

67406-4

67406-4

No. 67406-4-I

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

---

STATE OF WASHINGTON,

Respondent,

v.

VANESSA RODRIGUEZ,

Appellant.

---

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

APPELLANT'S OPENING BRIEF

---

LINDSAY CALKINS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, WA 98101  
(206) 587-2711

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2012 APR -6 PM 4:50

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR....1

C. STATEMENT OF THE CASE.....3

    1. Events prior to trial.....1

    2. Trial proceedings.....2

D. ARGUMENT.....8

    1. THE TRIAL COURT VIOLATED CRIMINAL  
    RULE 3.5 BY ADMITTING MS. RODRIGUEZ'S  
    CUSTODIAL STATEMENT WITHOUT FIRST  
    DETERMINING THAT THE STATEMENT WAS  
    VOLUNTARY.....8

    2. MS. RODRIGUEZ'S DUE PROCESS RIGHTS  
    WERE VIOLATED WHEN HER  
    INVOLUNTARY STATEMENT WAS  
    USED TO IMPEACH HER.....11

    3. THE PROSECUTOR IMPROPERLY ARGUED  
    FACTS NOT IN EVIDENCE AND TOLD THE  
    JURY THAT IN ORDER TO ACQUIT MS.  
    RODRIGUEZ, THEY WOULD HAVE TO FIND  
    THAT THE STATE'S WITNESSES WERE  
    LYING.....14

    4. CUMULATIVE ERROR DENIED MS.  
    RODRIGUEZ A FAIR TRIAL.....18

E. CONCLUSION.....19

CONCLUSION.....	19
-----------------	----

## TABLE OF AUTHORITIES

### **Washington Supreme Court Decisions**

<u>State v. Belgarde</u> , 110 Wn.2d 504, 755 P.2d 174 (1998).....	16
<u>State v. Broadaway</u> , 133 Wn.2d 118, 942 P.2d 363 (1997).....	12
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	18
<u>State v. Gregory</u> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	14
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	13
<u>State v. McKenzie</u> , 157 Wn.2d 44, 134 P.3d 221 (2006).....	14
<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984).....	18
<u>State v. Rupe</u> , 101 Wn.2d 664, 683 P.2d 571 (1984).....	12
<u>State v. Weber</u> , 159 Wn.2d 252, 149 P.3d 646 (2006), cert. denied, 551 U.S. 1137, 127 S. Ct. 2986, 168 L. Ed. 2d 714 (2007).....	15, 17
<u>State v. Williams</u> , 137 Wn.2d 746, 975 P.2d 963 (1999).....	8

### **Washington Court of Appeals Decisions**

<u>In re Detention of Bergen</u> , 146 Wn. App. 515, 195 P.3d 529 (2008).....	15
<u>State v. Alexander</u> , 55 Wn. App. 102, 776 P.2d 984 (1989).....	9
<u>State v. Alexander</u> , 64 Wn. App. 147, 822 P.2d 1250 (1992).....	19
<u>State v. Borsheim</u> , 140 Wn. App. 357, 165 P.3d 417 (2007).....	10, 11

<u>State v. Casteneda-Perez</u> , 61 Wn. App. 354, 810 P.2d 74 (1991), <u>rev. denied</u> , 118 Wn.2d 1007, 822 P.2d 287 (1991).....	17
<u>State v. Fleming</u> , 83 Wn. App. 209, 921 P.2d 1076 (1996).....	16, 17, 18
<u>State v. Jamison</u> , 105 Wn. App. 572, 20 P.3d 1010 (2001).....	11
<u>State v. Jones</u> , 144 Wn. App. 284, 183 P.3d 307 (2008).....	17
<u>State v. Harris</u> , 14 Wn. App. 414, 542 P.2d 122 (1976).....	10
<u>State v. Kidd</u> , 36 Wn. App. 503, 674 P.2d 674 (1983).....	9
<u>State v. Pejsa</u> , 75 Wn. App. 139, 876 P.2d 963 (1994).....	13
<u>State v. Setzer</u> , 20 Wn. App. 46, 579 P.2d 957 (1978), <u>abrogated on other grounds by State v. Broadaway</u> , 133 Wn.2d 118, 942 P.2d 363 (1997).....	12
<u>State v. Taylor</u> , 162 Wn. App. 791, 259 P.3d 289 (2011).....	11
<u>State v. Trout</u> , 125 Wn. App. 403, 105 P.3d 69, <u>rev. denied</u> , 155 Wn.2d 1005, 122 P.3d 185 (2005).....	12
<u>State v. Vannoy</u> , 25 Wn. App. 464, 610 P.2d 310 (1980).....	11
<u>State v. Woods</u> , 3 Wn. App. 691, 477 P.2d 182 (1970).....	10

