. Crazy Mike's identification bolstered Ms. Mateo's initial identification of Bobadillo and impeached her subsequent identification of Mr. Marquez as the shooter. As a consequence, the failure to admit Crazy Mike's statement denied Mr. Marquez his right to present a defense. The court's error was not harmless and Mr. Marquez is entitled to reversal of his convictions.

2. MR. MARQUEZ'S RIGHT TO PRESENT A DEFENSE WAS VIOLATED WHEN THE TRIAL COURT REFUSED TO GIVE HIS PROPOSED MISSING WITNESS INSTRUCTION

Israel Bobadillo was identified in a show-up immediately after the shooting as the person who shot Mr. Molio'o by his cousin, Nora Mateo. 9/23/08RP 105, 9/24/08RP 37-38. Ms. Mateo, who was present when the shooting occurred, was 100% positive Mr. Bobadillo was the person who shot her cousin. 9/24/08RP 38.

Bobadillo was interviewed by the Tukwila Police Detectives Tom Stock and Gary Koutouvidis. 9/23/08RP 8. Bobadillo took the detectives to an apartment complex on South Cloverdale Street in Seattle, where the detectives observed a red Toyota Corolla similar to one seen arriving at the mall with some of the people involved in the shooting. 9/23/08RP 13, 10/13/08RP 66. The detectives returned Bobadillo to the Tukwila Police station, gathered additional officers, and went back to the Cloverdale address. 9/23/08RP 14, 10/13/08RP 67. The detectives intended to speak with a woman named Ashleyann and a man named Israel. 9/23/08RP 14-15, 10/13/08RP 67. At an apartment at that address, the detectives arrested Mr. Marquez and detained Ashleyann Tuilaepa, Mr. Marquez's girlfriend. 9/23/08RP 27-28, 10/13/08RP 71-72. A

subsequent search of the apartment revealed a .45 caliber Glock semi-automatic handgun in the area where Mr. Marquez was discovered. 9/23/08RP 65. The handgun was subsequently linked to the bullets recovered from Mr. Mollo's body. 10/9/08RP 130-47.

The defense theory at trial was that, although Mr. Marquez may have been present at the time of the shooting, Bobadillo was the shooter. The State did not call Bobadillo as a witness at trial. Mr. Marquez requested the court instruct the jury on the State's failure to produce Bobadillo as a witness. CP 69.² The trial court refused to give the requested instruction:

Although [Bobadillo] certainly is in the custody of the State. The State brought him here and had him available to both of you for purposes of calling him into the court room.

...
The second element is that the testimony must relate to an issue of fundamental importance as contrasted to a trivial or unimportant issue. And certainly, Mr. Bobadillo's testimony would be important, and the State brought him here and planned to call him until his attorney interjected an exercise of his constitutional right.

And the third, that the circumstances must establish, as a matter of reasonable probability, that the State would not knowingly fail to call the witness in question

² Mr. Bobadillo had previously invoked his right to silence regarding his proposed testimony at trial. 9/11/08RP 53-54. The State then returned Mr. Bobadillo to the Washington State Penitentiary. 9/11/08RP 52.

unless the witness's testimony would be damaging for the State, and everything there that has been presented to me is just the opposite of that; that Mr. Bobadillo's testimony would be extremely helpful to the State.

...
But the only, the only information I have here is that the State was prepared to call him and intended to call him and would have liked to call him.

So, under these circumstances it is not appropriate for me to give a missing witness instruction.

10/13/08RP 32-33.

a. A defendant is entitled to have the jury instructed on his theory of the case. The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment guarantee a defendant's right to a trial by jury. *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S.Ct. 2078, 2080, 124 L.Ed.2d 182 (1993) (the Sixth Amendment protects the defendant's right to trial by an impartial jury, which includes "as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.' "). The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment require that criminal defendants be afforded a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

As part of the constitutionally protected right to present a defense, each side in a case is entitled to instructions embodying its theory of the case if the evidence supports that theory. *State v. Benn*, 120 Wn.2d 631, 654, 845 P.2d 289, *cert. denied*, 510 U.S. 944 (1993). The proponent of a jury instruction is entitled to have the instruction given where it describes his theory of the case and is supported by sufficient evidence. *State v. Williams*, 132 Wn.2d 248, 259, 937 P.2d 1062 (1997). When considering whether a proposed jury instruction is supported by sufficient evidence, the trial court must take the evidence and all reasonable inferences in the light most favorable to the requesting party. *State v. Hanson*, 59 Wn.App. 651, 656-57, 800 P.2d 1124 (1990).

