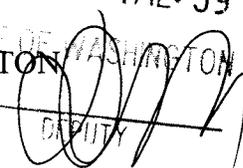


FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 
DEPUTY

NO. 40299-8-II

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

STATE OF WASHINGTON, Respondent

v.

LUIS FERNANDO VARGAS-GUTIERREZ, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROGER BENNETT
CLARK COUNTY SUPERIOR COURT CAUSE NO.09-1-00530-3

BRIEF OF RESPONDENT

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P.M. 9-23-0

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I. STATEMENT OF FACTS

The State accepts the statement of facts as set forth by the defendant. Where additional information is necessary, it will be supplemented in the argument section of the brief.

II. RESPONSE TO FIRST ARGUMENT

The first argument raised by the defendant is a claim that the court failed to exclude additional testimony by a police officer (Officer Gomez). This failure to exclude the additional testimony denied the defendant a fair trial.

Specifically, at the time of the 3.5 hearing on the first day of trial Officer Gomez testified about statements made by the defendant in Spanish. However, he testified at the 3.5 that he had no knowledge of the specifics. In other words he did not remember specifics of the conversation.

Detective Boardman also testified and once he completed his testimony, Officer Gomez retook the witness stand and was inconsistent with prior testimony.

The trial court made findings that the testimony of Detective Boardman relating to the defendant's admissions had to be excluded due to hearsay.

The next day the State requested reconsideration by the court as to the 3.5 ruling. Officer Gomez retook the stand and after having reviewed the PC statement, testified about specific recollections about the conversation. For example, he remembered that the defendant admitted during questioning possible incriminating statements and specifically admissions relating to guns and drugs. The State submitted that Officer Gomez had been confused by the questioning and needed to clarify testimony. Ultimately, Officer Gomez was allowed to testify for the jury.

After lengthy discussion with the court concerning this, the court made its ruling:

THE COURT: Let me rule on that.

I find the witness's testimony to be credible. So I'll hear no more argument about shams, farces, or concoctions. Not to me, anyway. You can argue to the jury all you want.

So the question then is this, the State had intended to proceed with hearsay. Perhaps the State wasn't aware of the Trujillo case. Mr. Byrd did raise the issue of hearsay; and so perhaps he was hoping or expecting to exclude all that evidence from Boardman under a hearsay objection. The State has gotten around that, now that the objection has

been made and I've ruled on it and sustained the objection, by presenting a witness with first-hand knowledge.

This witness did not write a report. This defense did not have in its possession prior to trial knowledge that this witness would be testifying about the substance of the admissions with – from the defendant.

MR. BYRD (Defense Counsel): Therein is the prejudice.

THE COURT: There is the prejudice. And so now on the third day of trial it is disclosed that the State wants to offer such evidence.

-(RP Vol. III, 457, L16 – 458, L12)

...

THE COURT: I already made a ruling. Why should I change my ruling?

MR. BYRD: Well, I would – one, in the interest of justice.

THE COURT: Because it was wrong, right?

MR. BYRD: Correct.

THE COURT: I don't think it was. I deny you that request.

Now, on the issue of prejudice, the claim is here, it's not a late disclosure claim because the defense knew it all along that the State was intending to present such evidence. The defense, however, raised the hearsay objection pretrial, the first day of trial, and perhaps was hoping that I would grant that hearsay objection and they wouldn't have to face the evidence. As it turns out the defense was correct. I did exclude that evidence from Boardman under the hearsay rule.

So the question is, has there been undue prejudice to the defense? And I don't believe that hoping to exclude evidence and then having it come in anyway is prejudice. The – it's not undue prejudice. The State – or the defense was aware of the evidence. They kept it out in one phase or under one form, but it's going to come in under another.

I overrule the objection. This officer may testify, of course, subject to cross-examination and impeachment, as to his recollection be it refreshed or unrefreshed of his discussion with the defendant. That's my ruling.