**United States Supreme Court Decisions**

<u>Jackson v. Denno</u> , 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964).....	9
<u>Michigan v. Harvey</u> , 494 U.S. 344, 110 S. Ct. 1176, 108 L. Ed. 2d 293 (1990).....	11
<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	5, 10, 13

**United States Court of Appeals Decisions**

United States v. Witherspoon, 410 F.3d 1142,  
(9th Cir. 2005).....15

**Court Rules**

CrR 3.5(a).....8, 10  
RAP 2.5(a)(3).....11

A. ASSIGNMENTS OF ERROR

1. The trial court violated Criminal Rule 3.5 by admitting Ms. Rodriguez's custodial statement without holding a hearing to determine the statement's admissibility.

2. The trial court violated Ms. Rodriguez's due process rights by admitting her involuntary custodial statement.

3. The prosecutor erred by arguing facts not in evidence.

4. The prosecutor committed reversible misconduct by arguing that in order to believe Ms. Rodriguez's testimony, the jury would need to find that the police officers were lying.

5. Cumulative error denied Ms. Rodriguez a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Criminal Rule (CrR) 3.5 requires a trial judge to hold an admissibility hearing whenever a "statement of the accused is to be offered in evidence." Here, the prosecutor introduced Ms. Rodriguez's custodial statement, and no admissibility hearing took place. Did the court violate CrR 3.5?

2. The admission of a defendant's involuntary statement violates due process when the State does not show that the statement was made voluntarily. Here, Ms. Rodriguez made a

statement while she was in custody, without having been read Miranda warnings, without counsel present, while in the presence of two authority figures, and in response to a direct, accusatory question. No evidence was offered to show that Ms. Rodriguez's statement was made willingly, but the trial court nonetheless admitted her custodial statement. Did the trial court violate Ms. Rodriguez's due process rights?

3. A prosecutor is forbidden from arguing facts that were not presented in evidence. In this case, the prosecutor told the jury that the State's witnesses had no interest in the outcome of the case and that their lives would not be affected regardless of whether a conviction were obtained; there was no evidence presented to support these arguments. Did the prosecutor commit misconduct?

4. A prosecutor may not misstate the law by arguing that in order to acquit a defendant, the jury must find that the state's witnesses were either lying or mistaken. Here, the prosecutor argued that the jury could either believe the defendant's side of the story, or they could find that the police officers lied. Was this error?

5. The cumulative error doctrine states that even though one error may not be so prejudicial as to require reversal, several errors may combine to deny a defendant a fair trial. In this case, Ms. Rodriguez's inculpatory statement was erroneously admitted, and the prosecutor committed flagrant misconduct during closing argument. The case turned on a credibility determination; there was no inculpatory physical evidence introduced. Must the trial court be reversed under the cumulative error doctrine?

### C. STATEMENT OF THE CASE

#### 1. Events prior to trial

At 11 p.m. on October 20, 2010, Officers John Postawa and Joshua Matt responded to a call at the Meadows Apartment Complex in Auburn, Washington. RP 37, 97.<sup>1</sup> There had been a report of a dispute in the apartment courtyard. RP 38.

When they arrived, the officers questioned several individuals about the incident, including Vanessa Rodriguez. RP 40–41. Ms. Rodriguez had just come from a party to welcome home her cousin and was intoxicated. RP 43, 172. When the

officers initially contacted Ms. Rodriguez she cooperated with them, talking and answering their questions. RP 42, 101. But when Officer Postawa asked her about one of her friends, Ms. Rodriguez became upset and agitated. RP 44.