This Court reviews a trial court's refusal to give a requested jury instruction *de novo* where the refusal is based on a ruling of law. *State v. White*, 137 Wn.App. 227, 230, 152 P.3d 364 (2007), *citing State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). Where the court's refusal to give a requested instruction was based on factual reasons, it is reviewed for an abuse of discretion. *White*, 137 Wn.App. at 230, *citing Walker*, 136 Wn.2d at 771-72. A proposed instruction is appropriate if it properly states the law, is not misleading, and allows a party to argue a theory of the case

that is supported by the evidence. *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003).

b. A defendant is entitled to a missing witness instruction where the witness is “peculiarly available” to the State. “A party’s failure to produce a particular witness who would ordinarily . . . testify raises the inference in certain circumstances that the witness’s testimony would have been unfavorable.” *State v. McGhee*, 57 Wn.App. 457, 462-63, 788 P.2d 603, *review denied*, 115 Wn.2d 1013, 797 P.2d 513 (1990). To obtain a missing witness instruction in a criminal case, the defendant is not required to prove that the State deliberately suppressed unfavorable evidence. *Id.* at 463. Rather, the defendant must establish circumstances indicating that the State would not knowingly fail to call the witness unless the witness’s testimony would be damaging to the State. *State v. Davis*, 73 Wn.2d 271, 280, 438 P.2d 185 (1968).³

³ “In other words, the inference is based, not on the bare fact that a particular person is not produced as a witness, but on his non-production when it would be natural for him to produce the witness if the facts known by him had been favorable.”

Davis, 73 Wn.2d at 280 (emphasis, citations, and internal quotations omitted).

In addition, a missing witness instruction is appropriate when the uncalled witness is “peculiarly available” to the State. *Davis*, 73 Wn.2d at 276. For a witness to be “peculiarly available” to the State, there must have been a community interest between the State and the witness, or the State must have such a superior opportunity for knowledge of a witness that there was a reasonable probability that the witness would have been called to testify for the State except that the testimony would have been damaging. *Id.* at 277. Accordingly, a party seeking the benefit of the inference must show the missing witness was “peculiarly within the other party's power to produce.” *Blair*, 117 Wn.2d at 491 (citation and internal quotation omitted). The rationale behind this requirement is that a party “will likely” call as a witness “one who is bound to him by ties of affection or interest unless the testimony will be adverse,” and that a party with a close connection to a potential witness will be more likely to determine in advance what the testimony would be. *State v. Blair*, 117 Wn.2d 479, 490, 816 P.2d 718 (1991), *citing Davis*, 73 Wn.2d at 277.

The missing witness doctrine does not apply if the witness is equally available to both parties. *Blair*, 117 Wn.2d at 490. But a witness is not equally available merely because he or she is

physically present or subject to the subpoena power. *Davis*, 73 Wn.2d at 276. A witness's availability may depend, among other things, upon his or her relationship to one or the other of the parties, and the nature of the testimony that he or she might be expected to give. *Davis*, 73 Wn.2d at 277.

c. Mr. Bobadillo was "peculiarly available" to the State. The trial court was persuaded by the fact Bobadillo was housed at the King County Jail and either party could have called him as a witness. 10/13/08RP 32. But, as stated in *Davis*, the mere fact Bobadillo was available to both parties to subpoena or call as a witness is not determinative. 73 Wn.App. at 276. Rather, the critical question is the relationship between Bobadillo and the respective parties.

Bobadillo was in the custody of the State and had cooperated with the State when he was interviewed by the Tukwila Police. Further, once the State determined it was not going to call Bobadillo, the State had him transported back to the Washington State Penitentiary.

