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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ISRAEL VELASQUEZ-MARQUEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEBORAH D. FLECK

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Evidentiary rulings are addressed to the sound discretion of the trial court, and will not be reversed absent manifest abuse of that discretion. Unless a hearsay exception applies, hearsay evidence is not admissible. In this case, the defendant offered a hearsay statement made by someone identified only as "Crazy Mike." The statement did not qualify as a present sense impression because it was made up to 30 minutes after the events in question, and it did not qualify as an excited utterance because "Crazy Mike" was not excited. Did the trial court properly exercise its discretion by excluding this inadmissible hearsay?

2. A so-called "missing witness" instruction should be given only if a witness is peculiarly available to only one party, if the witness's absence is unexplained, and if it is reasonable to infer that the party has not called the witness to testify because the testimony would have been unfavorable. In this case, the defendant asked for a "missing witness" instruction for a witness who refused to testify due to the constitutional privilege against self-incrimination. The record establishes that the witness's testimony, if given, would have been favorable to the State and incriminating

to the defendant. Did the trial court properly exercise its discretion in refusing the "missing witness" instruction?

3. A defendant who claims that prosecutorial misconduct deprived him of a fair trial must demonstrate both that the conduct was improper and that prejudice resulted. A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence. Remarks that would otherwise be improper are permitted in rebuttal if they are a fair reply to the arguments of the defense. In this case, the defendant argued that another person had killed the victim. In rebuttal, the State argued that the defendant had been charged with the crime because overwhelming evidence pointed only to the defendant as the person responsible for the murder. Were these remarks proper?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Israel Velasquez-Marquez, with murder in the first degree with a firearm enhancement and unlawful possession of a firearm in the first degree for shooting and killing Wayne Molio'o on September 9, 2006. CP 1-5, 16-17. A jury trial on these charges was held in September and October 2008 before the Honorable Deborah Fleck.

The jury found the defendant guilty as charged as to both counts and the enhancement. CP 129-31. The trial court imposed a standard-range sentence totaling 360 months in prison. CP 134-42. The defendant now appeals. 143-53.

2. **SUBSTANTIVE FACTS**

Nora Mateo, age 15, and her 18-year-old cousin, Wayne Molio'o went to Southcenter mall with several friends in the afternoon on Saturday, September 9, 2006. RP (9/23/08) 104-115. They went to McDonald's in the mall's food court, and sat down at a table to enjoy their meals. RP (9/23/08) 113-14. While they were eating, their attention was drawn to a group of four young Hispanic males who were displaying blue bandanas to signify their membership in a Mexican gang "from the south side." RP (9/23/08) 132. Wayne Molio'o was affiliated with the Crips, and another male in the group, Perry Asuemo, claimed an affiliation with the Bloods. RP (9/23/08) 116-17; RP (10/9/08) 24-25. The four young Hispanic males belonged to a rival gang for both Crips and Bloods. RP (9/23/08) 134.

Molio'o told Asuemu and two other males named Masina and Dean to approach the four young males and tell them to put away their bandanas. RP (9/23/08) 135; RP (10/9/08) 29-31.

Masina and Dean spoke to the four youths, and they put their bandanas in their pockets as instructed. RP (10/9/08) 35-36. As Asuemu, Masina, and Dean were returning to the table, one of the young Hispanic males pulled out a cell phone to make a call. RP (10/9/08) 36-37.

Molio'o, Mateo, Asuemu, and the others stayed at their table for another 15 or 20 minutes, and then walked outside to the nearby bus stop. RP (9/23/08) 138. While waiting for the bus, they passed the time taking pictures and videos of each other. RP (9/23/08) 140-41; RP (10/9/08) 38-39. Shortly after 6:00 p.m., three vehicles arrived and a group of 15 to 20 Hispanic males approached Molio'o's group at the bus stop. The four young males with the blue bandannas were in the group approaching Molio'o and his friends. RP (9/23/08) 142-44.

A male with a shaved head and a broken beer bottle in his hand, later identified as Israel Alacio Bobadilla, advanced towards Wayne Molio'o, who had taken his shirt off and was preparing to fight. RP (10/9/08) 44, 46-47, 49-50, 66-68. Just then, however, another male with a shaved head pulled a black handgun from his waistband, pointed it at Molio'o, and started shooting. RP (9/23/08) 8, RP (10/9/08) 51-52, 54, 75.

Wayne Molio'o tried to run away, but he had been shot five times and was bleeding badly. RP (9/30/08) 103-21; RP (10/9/08) 55-57. He collapsed in the grass and said, "I'm done. I'm done."¹ RP (10/9/08) 59. Meanwhile, the Hispanic males scattered in several different directions; some of them jumped into the nearby vehicles and drove away, while others "just ran." RP (9/24/08) 18.