Officer Postawa believed that Ms. Rodriguez was hindering his investigation, and he began to arrest her. RP 44–45. Ms. Rodriguez struggled, and Officer Matt walked over to help secure the handcuffs. RP 45. Officer Postawa then began escorting Ms. Rodriguez to a patrol car. RP 45. As they walked, Ms. Rodriguez struggled. RP 46. Then, as Officer Postawa tried to force Ms. Rodriguez into the car, Officer Matt came over and helped to push Ms. Rodriguez’s legs in. RP 47. Officer Postawa went around the car and pulled Ms. Rodriguez’s shoulders as Officer Matt pushed her legs into the back seat. RP 48. Ms. Rodriguez was bicycle kicking, and all three of them were yelling. RP 48.

At some point Ms. Rodriguez’s foot made contact with Officer Matt’s face. RP 109. Officer Postawa testified that he did not see Ms. Rodriguez kick Officer Postawa in the face, but

---

<sup>1</sup> The record is contained in two consecutively-paginated volumes.

Officer Matt stated that Ms. Rodriguez pulled her knee back to her chest and kicked him. RP 48, 109.

Ms. Rodriguez testified that she never intended to kick Officer Matt. RP 188. She explained that she was highly intoxicated that night. RP 188. She stated that she had not wanted to assault Officer Matt, and did not intend to do so. RP 201. When she was taken to jail, Ms. Rodriguez believed it was for obstruction, not for assaulting an officer. RP 201.

The next morning, two detectives came to question Ms. Rodriguez about the incident. RP 202; Suppl. CP 55.<sup>2</sup> Before reading Miranda<sup>3</sup> warnings, Detective Michael Jordan introduced himself and told Ms. Rodriguez that they had arrested her for assaulting a police officer. RP 202; Suppl. CP 55. That was the first time that Ms. Rodriguez had heard that she would be charged with assaulting a police officer; she had believed she would be charged with obstruction for failing to be forthcoming with information about her friend. RP 202. Detective Jordan asked Ms. Rodriguez if she would speak to

---

<sup>2</sup> The State's Trial Brief has been supplementally designated.

them about the assault. RP 202. In response to that question, Ms. Rodriguez said that she was only defending herself. RP 202.

## 2. Trial proceedings

In its trial brief, the State indicated the need for a 3.5 hearing before introducing Ms. Rodriguez's statement for impeachment purposes at trial. Suppl. CP 56. No 3.5 hearing was held.

The only evidence presented at trial was the testimony of Officer Postawa and Officer Matt. RP 30–96; 96–155. There were also photographs of Officer Matt's face and hand, taken shortly after the incident, showing little to no damage. RP 117–18. Ms. Rodriguez and both of the officers testified that Ms. Rodriguez had been extremely intoxicated. RP 43, 62, 125, 146, 183. Officer Postawa testified that Ms. Rodriguez was only wearing jeans and a bra, was talking with loud, exaggerated motions and an elevated voice, and had bloodshot, watery eyes. RP 42. Ms. Rodriguez testified that she had consumed two 24-

---

<sup>3</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

ounce Four Loko drinks and some beer, and had trouble remembering the details of that night. RP 174, 178–79, 182.

The defense requested and got a voluntary intoxicated instruction. CP 42; RP 168. Counsel indicated that the nature of the defense was general denial, and argued that Ms. Rodriguez could not have formed the necessary intent for assault in her inebriated state. RP 5–6, 252–53. When Ms. Rodriguez testified that she never meant or intended to kick Officer Matt, the State introduced Ms. Rodriguez’s jail statement that she was just defending herself. RP 201, 202. Defense counsel argued at a sidebar that the statement should not be admitted, but the court allowed it. RP 202, 205–07.

In closing, the prosecutor argued:

Personal interest in outcome . . . regardless of whether the defendant is found guilty or not guilty, it’s not going to change [Officer Matt’s] life in any appreciable degree, nor Officer Postawa’s. Still going to be at Auburn Police, still going to do their normal patrol, and it’s not going to have any real bearing on their lives. The defendant, on the other hand, that’s a different story, for very obvious reasons . . . She does have an interest in being found not guilty in this case, and that’s another thing that you need to consider . . . who’s got a dog in the fight.

RP 236–37. She later stated,

[Y]our job is to make that credibility assessment and decide whether the defendant’s story should be believed, or whether these two officers that have no dog in the fight, whose lives aren’t going to be affected appreciably by the outcome of this case, would get up on the stand and lie to you.

RP 241–42.

The jury convicted Ms. Rodriguez of assault in the third degree. CP 45.

