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FILED
June 23, 2015
Court of Appeals
Division I
State of Washington

NO. 72419-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

VICTOR CONTRERAS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA B. DOYLE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1) Whether Contreras waived his right to challenge on appeal the propriety of a detective's testimony regarding his interview of Contreras.

2) Whether Contreras's and his associates' shooting attack on the victims amounted to a continuing course of conduct, thus obviating any need for a unanimity instruction.

3) Whether the State delivered suitable closing argument.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The appellant, Victor Contreras, was charged by amended information and tried with co-defendant Douglas Ho for three counts of assault in the first degree and one count of unlawful possession of a firearm in the first degree. CP 13-15. The three counts of first-degree assault alleged that Contreras and Ho assaulted Lawrence West, William Ngeth, and Troung Ngo on the night of July 22-23, 2012, with the intent to inflict bodily harm; in addition, Contreras and Ho were accused of committing these assaults to benefit their criminal street gang. CP 13-14.

By jury verdict rendered on May 14, 2014, Contreras was found guilty as charged for his substantive offenses, as well as for the gang aggravator. CP 34-43.

2. SUBSTANTIVE FACTS

During the afternoon of July 22, 2012, Lawrence West and Troung Ngo visited the Beacon Hill home of their friend, William Ngeth, to work on Ngeth's car with him. 8RP 20-21.¹ The three young men were members of a Seattle street gang that called itself the Tiny Raskal Gangsters (TRGs). 8RP 8-9. In the late evening, the three decided to drive to another TRG member's house on Rainier Ave. S. in Ngeth's car. 8RP 22-23.

Ngeth stopped his car at the intersection of Beacon Ave. S. and S. Spokane St. at a traffic signal. 8RP 25. While the men waited for the light to change, a tan car pulled up alongside Ngeth's vehicle. 8RP 25. West was concerned – he knew that he needed to be on the lookout for a tan car because such a vehicle belonged to Contreras, a member of another street gang, Insane Boyz. 8RP 27. The TRGs and Insane Boyz had been involved in a

¹ The verbatim report of proceedings consists of 16 volumes, referred to in this brief hereinafter as follows: 1RP (4/25/2013); 2RP (4/10/2014); 3RP (4/15/2014); 4RP (4/21/2014); 5RP (4/22/2014); 6RP (4/23/2014); 7RP (4/26/2014); 8RP (5/5/2014); 9RP (5/6/2014); 10RP (5/7/2014); 11RP (5/8/2014); 12RP (5/12/2014); 13RP (5/13/2014); 14RP (5/14/2014); 15RP (5/14/2014); and 16RP (9/5/2014).

long-standing feud, including a recent incident in which shots had been fired at the home where Insane Boyz member Ho lived with his family. 7RP 122-24.

West turned to Contreras's car and saw Ho emerge from the car's sunroof, holding a gun. 8RP 27-28. Contreras was driving his car, Ho was in the front passenger seat, and a third, unidentified person was in the rear seat behind Contreras.

West told Ngeth to drive and Ngeth complied, running the still-red traffic signal. 8RP 27, 29. West heard one shot fired from Contreras's car, and felt the impact when the round struck Ngeth's vehicle. 8RP 29-30. Contreras began to follow Ngeth's car. 8RP 29.

Ngeth, driving at high speed, tried to escape Contreras's pursuing vehicle, but was unsuccessful. 8RP 32-35. Eventually, Ngeth turned sharply to avoid a dead end at a cul-de-sac located at 22nd Ave. S. and S. Lucile St., and crashed into the curb, immobilizing his vehicle. 8RP 35. As West, Ngeth, and Ngo got out of their car and began to run, West saw Contreras's car stop, and watched Contreras and Ho get out. 8RP 35.

West's group scattered. 8RP 39. Ho and Contreras fired many gunshots at the TRGs; residents of the area said that the

shooting lasted for at least 90 seconds and counted up to 15 rounds being fired. 7RP 12; 9RP 158-59.