Detective Karen Sotace and several other Tukwila Police officers quickly responded to the shooting. Detective Sotace was working security at the mall that day, and she was already nearby when the shooting occurred. RP (10/22/08) 20-24. As Sotace was running to the scene, she received a radio transmission from another officer who said that he was chasing six Hispanic males through the food court in the mall. RP (9/22/08) 25. Sotace spotted these individuals running outside, and was able to detain one of them almost immediately. This individual was carrying a t-shirt with "Sureño 13" printed on it. Sureño 13 is a Mexican gang. RP (9/22/08) 27-29.

As Sotace was detaining the first individual, two other officers arrived and alerted her to two other individuals attempting

¹ Molio'o died at the hospital early the following morning from damage to several vital organs and internal bleeding. RP (9/30/08) 110, 132, 137, 141.

to hide between cars in the crowded parking lot. These individuals, one of whom was Juan Vargas Salmeron, were detained as well. Salmeron was wearing blue clothing, and both Salmeron and the other individual were wearing belt buckles with the number "13" on them. These items were also consistent with Sureño 13 gang membership. RP (9/22/08) 30-33.

Sotace then noticed two more individuals at the nearby bus stop, and they were detained as well. One of these individuals was Israel Alacio Bobadilla. RP (10/22/08) 35-38. As Sotace was detaining and speaking with Bobadilla, she noticed what appeared to be small blood drops on his pants. RP (9/22/08) 41. Also, at some point while Sotace had Bobadilla detained, a bystander identified only as "Crazy Mike" walked up to her and said that Bobadilla was the shooter. Sotace asked "Crazy Mike" to stand by so that she could speak with him further, but he disappeared. RP (9/8/08) 91-93. Sotace noted that "Crazy Mike" was "[p]retty calm" when he came up and spoke with her.² RP (9/8/08) 93.

² As will be discussed in detail in the first argument section below, Detective Sotace testified about her brief encounter with "Crazy Mike" during the pretrial suppression hearing, but the trial court would not allow the defendant to elicit "Crazy Mike's" hearsay statement at trial.

Bobadilla and the others were transported to the Tukwila Police station for further investigation. Nora Mateo was also transported to the station to give a statement and to identify possible suspects. RP (9/25/08) 35. The police conducted a one-on-one identification procedure with Mateo and Bobadilla in the sally port at the police station. Mateo identified Bobadilla as the shooter, and stated that she was 100 percent certain of her identification.³ RP (9/24/08) 36-41; RP (10/2/08) 9-12.

Detectives Gary Koutouvidis and Tom Stock interviewed Bobadilla after Mateo identified him as the shooter.⁴ RP (9/9/08) 10. Bobadilla initially claimed that he was not even involved in the incident at the mall. RP (9/9/08) 12. However, after the detectives informed Bobadilla that a witness had identified him as the shooter and pointed out the blood on his pants, "he understood the enormity of the issue" and began to cooperate. RP (9/9/08) 14.

³ Mateo also identified Bobadilla in a photographic montage several days later. RP (9/22/08) 92-94.

⁴ As will be discussed in detail in the second argument section below, Bobadilla did not testify at trial, despite being subpoenaed by the State and transported to the King County Jail during the trial, because Bobadilla's attorney, Donald Minor, would not allow him to testify due to the Fifth Amendment privilege against self-incrimination. RP (9/9/08) 91-92; RP (9/10/08) 114.

Bobadilla told the detectives that the shooter was another Hispanic male named "Israel" who looked a lot like Bobadilla and was wearing very similar clothing during the incident. RP (9/9/08)

15. Bobadilla explained that the trouble began when someone received a phone call from a young gang member known as "Chino," who said he was having trouble with rival gang members at the mall. RP (9/9/08) 16. Bobadilla told the detectives that a large group of Sureños and other affiliated gang members had a meeting at a grocery store in Burien, and then went to the mall to help Chino. Bobadilla said that the other Israel, the shooter, was riding in Ashley Ann Tuilaepa's red car. Bobadilla explained that Tuilaepa used to be his girlfriend, but that now she was dating the other Israel. RP (9/9/08) 16-17. Bobadilla said that he rode to the mall in a brown car. RP (9/9/08) 18. Bobadilla again stated that the other Israel was "wearing the same clothes and he looks just like me," except for a large mole near his right eye. RP (9/9/08) 19.

Bobadilla described how the group met up with Chino at the mall and started walking together towards the bus stop. Chino then pointed to the group at the bus stop as the persons who had given him trouble in the mall. RP (9/9/09) 20-21. Bobadilla said that he expected a fist fight, but then he saw the other Israel point and

shoot a black .45 caliber pistol at the other group. RP (9/9/08) 25. Bobadilla said that he must have got Molio'o's blood on his pants because he chased Molio'o after he was shot. RP (9/9/08) 22.