Further, the fact the State did not call the person who turned the entire investigation in a different direction speaks volumes. Before the police interviewed Bobadillo, he was considered the

shooter based upon Nora Mateo's identification and Crazy Mike's spontaneous identification. Only after Bobadillo's interview did the police focus on Mr. Marquez. Given Bobadillo's importance to the State's investigation, it seems odd the State did not call him as a witness. The only inference to be drawn was that he no longer was willing to testify consistent with the State's theory. Under *Davis*, this factor also supports the point that Bobadillo was peculiarly available to the State.

Mr. Marquez's defense was not only that he did not shoot Mr. Molio'o but that Bobadillo did. The State's failure to call Bobadillo as a witness spoke volumes yet Mr. Marquez was denied the opportunity to have the jury instructed it could use this fact against the State. As a consequence, Mr. Marquez was denied his constitutionally protected right to present a defense because he was denied the ability to argue his theory of the case. Mr. Marquez submits this Court must reverse his convictions and remand for a new trial.

3. THE PROSECUTOR VIOLATED MR.
MARQUEZ'S RIGHT TO DUE PROCESS AND
A FAIR TRIAL IN CLOSING ARGUMENT

During questioning of Tukwila Detective Gary Koutouvidis, the prosecutor asked: "And after the apprehension of [Mr. Marquez] that morning, was Mr. Bobadilla released?" 10/13/08RP 78. Mr. Marquez immediately objected and a sidebar occurred wherein Mr. Marquez moved for a mistrial, arguing the inference to be drawn from the prosecutor's question was that the police believed Bobadilla to be innocent, thus expressing an improper opinion. 10/13/08RP 78, 97. The court noted such evidence was not admissible and sustained the objection. *Id.* The prosecutor subsequently withdrew the question. *Id.* at 78.

During rebuttal argument the prosecutor returned to this theme:

And why would the State want to charge [Mr. Marquez] instead of Mr. Bobadilla, if the evidence pointed to Mr. Bobadilla? The evidence does not point to Mr. Bobadilla. Each and every piece points to [Mr. Marquez].

10/13/08RP 153. At the conclusion of the prosecutor's argument, Mr. Marquez renewed his motion for a mistrial on the grounds the prosecutor was expressing her opinion regarding the guilt of Mr. Marquez. 10/13/08RP 157-58. The court denied the motion,

finding the prosecutor's argument a fair response to Mr. Marquez's argument. *Id.* at 161.

a. A prosecutor must not act in a manner designed to undercut the defendant's right to a fair trial. The United States Supreme Court has stated that a prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). "A prosecutor's duty is not merely to zealously advocate for the State, but also to ensure the accused receives a fair trial." *State v. Jones*, 144 Wn.App. 284, 295, 183 P.3d 307 (2008).

Prosecutorial misconduct may deprive a defendant of a fair trial, and only a fair trial is a constitutional trial. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Prosecutorial misconduct which deprives an individual of a fair trial violates the individual's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. "The

touchstone of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause?" *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Therefore, the ultimate inquiry is not whether the error was harmless or not harmless, but rather whether the impropriety violated the defendant's due process rights to a fair trial. *Davenport*, 100 Wn.2d at 762.

Comments made by a deputy prosecutor constitute misconduct and require reversal where they were improper and substantially likely to affect the verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct and resulting prejudice. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245, *cert. denied*, 518 U.S. 1026 (1996). "Prejudice is established by demonstrating a substantial likelihood that the misconduct affected the jury's verdict." *Id.*

b. The prosecutor impermissibly expressed her opinion regarding Mr. Bobadillo's veracity and Mr. Marquez's guilt.

It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008), *citing State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). Prejudicial error will not be found unless it is "clear and unmistakable" that counsel is expressing a personal opinion, and not arguing an inference from the evidence. *Brett*, 126 Wn.2d at 175, *quoting State v. Sargent*, 40 Wn.App. 340, 344, 698 P.2d 598 (1985); *State v. Papadopoulos*, 34 Wn.App. 397, 400, 662 P.2d 59 (1983).