As West climbed a fence in his effort to flee, he felt something hit him. 8RP 42. As he hid, West heard Contreras's car drive off, and Seattle Police Department (SPD) patrol cars arriving. 8RP 45. West was taken to Harborview Medical Center, where doctors determined that he had been shot in the torso and arm. 10RP 8-9.

Investigators suspected that Insane Boyz members may have been involved in this incident, and asked patrol officers to look for Contreras's car. 7RP 50. On July 24, 2012, SPD officers located Contreras's car at a barbeque site at Seward Park; Contreras and Ho were both present. 7RP 50. Inside Contreras's car, police found a Smith and Wesson .40 caliber pistol, a Glock .45 caliber pistol, and boxes of .45 caliber and .40 caliber ammunition. 7RP 57-61. In a second vehicle at the scene that belonged to the girlfriend of another Insane Boyz member, police recovered a Kimber .45 caliber pistol. 7RP 54.

Examination of the weapons and ammunition by SPD latent print examiners were somewhat fruitless, but Ho's fingerprints were lifted from the magazine of the Kimber pistol. 9RP 47-51.

Police recovered a number of slugs and shell casings from the shooting scenes at 22nd Ave. S./S. Lucile St. and Beacon Ave. S./S. Spokane St. 6RP 103-04, 115-17, 138-39, 150-51. A firearms examiner from the Washington State Patrol Crime Laboratory examined the guns recovered by SPD officers on July 24, 2012, along with the slugs and casings. 7RP 158, 170. Each of the guns was determined to be operable, and many of the slugs and cartridges found at the shooting locations were determined to have been fired from those weapons. 7RP 175-86.

In addition, cell phone records analyzed by an SPD detective revealed that the phones owned by Contreras and Ho were used at nearly the same time on the night of July 22, 2012, in the area of Beacon Ave. S. near S. Spokane St. 11RP 53, 59.

Stipulations were read to the jury that explained that both Contreras and Ho had prior convictions for serious offenses and were thus prohibited from having firearms on July 22-23, 2012. 11RP 71.

Neither Contreras nor Ho testified in their own cases-in-chief, and both rested without calling any witnesses to testify in their defense. 12RP 34-36.

C. ARGUMENT

1. DETECTIVE SEVAAETASI'S TESTIMONY CONCERNING HIS INTERVIEW OF CONTRERAS DID NOT AMOUNT TO MANIFEST CONSTITUTIONAL ERROR.

Contreras begins his appeal by condemning the following testimony of SPD Detective Robert Sevaaetasi on direct examination in the State's case-in-chief, during which the detective described his conversation with Contreras following the defendant's arrest:

Q [by deputy prosecutor]: Did you have a conversation with Mr. Ho and Mr. Contreras?

A [Det. Sevaaetasi]: Yes.

Q: Was that done separately?

A: Yes.

Q: Take us through that.

A: Well, they were held in interview rooms up on the seventh floor at headquarters. They're separate rooms. I went in there. I think a very brief conversation like, "How are you doing?" And then they asked why they were there. I read them their rights, and I told them that they were there for investigation of a shooting. Once I did that, I put both of them separately in separate rooms when this happened, and they denied any knowledge of it.

Q: When asked about their whereabouts on the night in question, was there an answer?

A: They couldn't account for where they were.

Q: Did both of them give the same kind of answers?

A: Yes. They had – they were – they were kind of indifferent to the whole incident, being interviewed, being advised of their rights. It was like nonchalant to them, and I found this not at all unusual.

Q: The nonchalance you didn't find unusual?

A: Yeah, or the indifference to it and that there was similar behavior.

Q: Explain nonchalance and indifference.

A: Well, you know, normally you would arrest someone, put them in handcuffs, and take them to the police station. They would – some protestation about guilt or innocence or whatever or why they're there. There was no such attitude from them. They were – really kind of indifferent, just sat there. And when I asked them if they could account for their—their whereabouts, it was, "I don't remember. I don't know."

9RP 97-98.