-(RP Vol. III, 460, L4 – 461, L7)

This matter was again raised at the close of trial and hearings prior to sentencing. The trial court at that time made a much more extensive review of the evidence and the nature of its ruling. The court commented as follows:

THE COURT: Counsel, thank you very much.

The defendant was arrested on March 21st, 2009. And nobody disputes that he was interviewed by Officer Gomez and did make statements. Officer Gomez, as I previously found, is fluent in the Spanish language and is qualified to testify as to statements made in Spanish and translate those into English for a jury.

The police department didn't anticipate at the time when they were doing the investigation that Detective Gomez would be the witness. And later the prosecuting attorney didn't testify either that he would be the witness as to the content of defendant's statements. He translated them on

the scene to Detective Boardman who wrote them down as they were translated. And the anticipation was that Detective Boardman would be the witness to testify as to statements by the defendant.

As things turned out, of course, Mr. Byrd made the appropriate hearsay objection, I sustained it. And under the Trujillo case, the hearsay rule prohibited Boardman from testifying as to what Gomez told him.

But the point is, here, that from March 21st, 2009 through September 21st, exactly six months later, nobody anticipated that Gomez would be testifying as to the content of those statements. He wrote no report. He did apparently refresh his recollection, or rather – strike that. He did review a report by Detective Boardman at some unknown time prior to trial, but I don't know exactly when that was.

The court ruled at the 3.5 hearing that Boardman could not testify. The State then, as pointed out, regrouped or huddled, and considered the concept of past recollection recorded, and presented that theory to me the following day. My ruling was that past recollection recorded was not available as a hearsay exception because the person who had the past recollection was Gomez, but the recording was made by Boardman based on what Gomez told him.

Now, the other day I started thinking about that ruling, and it's possible – it's certainly possible maybe I was wrong if you look at Boardman not as a witness, but as a recording device. In other words, who says that Gomez's recording can only be by writing it down or putting it on a tape recorder? Maybe Gomez can record his information by relating it to someone else who writes it down, as long as both witnesses testify, Gomez that he accurately related it to Boardman, and Boardman that he accurately recorded it. So if you look at it that way, Boardman is the tape recorder – or the recorder like a court reporter, maybe, rather than a witness. And so maybe the hearsay rule doesn't kick in as between those two. But that wasn't my ruling. My ruling

was that no, you can't use past recollection recorded. And then I or someone else suggested the concept of past – or refreshed recollection.

We then got into the events which were the subject of the testimony of this hearing. That is, how, in fact, Officer Gomez's memory came to be such that he remembered details of the interview when it appeared on the first day of the 3.5, on March 21, 2009, he had no such recollection. Well, I guess that's the purpose of refreshing recollection, is if you don't have a recollection on one day, and then after reviewing materials from the incident you then have a recollection, you can testify as to that, quote, refreshed recollection.

The goal of the courts, and this is set forth in State v. Hewlett, 92 Wn.2d 967, the court has to act as a gatekeeper. The court has to determine whether, in fact, the witness's recollection needs refreshing. Clearly it did, because he said he didn't remember anything on the first day of the 3.5.

And, further, that the matter which he's refreshing his recollection with, that is the writing of Boardman, has been made available to defense counsel, which is undisputed.

And, third, that the witness is, quote, not being coached. That the witness is using the notes to aid, and not to supplant his own memory. In other words, he's now after reviewing what they call the notes, which would be the report of Detective Boardman, and that they have retriggered – refreshed his memory and that he's not simply spewing back what's in the notes.

That is a preliminary determination under ER 104 that the court must make. And in doing so, the court must address credibility of the witnesses.

Then the various facets of the testimony over the three days that we had with Officer Gomez. It is his testimony that he was confused, and Mr. Byrd is focused on whether he was

confused by the court's ruling, and that would be the ruling saying it's hearsay and cannot be presented. I'm not so sure that's what he was talking about, because it was apparent to me and I even remarked during the testimony that we're throwing around the term "independent recollection" without defining it. So I think the court and counsel are the ones who created the confusion.