The detectives were skeptical of what Bobadilla was telling them. RP (9/9/08) 15. Nonetheless, Bobadilla was willing to take them to Ashley Ann Tuilaepa's apartment on Cloverdale in the Burien area so that the police could investigate whether the other Israel was staying there. RP (9/9/08) 25. Upon arrival at the Cloverdale address, Bobadilla identified a red Toyota in the parking lot as belonging to Tuilaepa. RP (9/9/08) 26-27. The detectives then drove back to the police station, dropped off Bobadilla, and returned the to Cloverdale apartment with several other officers and detectives for the purpose of contacting any persons inside. RP (9/9/08) 28-29.

Upon returning to the Cloverdale apartment, Detective Stock, Detective Koutouvidis, and Sergeant Doug Johnson looked into the open bedroom window and saw the defendant and Ashley Ann Tuilaepa lying on top of the bed, asleep. RP (9/23/08) 21-25; RP (10/2/08) 13-14; RP (10/13/08) 68-69. The defendant fit the description of the shooter provided by both Nora Mateo and Bobadilla. Also, he was fully clothed and was wearing black gloves

on both hands. RP (10/2/08) 14-15. Detective Stock noted that the defendant very closely resembled Bobadilla, just as Bobadilla had said. RP (9/23/08) 30-32.

At that point, Sergeant Johnson pointed his gun through the window, announced that the police were present, and shouted a "hands up" command. RP (10/2/08) 15. The defendant initially slipped one hand under a blanket and out of view. Johnson repeated his commands, and the defendant finally complied. RP (10/2/08) 16.

The defendant and Tuilaepa were removed from the apartment at gunpoint, and the officers conducted a sweep of the premises. During the sweep, the officers saw a magazine for a Glock semiautomatic pistol lying in plain view on top of the bed where the defendant and Tuilaepa had been sleeping. RP (9/25/08) 152-55. When the detectives later returned to the apartment with a search warrant, they seized this partially-loaded magazine, and they also located a .45 caliber Glock pistol under the defendant's pillow. The gun and ammunition were consistent with cartridge casings from the crime scene. RP (9/23/08) 35, 42, 61-62, 65, 67, 68, 77.

After the defendant was arrested, Ashley Ann Tuilaepa cooperated with the police and testified at trial. Tuilaepa had been dating the defendant for approximately two months at the time of the shooting, and knew him as "Rigoberto" and the street name "Smokey Lacote." RP (9/24/08) 53, 56. Tuilaepa confirmed that Bobadilla was her ex-boyfriend. RP (9/24/08) 58-59. On the day of the shooting, Tuilaepa drove the defendant and an individual named Lorenzo to the grocery store in Burien where the gang meeting took place. RP (9/24/08) 76-88. After that, the defendant told Tuilaepa to drive him to Southcenter to "go check on his little cousin[.]" RP (9/24/08) 102-03. The cousin in question was Chino, whose real name is Marco Antonio Marquez-Quin. The defendant told Tuilaepa that some Samoan individuals wanted to fight with Chino at the mall. RP (9/24/08) 102-03; RP (9/30/08) 18, 24.

Tuilaepa then drove the defendant, Lorenzo, and three other individuals to the mall in her red Toyota Corolla. The defendant rode in the front passenger seat. Bobadilla was in a gray or brown Honda with three other people, and an individual known as "Shorty" brought still more people in his pickup truck. RP (9/24/08) 103, 108, 110.

Kaughtia Pounds was at the mall that day with her family. RP (10/2/08) 62-63. As Pounds and her family were standing near the entrance to the food court deciding where to go, Pounds noticed Tuilaepa's red Toyota Corolla pulling up behind her. Pounds took particular note of the car because it had stopped in the middle of a crosswalk in a crowded area on a busy day. RP (10/2/08) 65, 69. As Pounds watched, the male in the front passenger seat of the Toyota got out of the car and walked to the trunk. Pounds then saw the male put black gloves on both hands, reach into the trunk, and pull out a black semiautomatic handgun. RP (10/2/08) 66-67. Pounds noted that he "took his time" putting the gloves on before getting the gun out of the trunk. RP (10/2/08) 71. At that point, he concealed the gun in the front of his pants and started running towards the teenagers at the bus stop. RP (10/2/08) 67, 72-73. Pounds quickly ushered her family inside the mall before the shooting started, and called the police. RP (10/2/08) 67, 75-76.