Contreras recognizes that he did not object to this testimony during Det. Sevaaetasi's direct examination. Nevertheless, he contends that reversal of his convictions is required because this testimony amounted to manifest constitutional error. Specifically, Contreras asserts that the detective's testimony constituted either an improper comment on his exercise of his constitutional right to remain silent or an improper expression by the detective of his

opinion on Contreras's guilt, and that this caused him actual prejudice.

Contreras's claim is without merit. An error raised for the first time on appeal must be manifest and truly of constitutional dimension. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Moreover, the appellant must demonstrate that the alleged error actually affected his rights at trial. Id. at 926-27. Contreras cannot meet his obligations here. The detective's testimony concerned not Contreras's *silence*, but his *statements* while being interrogated. Furthermore, a fact witness is permitted under well-established case law to describe a defendant's demeanor, and the detective's testimony here contained no expression of his subjective belief as to Contreras's guilt. Finally, Contreras fails to show how the detective's testimony caused him genuine harm that would cause this Court to question the jury's verdict. His contention should be rejected.

Generally, a police witness may not comment on the silence of a defendant in order to imply guilt from a refusal to answer questions. State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). To do so violates the defendant's Fifth Amendment right to

refrain from self-incrimination. State v. Easter, 130 Wn.2d 228, 242-43, 922 P.2d 1285 (1996).

However, when a defendant talks to investigators, a police witness may comment on what he does or does not say. State v. Clark, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001). Likewise, a witness's reference to a defendant's demeanor cannot be construed as naturally and necessarily referring to the defendant's exercise of his Fifth Amendment right to remain silent. See State v. Barry, __ Wn.2d __, __ P.3d __, 2015 WL 3511916 at *4 (Wash. June 4, 2015). A reviewing court should examine "the nature of the statement and the context in which it was offered... to determine the presence of error." United States v. Elkins, 774 F.2d 530, 537-38 (1st Cir. 1985), quoted in Barry, 2015 WL 3511916 at *4.

Here, it is clear from the excerpted testimony reprinted supra that Det. Sevaaetasi was explaining Contreras's manner and conduct while in custody and participating in an interview, as opposed to commenting on an exercise by Contreras of his Fifth Amendment right to silence in response to interrogation or advisement. Sevaaetasi was simply describing Contreras's blasé demeanor, following his arrest on suspicion of a violent offense,

when asked in an interview room at police headquarters to state where he had been on the night of the crime.

The cases to which Contreras tries to equate Det. Sevaaetasi's testimony are inapposite. In State v. Holmes, 122 Wn. App. 438, 93 P.3d 212 (2004), the case detective was far more explicit in his suggestion that the defendant's failure to proclaim his innocence was suspicious. See Holmes, 122 Wn. App. at 442 (quoting detective: "When he was advised what the charge was, there wasn't any kind of denial or something that I would normally expect to see."). Here, in contrast, Det. Sevaaetasi described Contreras's "attitude" of nonchalance, i.e., a lack of concern altogether about being in custody, as opposed to an absence of an expression of blamelessness, and observed that Contreras's demeanor was "not at all unusual." 9RP 98. Furthermore, whereas in Holmes the deputy prosecutor emphasized the detective's comment in closing argument, here there is no suggestion that the State made any reference to Det. Sevaaetasi's observation. See Holmes, 122 Wn. App. at 442-43.

Similarly, in State v. Pinson, 183 Wn. App. 411, 333 P.3d 528 (2014), the detective specifically noted during his testimony that the defendant "became quiet" when their conversation turned

to the specifics of the alleged crime, and the deputy prosecutor expressly noted in closing argument that the defendant's silence was "evidence of his guilt." Pinson, 183 Wn. App. at 414-15. Here, there was no parallel description of Contreras as somehow "clamming up" while being questioned, and no exploitation of such an event in closing argument.