Officer Gomez thought that he could not testify as to his recollections if they were contained in the PC Statement, because he thought "independent recollection" meant that he could not relate statements that were not only remembered, but also – also contained in the PC Statement. We never did explain what independent recollection means, and whether or not it excludes recollecting or remembering something that is also in the writing. I specifically find, after hearing Gomez testify numerous times, that he is credible. He interviewed the defendant. He defendant made statements to him. Officer Gomez testified from his memory, whether it was independent or refreshed from the Probable Cause Statement. He was not merely reciting what was in Boardman's report, but actually had a legitimate and true memory of statements made. That's my finding on his credibility.

My finding is that when he testified in the latter portion of the trial in terms very damaging to the defendant, he did so, again, from memory, and was not parroting Boardman's report. This is the same ruling I've made previously at trial. Yes, it is true that we've had substantially more testimony upon the events, but that's – that's the way I analyzed it previously when Mr. Byrd objected, and then I let it in. And this hearing has not changed the basis of my ruling.

Defendant's motion for a new trial is denied and we need to schedule a sentencing date.

-(Sentencing Hearing January 22, 2010, RP 155, L20 –
160, L19)

Decisions involving evidentiary issues lie largely within the sound discretion of the trial court and will not be reversed on appeal absent a showing of abuse of discretion. Maehren v. City of Seattle, 92 Wn.2d 480, 488, 599 P.2d 1255 (1979). An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. State v. Huelett, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979); State v White, 152 Wn. App. 173, 215 P.3d 251 (2009).

As explained in State v Huelett, 92 Wn.2d 967, 968-969, 603 P.2d 1258 (1979):

We are concerned here with the recollection refreshed as distinguished from a recollection recorded. That distinction was explained in State v. Little, 57 Wn.2d 516, 520-21, 358 P.2d 120 (1961), where we said:

[A] distinction must constantly be borne in mind between (1) refreshing recollection, and (2) a past recollection recorded. In the former situation, with which we are concerned here, the notes or memoranda used by the witness are not placed in evidence, but are used to trigger his psychological mechanisms of recognition and recollection, enabling the witness to then testify from his own memory. The testimony is the evidence, the writing is not. With respect to past recollection recorded, the notes or memoranda are the evidence . . .

...

In short then, the criteria for the use of notes or other memoranda to refresh a witness' recollection are (1) that the

witness' memory needs refreshing, (2) that opposing counsel have the right to examine the writing, and (3) that the trial court be satisfied that the witness is not being coached – that the witness is using the notes to aid, and not to supplant, his own memory.
(Footnote omitted.)

As stated in State v. Little, supra, allowing the use of notes to refresh the memory of a witness lies within the discretion of the trial court. This is the general rule.

The extent to which the witness may use such a memorandum is for the trial judge in his discretion to determine, and his ruling will not be disturbed unless there has been an abuse of such discretion. 2 C. Torcia, Wharton's Criminal Evidence § 415 (13th ed. 1972).

Our function is thus limited. The sole issue is whether the trial judge abused his discretion. Such abuse occurs only if no reasonable person would take the view adopted by the trial court. State v. Blight, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977).

The State submits that the trial court did not abuse its discretion in ruling in the way that it did. The rules of evidence concerning hearsay and recollections refreshed and recorded were all properly used by the court and gave it a firm foundation for the nature of its rulings.

III. RESPONSE TO ARGUMENT 2

The second argument raised by the defendant is a claim that the jury was improperly instructed concerning a special verdict enhancement.

A copy of the Court's Instructions to the Jury (CP 84) and the Special Verdict Forms A (CP 105) and B (CP 106) are attached hereto and by this reference incorporated herein.

The State submits that if there is error involved in this, it is harmless error.

There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). As the Supreme Court explained in Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134[, 102 S. Ct. 1558, 1574-75, 71 L. Ed. 2d 783] (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under

the circumstances, the challenged action “might be considered sound trial strategy.” See Michel v. Louisiana, [350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1995)].

-Strickland, 466 U.S. at 689.