D. ARGUMENT

1. THE TRIAL COURT VIOLATED CRIMINAL RULE 3.5 BY ADMITTING MS. RODRIGUEZ’S CUSTODIAL STATEMENT WITHOUT FIRST DETERMINING THAT THE STATEMENT WAS VOLUNTARY.

Criminal Rule 3.5(a) states,

When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible.

CrR 3.5(a). The rule, adopted in an earlier form in 1967, “was designed to enforce constitutional rights found by the United States Supreme Court.” State v. Williams, 137 Wn.2d 746, 750–51, 975 P.2d 963 (1999). The Court has held that the Fourteenth Amendment requires a “fair hearing in which both the

underlying factual issues and the voluntariness of [a defendant's] confession are actually and reliably determined.” Id. (quoting Jackson v. Denno, 378 U.S. 368, 380, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964)). Furthermore, the Court explained, “[i]t is both practical and desirable that ... a proper determination of voluntariness be made prior to the admission of the confession to the jury which is adjudicating guilt or innocence.” Jackson, 378 U.S. at 395.

The procedures in CrR 3.5 are mandatory. State v. Kidd, 36 Wn. App. 503, 509, 674 P.2d 674 (1983). Failure to comply with CrR 3.5 prior to the admission of an inculpatory statement is reversible error. See State v. Alexander, 55 Wn. App. 102, 105, 776 P.2d 984 (1989). But failure to hold a 3.5 hearing will not render a statement inadmissible if, after a review of the record, there is no concern about a statement's voluntariness. Kidd, 36 Wn. App. at 509.

That is not the case here. The record shows that Ms. Rodriguez was in custody, and had not been read her Miranda rights. RP 202; Suppl. CP 55. She made her statement to Detective Jordan in response to a direct, accusatory question.

See id. Ms. Rodriguez was hearing the accusation for the first time, and was surprised. See RP 201. No attorney was present, and Ms. Rodriguez had not been informed of her right to have one. Suppl. CP 55. There is substantial evidence showing that Ms. Rodriguez's statement was not made voluntarily, and a hearing was required to determine whether it was or not. CrR 3.5; c.f. State v. Harris, 14 Wn. App. 414, 422, 542 P.2d 122 (1976) ("If a review of the record discloses that there can be no issue concerning voluntariness, rights have not been violated by failure to hold such a hearing.") (emphasis added).

The prosecution understood its obligation to hold a hearing before introducing Rodriguez's custodial statement and yet never sought such a hearing. CrR 3.5; Suppl. CP 56. Ms. Rodriguez's statement to police was made before Miranda, and was therefore inadmissible in the state's case-in-chief. State v. Borsheim, 140 Wn. App. 357, 372 n. 6, 165 P.3d 417 (2007) (citing Miranda, 384 U.S. at 444). Had a hearing been held, it would have been found inadmissible, infra § D.2, and the State should not be given the benefit of the doubt when it neglected its obligation to prove the admissibility of the statement prior to its

introduction. See State v. Woods, 3 Wn. App. 691, 697, 477 P.2d 182 (1970) (State's burden to prove that custodial statement was free from coercion). Its improper admission requires reversal because her statement to police was central to the prosecution's ability to prove Ms. Rodriguez's intent, an essential element of assault. CP 38, 39.

2. MS. RODRIGUEZ'S DUE PROCESS RIGHTS  
WERE VIOLATED WHEN HER  
INVOLUNTARY STATEMENT WAS  
USED TO IMPEACH HER.

A defendant's statement may be used as impeachment evidence, even when the statement was made in violation of Miranda, if the statement was made voluntarily. State v. Borsheim, 140 Wn. App. at 371–72 (citing Michigan v. Harvey, 494 U.S. 344, 350–51, 110 S. Ct. 1176, 108 L. Ed. 2d 293 (1990)). The admission of an involuntary statement violates a defendant's right to due process, and is reviewable as a manifest error affecting a constitutional right. RAP 2.5(a)(3); State v. Taylor, 162 Wn. App. 791, 797, 259 P.3d 289 (2011); State v. Vannoy, 25 Wn. App. 464, 467, 610 P.2d 310 (1980) (admission of involuntary statements implicates due process); c.f. State v. Jamison, 105 Wn. App. 572, 587, 20 P.3d 1010 (2001) (“Acosta

does not challenge the trial court's finding that his statement was voluntarily given . . . Because the alleged error does not affect a constitutional right, the manifest constitutional error exception does not apply.”).