United States v. Velarde-Gomez, 269 F.3d 1023 (2001), also involves far more direct testimony regarding a defendant's *silence*, as opposed to manner and behavior, when being questioned. In that case, a U.S. Customs agent testified that when he told Velarde-Gomez that he had found 63 pounds of marijuana in his car's gas tank, the defendant had "no response," said nothing, and did not deny knowledge of the drugs. Velarde-Gomez, 269 F.3d at 1027. In contrast, here Det. Sevaaetasi was describing Contreras's seeming disinterest in his then-current status as an arrestee, as well as his *answers* to questions, as opposed to his exercise of his right to avoid self-incrimination. Moreover, as in Holmes and Pinson, the prosecutor in Velarde-Gomez highlighted the defendant's silence as probative of his culpability, unlike here. Id. at 1028.

Just as Det. Sevaaetasi's testimony did not infringe Contreras's Fifth Amendment right to silence, it also did not amount to an expression of opinion on Contreras's guilt. Such testimony can amount to a violation of a defendant's Sixth Amendment right to trial by jury. See State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). However, opinion testimony as to a defendant's *conduct* is admissible if it is prefaced with proper foundation: personal observations of the defendant's conduct, factually recounted by the witness, directly supporting the witness's conclusion. State v. Stenson, 132 Wn.2d 668, 724, 940 P.2d 1239 (1997).

Here, it is difficult to see how Det. Sevaaetasi's statement can be interpreted as a judgment of Contreras's culpability. He expressed no conclusions about Contreras on the basis of the defendant's coolness to being arrested and interrogated. He did not describe Contreras's detachment as indicative of anything in particular, explaining that Contreras neither proclaimed his innocence nor admitted his guilt. Det. Sevaaetasi simply pointed out his personal observation that Contreras was seemingly unconcerned about being at a police station. 9RP 97-98. Given that the State's evidence established that Contreras was a

committed gang member with prior contact with law enforcement, the jury was unlikely to interpret Det. Sevaaetasi's description as anything other than that of a person familiar with police interaction.

Det. Sevaaetasi's remarks stand in ready distinction from those at issue in State v. Haga, 8 Wn. App. 481, 507 P.2d 159 (1973), the case on which Contreras relies. In Haga, a paramedic testified that the defendant showed no grief following the death of his wife, and made no efforts to assist in the medic's life-saving efforts. Haga, 8 Wn. App. at 490. The paramedic explained that the defendant's behavior was notably unusual compared to the conduct and demeanor of other spouses of dying individuals he had encountered in the past. Id. This Court held that this testimony was problematic because the paramedic was permitted to testify as an expert on "bereavement response", when there was no such area of expertise, and his statements carried the inescapable implication that Haga had caused his wife's death. Id. at 491-92.

Here, in contrast, Det. Sevaaetasi was testifying from his direct observation of Contreras's demeanor that supported his conclusion that Contreras appeared indifferent to his circumstances. Neither the detective nor the State purported to establish that the detective was any sort of expert witness on the

subject of proper reactions to being arrested. Moreover, the detective's testimony carried no implicit suggestion as to his belief of Contreras's guilt; rather, it was merely a conclusion that Contreras did not appear to be flustered by being arrested and interrogated. This Court has upheld the admission of similar testimony in the past, rejecting assertions that such evidence is akin to that deemed inappropriate in Haga. See, e.g., State v. Allen, 50 Wn. App. 412, 749 P.2d 702 (1988).

Finally, even if this Court were to conclude that the admission of Det. Sevaaetasi's somewhat oblique testimony touched on Contreras's constitutional rights, it is still readily apparent that he fails to demonstrate actual prejudice warranting this Court's review despite the absence of a timely objection. Det. Sevaaetasi's remarks were limited to a few moments of testimony in a lengthy trial, and are not nearly as patently suggestive as the statements elicited from witnesses in the cases that Contreras has relied upon. Unlike those cases, in which the witnesses' testimony carried the unavoidable insinuation that the defendant either exercised his right to remain silent in order to deflect his guilt or behaved in a manner wholly inconsistent with an innocent person, here the detective's testimony suggested only that Contreras did

not appear to be shocked to be in police custody, and that the detective did not find this to be unusual. As discussed supra, given the jury's appropriate awareness of Contreras's history of gang participation and encounters with police, Det. Sevaaetasi's testimony does not carry the same sting that was present in these other cases.