But, even deficient performance by counsel “does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” Strickland, 466 U.S. at 691. A defendant must affirmatively prove prejudice, not simply show that “the errors had some conceivable effect on the outcome.” Strickland, 466 U.S. at 693. “In doing so, [t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” State v. Crawford, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006) (*quoting Strickland*, 466 U.S. at 694).

When a jury has unanimously found a defendant guilty of a substantive crime and proceeds to make an additional finding that would increase the defendant's sentence beyond the maximum penalty allowed by the guidelines, must the jury's answer be unanimous in order to be final? The Supreme Court answered this question in State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), and the answer was no. A nonunanimous jury decision on such a special finding is a final

determination that the State has not proved that finding beyond a reasonable doubt. State v Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010).

In Goldberg, the jury convicted the defendant of first degree murder but answered “no” on a special verdict form regarding an aggravating factor. Goldberg, 149 Wn.2d at 891. Yet when the trial court polled the jury, only one person indicated voting “no” on the aggravating factor. Goldberg, 149 Wn.2d at 891. The trial court concluded the jury was deadlocked and ordered continued deliberation, after which the jury returned with a “yes” verdict. Goldberg, 149 Wn.2d at 893. On appeal, our Supreme Court held this was error because a trial court has no authority to request a jury to continue deliberations on a special verdict, unlike when the jury is deadlocked on a general verdict. Goldberg, 149 Wn.2d at 894. The supplemental instruction expressly informed the jury that it had to be unanimous in order to answer “yes” and to find the “additional fact” that the defendant had committed the charged crime with a firearm. (CP 84, Instruction 16). In contrast, the trial court did not include a similar instruction informing the jury that it had to be unanimous in order to answer “no” if it could not unanimously answer “yes,” implying that the unanimity requirement does not apply to a “no” finding. See State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003).

In Goldberg, the trial court instructed the jury:

In order to answer the special verdict form "yes[.]" you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no[.]"

-(Goldberg, 149 Wn.2d at 893.)

The Supreme Court held that this instruction did not require unanimity for a "no" answer and that the jury had "performed as it was instructed" when it returned a verdict of "no," despite the fact that some jurors had disagreed. Goldberg, 149 Wn.2d at 893.4. Neither the instruction in Goldberg nor the instruction the trial court gave here specifically informed the jury that it need not be unanimous to answer "no" to the special verdict question. Instead, both instructions focused on the need for unanimity beyond a reasonable doubt in order to answer "yes." Thus, the logical inference from both the Goldberg instruction and the supplemental instruction here was that unanimity was not required for a negative finding.

Here, the State submits that even if the instruction were erroneous, the error was harmless. The jury unanimously answered the special verdict "yes" and when polled, each juror confirmed the verdict. There is no indication that the jury was confused or that they were initially

deadlocked. Unlike in Goldberg, the trial court did not order the jury to continue deliberating. The defendant argues that the jury might not have unanimously answered “yes” if the trial court had specifically instructed them that “not unanimous” was an option. But this is speculation and insufficient to show prejudice. See State v. Pineda-Pineda, 154 Wn. App. 653, 226 P.3d 164, 171 (2010) (noting that “any confusion about a negative verdict [is] purely hypothetical”). In order to hold that a jury instruction error was harmless, “we must ‘conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.’” State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). Because the defendant here received a unanimous verdict, he does not demonstrate harm from the instruction. The manifest error affecting a constitutional right must also be subject to a harmless error analysis. State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). A constitutional error is harmless only if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Brown, *supra*; State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The constitutional error analysis—requiring the error to be both manifest and not harmless—ensures that criminal defendants may not obtain new trials whenever it is

possible to identify a constitutional issue not raised below. Scott, 110
Wn.2d at 687-88.

The State submits that, if this is error, it is harmless.

IV. CONCLUSION

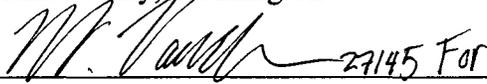
The trial court should be affirmed in all respects.

DATED this 23 day of September, 2010.