Juan Vargas Salmeron, an admitted member of Sureño 13, also testified at trial. Salmeron had arrived at the mall on the day of the shooting in Tuilaepa's car with the defendant. Salmeron specifically recalled that Bobadilla was not in the car with them on

the way to the mall. RP (10/2/08) 108-09. Salmeron was clear that the shooter was the person who came to the mall in the front passenger seat of the red car. RP (10/2/08) 130-32. After the shooting, Salmeron did not leave the scene in the red car, and was apprehended near the bus stop with Bobadilla. Salmeron was certain that the shooter was not at the bus stop with him after the shooting. RP (10/2/08) 133.

Ashley Ann Tuilaepa confirmed what Kaughtia Pounds had seen, and admitted that the defendant took a black gun out of the trunk of her car when they got to the mall. RP (9/24/08) 119-22. Tuilaepa stayed at the car while the large group went to the bus stop, and as soon as she heard the gunshots, she started the car. RP (9/224/08) 126-131. The defendant and three other individuals got into the car after the shooting, and Tuilaepa drove them away. RP (9/24/08) 132-34.

Tuilaepa saw the defendant put the gun back into the front of his pants after the shooting. RP (9/24/08) 35-36. As they were driving away, the defendant asked the other males in the car if they thought that he "got him" or "shot that boy." RP (9/25/08) 36-37. Later on, Tuilaepa saw the defendant's gun under his pillow, where it remained until it was seized by the police. RP (9/24/08) 154-55.

Forensic testing by the Washington State Patrol Crime Laboratory confirmed that the defendant's .45 caliber Glock pistol was the murder weapon. RP (10/9/08) 153.

Several days after the shooting, the detectives located Marco Antonio Marquez-Quin, aka "Chino," and brought him to the station for an interview. RP (9/20/08) 33-36. Marquez-Quin admitted that he had called the other gang members for help after his encounter with Mollo'o's group at the food court in the mall. RP (9/20/08) 69-72. Marquez-Quin specifically recalled that Bobadilla, whom he knew as "Travieso," broke a beer bottle on the curb as they were approaching the group at the bus stop. He also admitted to the detectives that his cousin, the defendant, pulled a black .45 caliber semiautomatic pistol from his waistband. RP (9/30/08) 83-85, 156-57. Marquez-Quin identified both Bobadilla and the defendant in separate photographic montages; he identified Bobadilla as the person with the broken bottle, and the defendant as the person with the gun. RP (9/30/08) 189-91.

After his arrest, the defendant sent several letters to Ashley Ann Tuilaepa from the jail. In these letters, among other things, the defendant asked Tuilaepa to tell Chino to "help" him (Ex. 50), he

subsequently expressed his disappointment in Chino (Ex. 62), and he admitted that he had "screwed up" (Ex. 63).

C. ARGUMENT

1. THE TRIAL COURT EXERCISED SOUND DISCRETION IN EXCLUDING INADMISSIBLE HEARSAY EVIDENCE OFFERED BY THE DEFENDANT.

The defendant first argues that the trial court erred in excluding a hearsay statement made by the individual identified only as "Crazy Mike" who told Detective Sotace that Bobadilla was the shooter. The defendant argues that the exclusion of this hearsay statement deprived him of the constitutional right to present a defense. Brief of Appellant, at 6-13. This claim should be rejected. The trial court exercised sound discretion in ruling that this testimony was not admissible under any exception to the hearsay rule. Indeed, the defendant's trial counsel conceded as much on the record. Thus, this Court should affirm.

The decision whether to admit a witness's testimony is an evidentiary matter addressed to the sound discretion of the trial court. State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001). A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable grounds. State

v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). A reviewing court will find an abuse of discretion only if it finds that no reasonable person would have ruled as the trial judge did.

Atsbeha, 142 Wn.2d at 914.

It is undisputed that a criminal defendant has the right to present witnesses in his own defense. Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). But the right to present a defense is by no means unfettered or absolute. Rather, it is tempered by the rules of evidence and procedure, which serve to ensure the fairness and accuracy of the proceedings for both parties:

In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.

Id.

The hearsay rule is one of the rules that ensure fairness and accuracy: "The purpose of the hearsay rule is to exclude untrustworthy evidence which may prejudice a litigant's cause or defense." State v. Picard, 90 Wn. App. 890, 899, 954 P.2d 336, rev. denied, 136 Wn.2d 1021 (1998). Absent an applicable exception, hearsay is simply not admissible. ER 802.

In this case, the defendant argues that "Crazy Mike's" statement to Detective Sotace that Bobadilla was the shooter was admissible under the hearsay exceptions for present sense impressions and excited utterances. But there was not a sufficient foundation for admission under either of these hearsay exceptions. Therefore, the trial court was well within its discretion in excluding this hearsay statement.