Furthermore, the jurors were properly instructed that they were the sole judges of credibility, that the defendants' refusal to testify could not be used to infer guilt, and that the opinions of expert witnesses need not be blankly accepted. CP 76, 81, 84. Proper instructions are critical to the determination of whether opinion testimony unfairly prejudiced a defendant. State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008).

Lastly, Contreras can point to no attempt by the State in closing argument to remind the jury of this aspect of Det. Sevaaetasi's testimony and/or contend that it was probative of Contreras's guilt. Instead, the State focused on the testimony of Lawrence West, the victim who was struck by gunfire; the physical evidence recovered at the scene and from the vehicles belonging to Contreras's mother and an associate of Contreras's gang; other witnesses' descriptions of the events on July 22, 2012; and

abundant proof of motive in the form of a long-standing, violent dispute between the gangs that the victims and defendants belonged to. 13RP 16-35.

For the same reason – i.e., the absence of prejudice – Contreras’s claim that his counsel was constitutionally ineffective for failing to object is also defective. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (setting forth the two-prong test for performance and prejudice when determining whether counsel provided ineffective assistance); Petition of Riley, 122 Wn.2d 772, 780, 863 P.2d 554 (1993) (restating that failure to establish one prong is fatal, and the reviewing court need not consider the other prong).

Contreras can neither establish plain error of constitutional magnitude nor the degree of prejudice that would justify review of his claim despite his failure to object at trial. The lack of substantial injury similarly defeats his claim of ineffective assistance of counsel. Contreras’s claims should be denied.

2. THE ASSAULTS ON THE VICTIMS AMOUNTED TO A CONTINUING COURSE OF CONDUCT, NEGATING THE NEED FOR A UNANIMITY INSTRUCTION.

Contreras next contends that his right to a unanimous jury was violated because the trial court failed to instruct the jurors that they need to unanimously agree on which act of assault was proved beyond a reasonable doubt. He asserts that two separate incidents occurred – at the intersection of Beacon Ave. S. and S. Spokane Street, where the shooting commenced, and in the area of 22nd Ave. S. and S. Lucile St., where it ended – and that each was a stand-alone event that could have justified his conviction. Contreras argues that in the absence of an instruction modeled on the state supreme court's decision in State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), his convictions for assault cannot stand.

Contreras's contention is without merit. A Petrich instruction is not required where multiple acts are so closely related as to amount to a continuing course of conduct. Here, Contreras and his associates engaged in an uninterrupted effort to chase down and shoot rival gang members. In other words, Contreras was an active

participant in a single enterprise. Under the circumstances, a unanimity instruction was unwarranted.

The determination of whether a unanimity instruction is needed depends on whether a prosecution constitutes a “multiple acts case.” State v. Locke, 175 Wn. App. 779, 802, 307 P.3d 771 (2013). Courts are required to distinguish, however, between one continuous offense and several distinct acts, each of which could be the basis for the charged crime(s). Locke, 80 Wn. App. at 802-03. A unanimity instruction is not required when the State’s evidence shows that the several acts indicate a “continuing course of conduct,” defined as an “ongoing enterprise with a single objective.” Id. at 803, quoting State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). To determine whether multiple acts constitute a continuing course of conduct, the reviewing court evaluates the facts of the case in a commonsense manner. Locke, 175 Wn. App. at 803; see also Love, 80 Wn. App. at 361 (noting that evidence of conduct at different times and places and involving different victims suggests an absence of a single-minded enterprise).

Contreras’s claim defies common sense. He asserts that a unanimity instruction was required because his group began firing

bullets at their victims at one intersection but then resumed shooting at a different location. Contreras ignores the fact that the purported “break in the action” consisted of the victims’ unsuccessful attempt to flee from the initial shooting. Contreras drove in uninterrupted pursuit of the fleeing victims, and then continued his and his comrades’ fusillade after the victims’ vehicle crashed. As SPD officers told the jury, a report of shots fired at the intersection of Beacon Ave. S. and S. Spokane St. was quickly updated to the nearby area of 22nd Ave. S. and S. Lucile St. By the time responding officers arrived at the second location, Contreras and his associates had already completed their assaults and fled from the scene. 6RP 65-68; 7RP 71-76.