The test for voluntariness is whether, under the totality of the circumstances, the statement was coerced. State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997). Relevant considerations may include the defendant’s condition and mental state, and the conduct of the state actor. State v. Rupe, 101 Wn.2d 664, 678–79, 683 P.2d 571 (1984). Courts will also consider whether the officers made any misrepresentations. State v. Trout, 125 Wn. App. 403, 414, 105 P.3d 69, rev. denied, 155 Wn.2d 1005, 122 P.3d 185 (2005).

In this case, the State made no effort to prove that Ms. Rodriguez’s statement was voluntary. It is the State’s burden to show that an inculpatory statement was made voluntarily, even if the statement is used for impeachment purposes. State v. Setzer, 20 Wn. App. 46, 50–51, 579 P.2d 957 (1978), abrogated on other grounds by Broadaway, 133 Wn.2d at 132. There was no showing by the State that Ms. Rodriguez’s statement to

Detective Jordan was made voluntarily. Rather, the evidence showed that Ms. Rodriguez made her statement when she was in police custody. Suppl. CP 55. An in-custody interview is inherently coercive. See State v. Pejsa, 75 Wn. App. 139, 146, 876 P.2d 963 (1994); Miranda, 384 U.S. at 467. In addition, Ms. Rodriguez was questioned when there were multiple officers—who were also male authority figures—present. Suppl. CP 55. She was confused by the fact that Detective Jordan had accused her of assault, and under these circumstances, her statement was not voluntary. See RP 202.

With next to no physical evidence, this case was a credibility contest between the officers and Ms. Rodriguez. See, e.g., RP 234. Thus, the erroneous admission of Ms. Rodriguez’s statement, “I was just defending myself,” was highly prejudicial; the statement suggested that she intended to kick Officer Matt, and intent was an element that the State needed to prove. CP 38, 39. This was a manifest constitutional error, and Ms. Rodriguez’s conviction must be reversed. See State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (the

demonstration of actual prejudice makes a constitutional error manifest).

3. THE PROSECUTOR IMPROPERLY ARGUED FACTS NOT IN EVIDENCE AND TOLD THE JURY THAT IN ORDER TO ACQUIT MS. RODRIGUEZ, THEY WOULD HAVE TO FIND THAT THE STATE'S WITNESSES WERE LYING.

In addition to improperly introducing Ms. Rodriguez's custodial statement without showing that it was voluntary, the prosecutor committed misconduct during closing argument. A defendant claiming misconduct must show improper comments and prejudice. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Where there was no objection below, a defendant must show that the conduct was so flagrant and ill-intentioned that the prejudice could not have been cured by an instruction to the jury. State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006).

Here, the prosecutor improperly argued facts not in evidence, and told the jury that in order to believe Ms. Rodriguez, they would need to find that Officers Matt and Postawa were lying. RP 236–37, 241–42. First, the prosecutor argued:

Personal interest in outcome . . . regardless of whether the defendant is found guilty or not guilty, it's not going to change [Officer Matt's] life in any appreciable degree, nor Officer Postawa's. Still going to be at Auburn Police, still going to do their normal patrol, and it's not going to have any real bearing on their lives. The defendant, on the other hand, that's a different story, for very obvious reasons . . . She does have an interest in being found not guilty in this case, and that's another thing that you need to consider . . . who's got a dog in the fight.

RP 236–37.

“Comments calculated to encourage the jury to render a verdict based on facts not in evidence is improper.” In re Detention of Bergen, 146 Wn. App. 515, 535, 195 P.3d 529 (2008) (citing State v. Weber, 159 Wn.2d 252, 276, 149 P.3d 646 (2006), cert. denied, 551 U.S. 1137, 127 S. Ct. 2986, 168 L. Ed. 2d 714 (2007)). That is precisely what happened here: the credibility of the officers was a central issue in this case, and the prosecutor used facts not in evidence—that their jobs would not be affected, and that they had no personal interest in the outcome—to encourage the jury to find Ms. Rodriguez guilty. See United States v. Witherspoon, 410 F.3d 1142, 1146 (9th Cir. 2005) (prosecutor's argument that police officers would risk

losing their jobs if their testimony was not truthful was “clearly improper”). There was no evidence to corroborate the prosecutor’s statement, and it was improper. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1998) (“A prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider.”).