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). This exception is interpreted "in a sufficiently restrictive manner" such that it does not apply where there are insufficient guarantees of trustworthiness. State v. Hieb, 39 Wn. App. 273, 278, 693 P.2d 145 (1984), *overruled on other grounds*, 107 Wn.2d 97, 727 P.2d 239 (1986). The trustworthiness of a present sense impression "is based upon the assumption that its contemporaneous nature precludes misrepresentation or conscious fabrication by the declarant." Id. Accordingly, "[t]he time limit [for present sense impressions] is considerably shorter than the time limit associated with the exception for excited utterances." 5A K. Tegland, Wash. Prac., Evidence § 803.4, at 417 (4th ed., 1999).

An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." ER 803(a)(2).

"Excited utterances are spontaneous statements made while under the influence of external physical shock *before the declarant has time to calm down enough to make a calculated statement based on self-interest.*" State v. Hardy, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997) (emphasis supplied). In other words, in order for a statement to qualify as an excited utterance, the declarant must be, by definition, excited. See State v. Brown, 127 Wn.2d 749, 757-59, 903 P.2d 459 (1995).

In this case, Detective Sotace testified during the pretrial suppression hearing that after she had detained Bobadilla and was speaking with him, an individual known only as "Crazy Mike" came up to her and said that the person she had detained [Bobadilla] was the shooter. RP (9/8/08 a.m.) 91-92. Sotace asked "Crazy Mike" to stand by so that she could speak with him further, but he disappeared. Sotace described "Crazy Mike" as "[p]retty calm" when he spoke to her. RP (9/8/08 a.m.) 93. Sotace could not pinpoint exactly how long after the shooting "Crazy Mike" spoke to her, but she knew that it was before the K-9 track started, which

was approximately 30 minutes after the shooting. RP (9/8/08 p.m.) 45; RP (9/10/08) 105.

Based on Detective Sotace's pretrial testimony, the trial court made the preliminary ruling that there was an insufficient foundation to establish an excited utterance, and that the passage of time was too lengthy for a present sense impression. However, the court invited the defense to attempt to lay further foundation to establish admissibility. RP (9/11/08) 32-33. During trial, outside the presence of the jury, Detective Sotace testified that she believed that "Crazy Mike" approached her when she was performing a pat-down and placing Bobadilla in handcuffs. RP (9/22/08) 158. Aside from this additional detail, no further foundation was laid as to either the timing of the statement in relation to the shooting, or the demeanor of "Crazy Mike" while making the statement. RP (9/22/08) 157-60.

In arguing again for admission of the statement, the defense abandoned any argument regarding an excited utterance, but maintained that it qualified as a present sense impression. RP (9/23/08) 160-61. The court again refused to allow the testimony, and ruled that there was still an insufficient foundation for admission under either exception to the hearsay rule. RP (9/23/08)

164-71. At one point, the defense conceded that it was within the trial court's discretion to exclude the statement, although this concession was later retracted without further argument. RP (9/23/08) 163; RP (10/9/08) 3-4. In making one final request to admit "Crazy Mike's" statement, the defense admitted that there was no further foundation to be laid. RP (10/13/08) 53-54.

Based on this record, the defendant cannot establish that the trial court abused its discretion in ruling that "Crazy Mike's" statement was inadmissible as either a present sense impression or an excited utterance. The hallmarks of trustworthiness underlying each hearsay exception were strikingly absent here. Specifically, for a present sense impression, it was not established that the statement was made immediately after the shooting. In fact, it appears that the statement was made nearly 30 minutes afterward. And, for an excited utterance, there was no evidence that "Crazy Mike" was excited or under the stress of the startling event. To the contrary, Detective Sotace described him as "pretty calm." Without a sufficient foundation to establish admissibility under either hearsay exception, the trial court exercised sound discretion in not allowing the testimony.

Nonetheless, the defendant argues that the trial court erred because "Crazy Mike's" statement was admissible both as an excited utterance and as a present sense impression. These arguments are without merit.

First, as to the excited utterance exception, the defendant argues that "Crazy Mike's identification related to the startling event; the shooting of Mr. Molio'o." Brief of Appellant, at 10. Although this statement is true, it is not sufficient to establish admissibility as an excited utterance. Rather, as discussed above, the declarant must also be excited or under the stress of the startling event when making the statement in question. Again, evidence establishing this aspect of an excited utterance was absent, as Detective Sotace noted that "Crazy Mike" was calm when he approached her.

And second, as to the present sense impression exception, the defendant cites a North Carolina case holding that a statement made about ten minutes after an event can still qualify as a present sense impression. Brief of Appellant, at 11-12 (citing State v. Odom, 316 N.C. 306, 312, 341 S.E.2d 332 (1986)). Although the Odom court did reach that conclusion under the particular facts of that case, this does not demonstrate that the trial court abused its

discretion under the particular facts of *this* case. Again, in this case, the record established that "Crazy Mike" made the statement in question up to 30 minutes after the shooting. In order to find error here, this Court would have to conclude that no reasonable trial judge would have found that the statement did not qualify as a present sense impression. That standard is clearly not met, and this Court should affirm because no error occurred.