Lawrence West explained in detail how he and his friends were initially attacked by Contreras and his associates, then were pursued by them in a high-speed car chase, and were again shot at in a compressed period of time. It challenges logic to suggest that this unbroken episode of attack was, in actuality, a sequence of events with separate and definitive beginning and end points.

This Court has recognized, in Love, that the continuing course of conduct exception to State v. Petrich is applicable to multiple acts of assault. See Love, 80 Wn. App. at 361. Common

sense compels the conclusion that Contreras's joint attack on the named victims in this case was an uninterrupted, ongoing enterprise with a single objective that occurred in a very short period of time during the course of a pursuit. It is little wonder that neither Contreras's counsel, nor his co-defendant's, sought a Petrich instruction under these circumstances.

3. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT.

Contreras accuses the State of committing misconduct in closing argument in two instances. First, he asserts that the deputy prosecutor engaged in deliberate wrongdoing in her initial remarks when she told the jury that “[w]e only know for certain two of the individuals that were shooting that night. That was Mr. Contreras and Mr. Ho.” 13RP 15-16. Contreras contends that, in this remark, the deputy prosecutor effectively vouched for the credibility of Lawrence West, and also represented a calculated effort by the prosecutor to align the State and the jury together against him. Contreras asserts that this remark was so flagrant and ill-intentioned that it could not have been remedied by a curative instruction, thus enabling him to seek appellate relief despite his failure to object at trial.

Contreras also argues that the prosecutor committed reversible misconduct during her rebuttal, when she told the jury that both defense attorneys “have gone through in their closing and tried to explain away or dismiss every single piece of the State’s evidence. But it gets to a point where you lose – where it becomes nonsensical.” Despite the fact that the trial court overruled an objection by Ho’s attorney to this statement, Contreras nevertheless maintains that the prosecutor improperly disparaged his attorney’s role as defense counsel with this requirement, causing such prejudice that a new trial is required.

Contreras’s contentions should be rejected. In order to establish prosecutorial misconduct, a defendant must prove that the prosecutor’s conduct was improper and that it prejudiced his right to a fair trial. State v. Carver, 122 Wn. App. 300, 306, 93 P.3d 947 (2004). A defendant can establish prejudice only if there is a substantial likelihood that the misconduct affected the jury’s verdict. Id. A prosecutor’s comments during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. Id. If defense counsel fails to object to the prosecutor’s statements, then reversal is required only if the misconduct was so flagrant and

ill-intentioned that no instruction would have cured the resulting prejudice. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

Although it is improper for a prosecutor to personally vouch for a witness's credibility, a prosecutor may argue inferences from the evidence, and a reviewing court cannot find prejudicial error unless "it is 'clear and unmistakable' that counsel is expressing a personal opinion." State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), quoting State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598 (1985).

Even within the circumscribed context of the unobjected-to remark here, it is far from unmistakable that the prosecutor was vouching for Lawrence West's credibility. The prosecutor made no overt, direct references to West's believability, or offer any personal estimation. Rather, the prosecutor noted that evidence pointing to the involvement of Contreras and Ho as two of a group of shooters targeting rival gang members included West's testimony, physical evidence, cell phone records, and ballistics analysis, along with proof of obvious motive. 13RP 16-17. Furthermore, the prosecutor shortly thereafter reminded the jury that it was its job to assess witness credibility. 13RP 18.

In addition, it is difficult to understand how the prosecutor's one usage of the term "we" in the course of a lengthy argument connoted a flagrant and ill-intentioned attempt to engender the jury's loyalty, as opposed to amounting to a mere choice of pronoun without significance. The sole Washington case on which Contreras relies, State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984), is readily distinguishable. Reed involved a prosecution's closing argument that was rife with outrageous remarks; the prosecutor repeatedly called the defendant a liar and asked the jurors to refuse to "let a bunch of city lawyers... and city doctors who drive down here [i.e., Pacific County] in their Mercedes Benz" influence their decision. Reed, 102 Wn.2d at 143-44.