Respectfully submitted:

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Clark County, Washington

By:

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

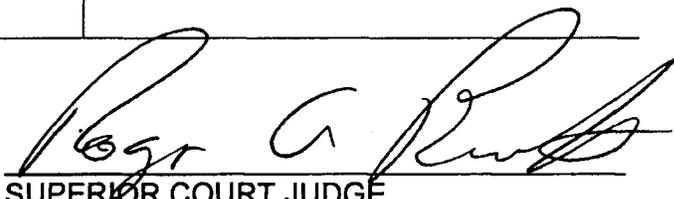
v.

LUIS FERNANDO VARGAS-
GUTIERREZ,

Defendant.

No. 09-1-00530-3

**COURT'S INSTRUCTIONS
TO THE JURY**



SUPERIOR COURT JUDGE

DATED this 27 day of September, 2009.

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JM

INSTRUCTION NO. 1

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

The complaint in this case is only an accusation against the defendant which informs the defendant of the charge. You are not to consider the filing of the complaint or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness's memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and the duty to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.



You are officers of the Court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

INSTRUCTION NO. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State of Washington is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

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

INSTRUCTION NO. 4

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 5

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

INSTRUCTION NO. 6

To convict the defendant of the crime of possession with intent to deliver a controlled substance - Cocaine as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

✓ (1) That on or about March 21, 2009, the defendant or an accomplice possessed a controlled substance, Cocaine;

✓ (2) That the defendant or an accomplice possessed the substance with the intent to deliver a controlled substance, Cocaine; and

✓ (3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 7

Cocaine is a controlled substance.

|

INSTRUCTION NO. 8

Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance.

Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.

In deciding whether the defendant or an accomplice had dominion and control over a substance, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant or an accomplice had the immediate ability to take actual possession of the substance, whether the defendant or an accomplice had the capacity to exclude others from possession of the substance, and whether the defendant or an accomplice had dominion and control over the premises where the substance was located. No single one of these factors necessarily controls your decision.

INSTRUCTION NO. 9

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

INSTRUCTION NO. 10

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result. It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

INSTRUCTION NO. 11

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, ~~he~~ aids another person committing the crime.

The word "aid" means all assistance whether given by support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

INSTRUCTION NO. 12

A person who is an accomplice in the commission of a crime may be convicted on proof of the commission of the crime and of his complicity in the crime, though the person claimed to have committed the crime has not been prosecuted or convicted, or has been convicted of a different crime or degree of crime.

INSTRUCTION NO. 13

If you are convinced beyond a reasonable doubt that a crime has been proven, and the defendant and one or more other persons participated in the crime, you need not determine which of the participants was a principal and which was an accomplice.

INSTRUCTION NO. 14

When you begin deliberating, you should first select a foreman. The foreman's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will not be repeated for you during your deliberations.

You will be given the exhibits admitted in evidence, these instructions, and verdict forms for recording your verdict. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The foreman must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.

INSTRUCTION NO. 15

If you find the defendant guilty of Possession of a Controlled Substance with Intent to Deliver, as charged in Count 1, it will then be your duty to determine whether or not the defendant possessed the controlled substance within one thousand feet of a school bus route stop designated by a school district with the intent to deliver the controlled substance at any location. You will be furnished with a special verdict form for this purpose. (Special Verdict A – Count 1).

If you find the defendant not guilty of Possession of a Controlled Substance with Intent to Deliver as charged in Count 1, do not use the Special Verdict A for that count. If you find the defendant guilty of Possession of a Controlled Substance with Intent to Deliver as charged in Count 1, you will complete the Special Verdict A for that count. Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.

If you find from the evidence that the State has proved beyond a reasonable doubt that the defendant possessed the controlled substance within one thousand feet of a school bus route stop designated by a school district with the intent to deliver the controlled substance at any location, it will your duty to answer the special verdict "yes".

On the other hand, if, after weighing all of the evidence, you have reasonable doubt that the defendant possessed the controlled substance within one thousand feet of a school bus route stop designated by a school district with the intent to deliver the controlled substance at any location, it will be your duty to answer the Special Verdict A "no".