But even if this Court were to conclude that no reasonable judge would have excluded "Crazy Mike's" hearsay statement, any possible error was harmless. For nonconstitutional evidentiary errors, the error is not deemed prejudicial "unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (quoting State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

In this case, the jurors heard testimony from Nora Mateo, who also misidentified Bobadilla as the shooter both in a show-up procedure at the police station after the shooting, and also ten days later in a photographic montage. RP (9/24/08) 35-39, 46-48. In addition, despite Mateo's misidentification and other evidence initially pointing to Bobadilla as the shooter, the evidence against

the defendant in this case was overwhelming. Among other things pointing inexorably to the defendant's guilt, the defendant was apprehended while still in possession of the murder weapon and wearing the same gloves he was wearing during the shooting, and he was identified by his girlfriend and his cousin as the shooter. RP (9/24/08) 119-26; RP (9/25/08) 35-37; RP (9/30/08) 189-91. In sum, there is no reasonable probability that the outcome of the trial would have been affected by the hearsay statement of "Crazy Mike," and the Court may affirm for this reason as well.

2. THE TRIAL COURT EXERCISED SOUND DISCRETION IN REFUSING TO GIVE THE DEFENDANT'S PROPOSED "MISSING WITNESS" INSTRUCTION BECAUSE THE FOUNDATIONAL REQUIREMENTS WERE NOT MET.

The defendant next argues that the trial court erred in refusing to give his proposed "missing witness" instruction regarding the State's failure to call Bobadilla as a witness. He claims that the trial court's failure to give this instruction deprived him of the right to a fair trial and the right to present a defense. Brief of Appellant, at 14-21. This claim is without merit. The trial court exercised sound discretion in refusing the "missing witness" instruction because the foundational requirements for giving this

instruction were clearly not met. This Court should reject the defendant's claim, and affirm.

Under the missing witness doctrine, when a party fails to produce a witness within that party's control, the jury may draw an inference unfavorable to that party if certain foundational requirements have been met. These foundational requirements are set forth in the so-called "missing witness" instruction, the current version of which provides as follows:

If a person who could have been a witness at the trial is not called to testify, you may be able to infer that the person's testimony would have been unfavorable to a party in the case. You may draw this inference only if you find that:

(1) The witness is within the control of, or peculiarly available to, that party;

(2) The issue on which the person could have testified is an issue of fundamental importance, rather than one that is trivial or insignificant;

(3) As a matter of reasonable probability, it appears naturally in the interest of that party to call the person as a witness;

(5) There is no satisfactory explanation of why the party did not call the person as a witness; and

(5) The inference is reasonable in light of all the circumstances.

WPIC 5.20.

As set forth in the instruction itself, this instruction is appropriate only when the witness in question is "peculiarly available" to only one of the parties. State v. David, 118 Wn. App. 61, 66-67, 74 P.3d 686 (2003), *opinion amended on other grounds*, 130 Wn. App. 232, 122 P.3d 764 (2005). Therefore, a party seeking the benefit of this instruction must establish that the witness was "peculiarly within the other party's power to produce." State v. Blair, 117 Wn.2d 479, 491, 816 P.2d 718 (1991) (citation and internal quotation omitted). Moreover, there must be a "community of interest" between one party and the witness such that it is "reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging." State v. Davis, 73 Wn.2d 271, 276-77, 438 P.2d 185 (1968). In addition, by its very terms, a "missing witness" instruction is not appropriate unless the witness's absence is unexplained. Therefore, no unfavorable inference may be drawn if there is a satisfactory explanation for the witness's failure to testify. Blair, 117 Wn.2d at 489.

The trial court's decision to refuse a "missing witness" instruction is reviewed for manifest abuse of discretion. David, 118 Wn. App. at 67. The trial court abuses its discretion only when its

decision rests on untenable grounds or was made for untenable reasons. State v. Lord, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007). A trial court abuses its discretion if it gives an instruction that the evidence does not support. State v. Hoffman, 116 Wn.2d 51, 111, 804 P.2d 577 (1991).

In this case, the trial court properly exercised its discretion by refusing to give the defendant's proposed "missing witness" instruction regarding Bobadilla. Bobadilla was not available to either party, and his absence was not unexplained. Indeed, the defendant did not dispute that Bobadilla had properly invoked his right against self-incrimination under the Fifth Amendment and was refusing to testify at the insistence of his attorney. RP (9/9/08) 91-92; RP (9/10/08) 114. Therefore, Bobadilla's absence and failure to testify had a more-than-satisfactory explanation, i.e., the exercise of a bedrock constitutional right.