To equate the remarks by the prosecutor in Reed with the single collective first-person reference in this case is spurious. The prosecutor's statement here was innocuous and had none of the loaded, inflammatory nature of the closing argument in Reed, which was a direct plea for sympathy by the prosecutor on the basis of insider-outsider status. It was a relatively meaningless choice of term used only to re-introduce the jury to the wealth of evidence pointing to the culpability of Contreras and Ho. Furthermore, any risk that the jury would have erroneously construed the prosecutor's

one-time choice of words here could have readily been remedied with a curative instruction had one been sought.

Comparison of the prosecutor's argument in Reed with the State's closing remarks here also shows the deficit of Contreras's claim that the State disparaged his attorney's role in the trial. Not only did the prosecutor in Reed malign opposing counsel because he was an urbanite, as opposed to "down here in the woods," he also told the jury that it must have been irritating for defense counsel to represent the defendant "when you don't have anything." Reed, 102 Wn.2d at 143. The prosecutor further suggested "most all trial lawyers" make disparaging comments for shock value. Id.; see also State v. Thorgerson, 172 Wn.2d 438, 466, 258 P.3d 43 (2011) (questioning the suitability of a prosecutor's description of defense counsel's strategy as "sleight of hand"); State v. Negrete, 72 Wn. App. 62, 66, 863 P.2d 137 (1993) (criticizing prosecutor for arguing that the defendant's lawyer was "being paid to twist the words of the witnesses.").

As the Thorgerson court observed, it is not misconduct for a prosecutor to argue that the evidence does not support the defense's theory of the case. Thorgerson, 172 Wn.2d at 465-66 (observing that even "isolated remarks calling defense arguments

'bogus' and 'desperate,' while strong and perhaps close to improper, do not directly impugn the role or integrity of counsel, and such isolated comments are unlikely to amount to prosecutorial misconduct.”). In other words, defense counsel’s arguments are open to a prosecutor’s appraisal, which is precisely what occurred in this case. The deputy prosecutor, on rebuttal, simply criticized the merits of the *closing arguments* of both defense attorneys, rather than the attorneys qua attorneys. There was neither direct disparagement nor even a clear effort to depict defense counsel’s strategy as deceptive. The prosecutor merely observed that both defense attorneys had beseeched the jurors to treat each piece of evidence in isolation, as opposed to in their totality, and that absurd results would follow were the jury to follow opposing counsel’s request. The trial court properly overruled the objection made by Ho’s attorney, and Contreras makes little effort to demonstrate that the prosecutor’s remark so tainted the proceedings that this Court should lack confidence in the propriety of the outcome of the trial.

4. THE TRIAL COURT’S WRITTEN CrR 3.5 FINDINGS OF FACT AND CONCLUSIONS OF LAW HAVE BEEN FILED.

Contreras correctly noted, at the time that he submitted his opening brief, that the trial court’s written findings of fact and

conclusions of law on the State's motion to admit, pursuant to CrR 3.5, his statements to police had not been filed with the superior court clerk. As Contreras also correctly observed, remand to the lower court for entry of these written rulings is the proper remedy. See State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998).

Remand is not necessary in this instance, however, because the written findings of fact and conclusions of law were filed with the superior court clerk on March 1, 2015. They have been designated for transmission to this Court as supplemental clerk's papers. Supp. CP ___ (sub no. 135, Written Findings of Fact and Conclusions of Law on CrR 3.5 Motion, filed Mar. 1, 2015).

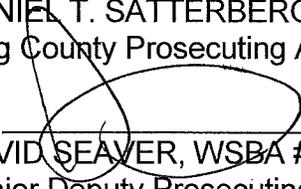
D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Contreras's convictions for first-degree assault and unlawful possession of a firearm.

DATED this 22nd day of June, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Jennifer Sweigert, containing a copy of the Brief of Respondent, in STATE V. VICTOR CONTRERAS, Cause No. 72419-3-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.

U Brame
Name
Done in Seattle, Washington

6/23/15
Date