By telling the jury that the State did not prosecute Bobadillo, the prosecutor was telling the jury that she believed Bobadillo and also believed Mr. Marquez was guilty. The prosecutor's misconduct was especially egregious in light of her earlier improper questioning of Detective Koutouvidis, wherein she attempted to get Koutouvidis to state to the jury *his* belief that Bobadillo was telling the truth. Counsel's conduct constituted misconduct.

Although prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements unsupported by the record. *State v.*

Weber, 159 Wn.2d 252, 276, 149 P.3d 646 (2006), *cert. denied*, ___ U.S. ___, 127 S.Ct. 2986, 168 L.Ed.2d 714 (2007). And it is generally improper for prosecutors to bolster a police witness's good character even if the record supports such argument. See *State v. Smith*, 67 Wn.App. 838, 844-45, 841 P.2d 76 (1992) (following line of cases from other states holding prosecutorial misconduct occurred when the State bolstered police witnesses' credibility with evidence that they received commendations and awards or had distinguished careers).

The prosecutor's argument was precisely the bolstering of veracity the cases disdain. This Court should rule counsel's argument was improper and violated Mr. Marquez's right to a fair trial.

c. The error was not harmless. Because improper opinions on guilt invade the jury's province and thus violate the defendant's constitutional right, the State bears the burden of proving beyond a reasonable doubt the error was harmless. *Chapman*, 386 U.S. at 23-24; *State v. Thach*, 126 Wn.App. 297, 312-13, 106 P.3d 782 (2005). This Court must presume that the constitutional error was prejudicial, and the State must convince this Court beyond a reasonable doubt that any reasonable jury

would have reached the same result absent the error. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007); *Thach*, 126 Wn.App. at 313.

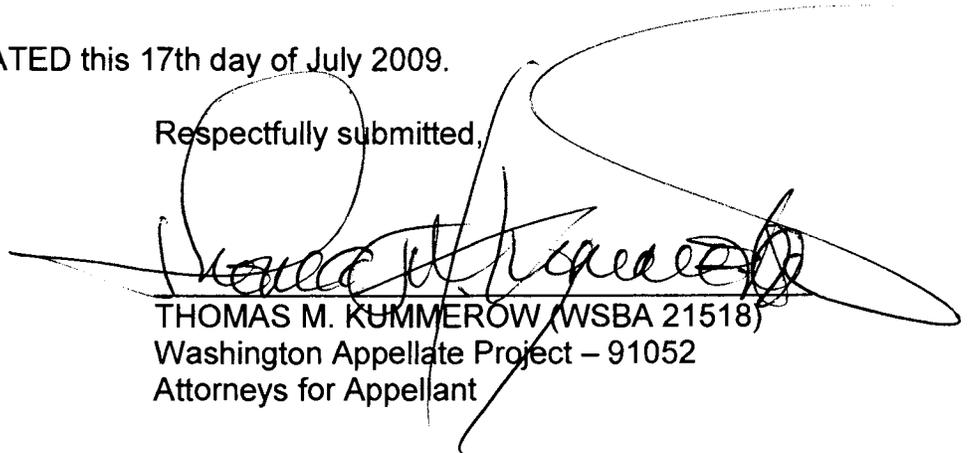
The error here cannot be harmless. The issue for the jury came down to whether Bobadillo or Mr. Marquez shot Mr. Molio'o. By expressing an opinion that Mr. Marquez was guilty while Bobadillo was completely truthful, counsel tipped the scales substantially against Mr. Marquez. As a consequence, had the prosecutor not engaged in the misconduct, the jury could have very well have come back with a not guilty verdict. Thus the prosecutor's misconduct was not harmless and Mr. Marquez is entitled to reversal of his conviction.

F. CONCLUSION

For the reasons stated, Mr. Marquez submits his convictions must be reversed and remanded for a new trial.

DATED this 17th day of July 2009.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over the typed name and address below. The signature is highly cursive and loops around the text.

THOMAS M. KUMMEROW (WSBA 21518)
Washington Appellate Project – 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 62693-1-I
v.)	
)	
ISRAEL VELASQUEZ-MARQUEZ,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF JULY, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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