Moreover, as the trial court found, there was no indication that Bobadilla's testimony would have been unfavorable to the State's case. RP (10/13/08) 31-32. To the contrary, the record demonstrated that Bobadilla's testimony would have been highly incriminating to the defendant, since it was Bobadilla who identified the defendant as the shooter and led the police to the Cloverdale

apartment where the both the defendant and the murder weapon were found. RP (9/9/08) 14-36. Indeed, prior to being informed of Bobadilla's refusal to testify, the State had every intention of calling Bobadilla as a witness because he would have helped the State's case. In sum, the foundational requirements for the proposed "missing witness" instruction were not satisfied, and thus, the defendant's claim fails.

Nonetheless, the defendant argues that Bobadilla was peculiarly available to the State, and that "[t]he only inference to be drawn" from Bobadilla's absence "was that he no longer was willing to testify consistent with the State's theory" that the defendant was the shooter. Brief of Appellant, at 21. In making this argument, however, the defendant omits a crucial aspect of the trial court's ruling, i.e., that Bobadilla's attorney had informed both parties that Bobadilla would not be testifying due to the privilege against self-incrimination. *Compare* RP (10/13/08) 31 (wherein trial court relies on the parties' agreement that Bobadilla's attorney has instructed Bobadilla not to testify), *with* Brief of Appellant, at 15 (wherein this portion of the trial court's ruling is replaced by ellipses).

Thus, the defendant omits a critical aspect of the record in an effort to show that Bobadilla was peculiarly available to the State

when, in fact, Bobadilla was unavailable to *both* parties due to the exercise of a constitutional privilege.⁵ This Court should reject the defendant's arguments, and affirm.

3. THE PROSECUTOR'S REMARKS IN REBUTTAL WERE A FAIR REPLY TO THE DEFENDANT'S CLOSING ARGUMENT, AND THUS, THEY WERE PROPER.

Lastly, the defendant argues that he was deprived of a fair trial because the trial prosecutor committed misconduct during her rebuttal argument. More specifically, the defendant claims that the prosecutor improperly expressed an opinion as to Bobadilla's credibility and as to the defendant's guilt. Brief of Appellant, at 22-27. This claim should be rejected. The prosecutor's remarks did not express an opinion as to either credibility or guilt, and were a fair reply to the defendant's closing argument. Moreover, even if the remarks were improper, a curative instruction would have been sufficient to ameliorate any resulting prejudice, and there is not a substantial likelihood that there was any impact on the jury's verdict. Therefore, this court should affirm.

⁵ A missing witness instruction is not appropriate when the witness's unavailability is due to the valid exercise of a privilege. See Blair, 117 Wn.2d at 489 (and cases cited therein). Here, as noted above, the defendant did not dispute that Bobadilla had properly invoked the privilege against self-incrimination through his attorney. See, e.g., RP (9/10/08) 114.

A defendant who claims on appeal that prosecutorial misconduct during closing argument deprived him of a fair trial "bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). A defendant who did not make a timely objection at trial has waived any claim on appeal unless the argument in question is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Id. A defendant who did make a timely objection must still show a "substantial likelihood" that the prosecutor's remarks affected the jury's verdict.⁶ Id.

⁶ There appears to be confusion in Washington case law as to whether anything other than a timely objection is sufficient to preserve a claim of prosecutorial misconduct on appeal. For example, in In re Detention of Law, 146 Wn. App. 28, 50, 204 P.3d 230 (2008), rev. denied, 165 Wn.2d 1028 (2009), this Court noted that the issue is waived and the "flagrant and ill-intentioned" standard will apply unless there has been a timely objection, "a request for a curative instruction, or a motion for mistrial[.]" As authority for this proposition, this Court cited State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). But Belgarde refers only to the lack of an objection, not a motion for a mistrial. Moreover, given that the standard for granting a motion for a mistrial is virtually the same as the standard for reversal due to "flagrant and ill-intentioned" misconduct – i.e., that nothing short of a new trial can ensure that the defendant will receive a fair trial – it seems illogical that a motion for a mistrial after the arguments have concluded would be sufficient to preserve this issue for appeal. In any event, it is not necessary to resolve this conundrum in this case, given that there is no basis to reverse under either standard of review.

A prosecutor is afforded wide latitude in closing argument to draw reasonable inferences from the evidence for the jury. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). Also, arguments that would otherwise be improper are nonetheless permissible when they are a fair reply to the defendant's arguments, unless such arguments go beyond the scope of an appropriate response. State v. Davenport, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984). In addition, the prosecutor's remarks must not be viewed in isolation, but "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." Brown, 132 Wn.2d at 561.