Next, the prosecutor argued:

[Y]our job is to make that credibility assessment and decide whether the defendant’s story should be believed, or whether these two officers that have no dog in the fight, whose lives aren’t going to be affected appreciably by the outcome of this case, would get up on the stand and lie to you.

RP 241–42. It is improper to argue that in order to acquit the defendant, the jury must find that the State’s witnesses were either lying or mistaken. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). These arguments both misstate the law and shift the burden of proof. As the Fleming Court explained, “The jury would not have had to find that [the State’s witness] was mistaken or lying in order to acquit; instead, it was required to acquit unless it had an abiding conviction in the truth of her testimony.” Id. at 213 (emphasis in original).

Here, the prosecutor did not merely ask the jury to decide whose story was more credible. See State v. Lewis, 156 Wn. App. 230, 241–42, 233 P.3d 891 (2010). Rather, the prosecutor told the jury that if they believed Ms. Rodriguez, they would have to conclude that the officers were lying. RP 241–42. To believe Ms. Rodriguez would have been to acquit her, as she testified that she did not have any intention to kick Officer Matt. RP 201. This was forcing the jury to either acquit Ms. Rodriguez or find that the State’s witnesses were lying, a violation of Fleming. Fleming, 83 Wn. App. at 213.

Both improper techniques that the prosecutor used in closing are well-established as misconduct by Washington courts. See, e.g., Weber, 159 Wn.2d at 276 (arguing facts not in evidence improper); State v. Jones, 144 Wn. App. 284, 293–94, 183 P.3d 307 (2008) (same); Fleming, 83 Wn. App. at 213 (improper to state that in order to acquit defendant jury must find that State’s witnesses were either lying or mistaken); State v. Casteneda-Perez, 61 Wn. App. 354, 362–63, 810 P.2d 74 (1991), rev. denied, 118 Wn.2d 1007, 822 P.2d 287 (1991) (same). As this Court has explained, when a prosecutor makes improper

comments well after court opinions have disallowed them, the conduct is flagrant and ill-intentioned. Fleming, 83 Wn. App. at 214.

The prosecutor made the arguments in Ms. Rodriguez's case long after this Court held those types of arguments improper. Her conduct was flagrant and ill-intentioned. Fleming, 83 Wn. App. at 214. Due to the small amount of evidence in this case, it was also highly prejudicial. See State v. Reed, 102 Wn.2d 140, 147–8, 684 P.2d 699 (1984). Ms. Rodriguez's conviction must be reversed. Fleming, 83 Wn. App. at 216.

#### 4. CUMULATIVE ERROR DENIED MS. RODRIGUEZ A FAIR TRIAL.

Even when any single error standing alone may not require reversal, a reviewing court may find that the combined errors denied a defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The cumulative error doctrine states that reversal is required when the cumulative effect of the errors had a material affect on the outcome of a trial. State v. Alexander, 64 Wn. App. 147, 150–51, 822 P.2d 1250 (1992).

In this case, the court improperly admitted Ms. Rodriguez's damaging custodial statement. Supra § D.1, D.2. In addition, the prosecutor committed misconduct by arguing facts not in evidence and by stating that in order to acquit Ms. Rodriguez the jury would have to find that the police officers were lying. Supra § D.3. Even if no individual error warrants reversal, the cumulative error doctrine mandates reversal in this case.

E. CONCLUSION

For the foregoing reasons, Ms. Rodriguez respectfully requests that this Court reverse her conviction for assault in the third degree.

DATED this 6<sup>th</sup> day of April, 2012.

Respectfully submitted,



---

LINDSAY CALKINS · No. 44127  
Washington Appellate Project · 91052  
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 67406-4-I
v.	)	
	)	
VANESSA RODRIGUEZ,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6<sup>TH</sup> DAY OF APRIL, 2012, 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:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] VANESSA RODRIGUEZ 1210 30 <sup>TH</sup> ST. SE APT 2 AUBURN, WA 98002	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 6<sup>TH</sup> DAY OF APRIL, 2012.

X \_\_\_\_\_ 

**FILED**  
**COURT OF APPEALS DIV I**  
**STATE OF WASHINGTON**  
**2012 APR -6 PM 4:50**

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710