INSTRUCTION NO. 16

If you find the defendant guilty of Possession of a Controlled Substance with Intent to Deliver, as charged in Count 1, it will then be your duty to determine whether or not the defendant was armed with a firearm at the time of the commission of the crime. You will be furnished with a special verdict form for each count for this purpose. (Special Verdict B – Count 1)

If you find the defendant not guilty of Possession of a Controlled Substance with Intent to Deliver as charged in Count 1, do not use the Special Verdict B for that count. If you find the defendant guilty of Possession of a Controlled Substance with Intent to Deliver as charged in Count 1, you will complete the Special Verdict B for that count. Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.

If you find from the evidence that the State has proved beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime, it will be your duty to answer the Special Verdict B "yes".

On the other hand, if, after weighing all of the evidence, you have reasonable doubt that the defendant was armed with a firearm at the time of the crime, it will be your duty to answer the Special Verdict B "no".

In order to find that the defendant was armed with a firearm, you must be unanimous as to which firearm the defendant was armed with.

INSTRUCTION NO:

17

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime as charged in Count 1.

A person is armed with a firearm, if at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether this connection existed, you should consider the nature of the crime, the type of firearm, and the circumstances under which the firearm was found.

A firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

The State alleges that for purposes of this instruction, the defendant was armed with Exhibit 13, the 7.62 mm rifle, and Exhibit 2, the Sig Saur .40 caliber pistol.

FILED

2009 SEP 24 PM 6:29

Sherry W. Parker, Clerk
Clark County

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

LUIS FERNANDO VARGAS-
GUTIERREZ,
Defendant.

No. 09-1-00530-3

SPECIAL VERDICT A - COUNT 01

THIS SPECIAL VERDICT IS TO BE ANSWERED ONLY IF THE JURY FINDS
THE DEFENDANT GUILTY OF Possession of a Controlled Substance with Intent to
Deliver – Cocaine, as charged in Count 01.

We, the jury, return a special verdict by answering as follows:

QUESTION: Did the defendant possess a controlled substance within one
thousand feet of a school bus route stop designated by a school district with intent to
deliver the controlled substance at any location?

ANSWER: yes (Write "yes" or "no")

DATED this 24 day of September, 2009.

Jordan D. Burtis
FOREMAN

*Jury polled 12:00
rec. 6:02 pm*

54
JTM

FILED

2009 SEP 24 PM 6:29

Sherry W. Parker, Clerk
Clark County

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

LUIS FERNANDO VARGAS-
GUTIERREZ,

Defendant.

No. 09-1-00530-3

SPECIAL VERDICT B – COUNT 01

We, the jury, return a special verdict by answering as follows:

QUESTION: Was the defendant LUIS FERNANDO VARGAS-GUTIERREZ
armed with a firearm at the time of the commission of the crime of Possession of a
Controlled Substance with Intent to Deliver – Cocaine, as charged in Count 01?

ANSWER: yes (Write "yes" or "no")

DATED this 24 day of September, 2009.

*1 copy filed 520
rec 6:02pm*

Jordan D. Bata
FOREMAN

*55
LJW*

FILED
COURT OF APPEALS
DIVISION II

10 SEP 27 PM 12:59

STATE OF WASHINGTON
BY: 
DEPUTY

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

STATE OF WASHINGTON,
Respondent,

v.

LUIS FERNANDO VARGAS-
GUTIERREZ,
Appellant.

No. 40299-8-II

Clark Co. No. 09-1-00530-3

DECLARATION OF
TRANSMISSION BY MAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On Sept 23, 2010, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO: David Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Catherine E Glinski
Attorney at Law
PO BOX 761
Manchester WA 98353

LUIS VARGAS-GUTIERREZ
DOC # 337798
Airway Heights Corr. Center
PO Box 1899
Airway Heights, WA 99001-1899

DOCUMENTS: Brief of Respondent

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


Date: Sept 23, 2010
Place: Vancouver, Washington.