When a defendant claims that the prosecutor has improperly expressed a personal opinion as to the defendant's guilt, the challenged remarks must be viewed in context. State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). As the court explained in McKenzie,

It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instruction, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur

until such time as it is *clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.*

McKenzie, 157 Wn.2d at 53-54 (emphasis in original) (quoting State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59, rev. denied, 100 Wn.2d 1003 (1983)). In short, the law requires a "clear and unmistakable" expression of personal opinion, "divorced from the evidence," before a prosecutor's remarks will be found to be an improper expression of opinion as to the defendant's guilt.

McKenzie, 157 Wn.2d at 57. In light of these standards and the record, the defendant's prosecutorial misconduct claims fail.

As would be expected, the defendant's closing argument was focused on convincing the jury that Bobadilla was the shooter, and that the defendant was not. As such, defense counsel highlighted evidence pointing to Bobadilla's involvement, and what he perceived as weaknesses in the State's case against the defendant. See, e.g., RP (10/13/08) 133 (no blood found on the defendant's clothes); RP (10/13/08) 134-36 (Mateo identified Bobadilla, not the defendant); RP (10/13/08) 136-39 (firearms experts were "sloppy"); RP (10/13/08) 139 (several witnesses to the shooting did not testify); RP (10/13/08) 147 ("there's no reliable evidence that Mr. Velasquez did the shooting").

In rebuttal, the prosecutor responded to each of these arguments in turn, noting the wealth of incriminating evidence against the defendant and answering the defendant's criticisms of the State's case. RP (10/13/08) 148-53. After discussing the evidence, the prosecutor stated:

And why would the State want to charge this man [the defendant] 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 the defendant.

RP (10/13/08) 153.

After the arguments were concluded, defense counsel moved for a mistrial. RP (10/13/08) 157-58. The trial court denied the motion, finding that the prosecutor's remarks as quoted above were proper. RP (10/13/08) 161.

The trial court's ruling is correct. The prosecutor's remarks fall far short of the "clear and unmistakable" expression of personal opinion, "divorced from the evidence," that the law requires for a finding of prosecutorial misconduct. Indeed, these remarks contain no expression of opinion at all, "clear and unmistakable" or otherwise. Rather, the prosecutor simply asked a rhetorical question as to why the State would charge the defendant with these crimes rather than Bobadilla, and then she answered that rhetorical

question by stating the obvious: because the evidence overwhelmingly established the defendant's guilt, not Bobadilla's. These remarks were a fair reply to the defendant's arguments that Bobadilla was the shooter and that the State's case was weak. In short, there is nothing at all improper about the remarks at issue in this case, and the defendant has failed to meet his burden to demonstrate otherwise.

But even if this Court were to find that these remarks were improper, there is still no basis to reverse under either standard of review. First, these remarks clearly do not constitute "flagrant and ill-intentioned" misconduct that could not have been cured by an instruction to the jury if a prompt objection had been made. Second, assuming that the defendant's motion for a mistrial is the same as a timely objection for purposes of this appeal, the defendant also fails to demonstrate a substantial likelihood that these remarks had any impact on the jury's verdict. As previously noted, the evidence against the defendant was overwhelming. The prosecutor's statement of the obvious in this regard certainly did not prevent the jurors from reaching this conclusion themselves based on the evidence.

In sum, the defendant has failed to meet his burden of demonstrating either that the prosecutor's remarks in rebuttal were improper, or that prejudice resulted. This Court should reject this claim, and affirm.

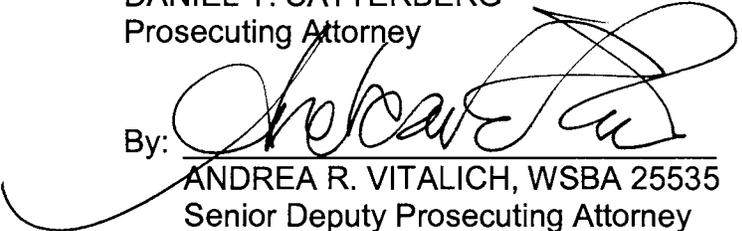
D. CONCLUSION

The trial court exercised sound discretion in excluding inadmissible hearsay and in refusing to give a "missing witness" instruction, and the defendant cannot show that he was deprived of a fair trial due to prosecutorial misconduct. For all of the reasons stated above, this Court should affirm the defendant's convictions for murder in the first degree with a firearm enhancement, and unlawful possession of a firearm in the first degree.

DATED this 30th day of October, 2009.

RESPECTFULLY submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ISRAEL VELASQUEZ-MARQUEZ, Cause No. 62693-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame

Name

Done in Seattle, Washington

10/30/09

Date