

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

STATE OF WASHINGTON,

Respondent,

v.

ALEX RODRIGUEZ-GONZALEZ,

Appellant.

APPELLANT'S BRIEF
FILED
JUL 11 2015
COURT OF APPEALS
DIVISION TWO
SEATTLE, WA

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

The Honorable James J. Stonier

BRIEF OF APPELLANT

VALERIE MARUSHIGE
Attorney for Appellant

23619 55th Place South
Kent, Washington 98032
(253) 520-2637

TABLES OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issue Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Procedural Facts</u>	2
2. <u>Substantive Facts</u>	2
C. <u>ARGUMENT</u>	10
REVERSAL IS REQUIRED BECAUSE CUMULATIVE ERROR DENIED RODRIGUEZ-GONZALEZ HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL	10
1. <u>The trial court erred in admitting evidence as statements against interest under ER 804(b)(3) without finding that the declarant was unavailable.</u>	10
2. <u>The trial court erred in admitting inadmissible hearsay.</u>	14
3. <u>The prosecutor committed misconduct during closing argument.</u>	16
4. <u>Cumulative error denied Rodriguz-Gonzalez a fair trial.</u>	18
D. <u>CONCLUSION</u>	19

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>In re Personal Restraint Petition of Lord,</u> 123 Wn.2d 296, 868 P.2d 835 (1994)	10
<u>State v. Aaron,</u> 49 Wn. App. 735, 745 P.2d 1316 (1987)	12
<u>State v. Brett,</u> 126 Wn.2d 136, 892 P.2d 29 (1995)	16
<u>State v. Case,</u> 49 Wn.2d 66, 298 P.2d 500 (1956)	18
<u>State v. Charlton,</u> 90 Wn.2d 657, 585 P.2d 142 (1978)	16
<u>State v. Classen,</u> 143 Wn. App. 45, 176 P.3d 582 (2008), <u>review denied</u> , 164 Wn.2d 1016, 195 P.3d 88 (2008)	17
<u>State v. Greiff,</u> 141 Wn.2d 910, 10 P.3d 390 (2000)	10
<u>State v. Palomo,</u> 113 Wn.2d 789, 783 P.2d 575 (1989), <u>cert. denied</u> , 498 U.S. 826, 111 S. Ct. 808, 112 L. Ed. 2d 53 (1990) . . .	11
<u>State v. Reed,</u> 102 Wn.2d 140, 684 P.2d 699 (1984)	16

TABLE OF AUTHORITIES

	Page
<u>State v. Sanchez</u> , 42 Wn. App. 225, 711 P.2d 1029 (1985), <u>review denied</u> , 105 Wn.2d 1008 (1986)	14
<u>State v. Sargeant</u> , 40 Wn.App. 340, 698 P.2d 598 (1985)	17
<u>State v. Sweeney</u> , 45 Wn. App. 81, 723 P.2d 551 (1986)	12
<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008)	16
<u>State v. Whisler</u> , 61 Wn. App. 126, 810 P.2d 540 (1991)	11

TABLES OF AUTHORITIES

	Page
 <u>FEDERAL CASES</u>	
<u>Mak v. Blodgett</u> , 970 F.2d 614 (9 th Cir. 1992)	10
<u>Ohio v. Roberts</u> , 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980)	11
<u>United States v. Mann</u> , 590 F.2d 361 (1 st Cir. 1978)	12
 <u>RULES, STATUTES, AND OTHERS</u>	
ER 801(a)	14
ER 801(c)	14
ER 802	14
ER 804(a)(5)	11
ER 804(b)(3)	11
U.S. Const. amend. VI	11
Wash. Const. article I, section 22 (amend. 10)	11

A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting evidence as statements against interest under ER 804(b) without finding that the declarant was unavailable at the time of trial.

2. The trial court erred in admitting inadmissible hearsay.

3. The prosecutor committed prosecutorial misconduct during closing argument.

4. Cumulative error denied appellant his constitutional right to a fair trial.

Issue Pertaining to Assignments of Error

Did the accumulation of errors deny appellant a fair trial where: 1) the trial court erred in admitting highly prejudicial statements as statements against interest under ER 804(b) without finding that the declarant was unavailable at the time of trial; 2) the trial court erred in admitting inadmissible hearsay prejudicial to appellant's defense; and 3) the prosecutor committed misconduct during closing argument and appellant was prejudiced by the misconduct?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On October 21, 2009, the State charged appellant, Alex Rodriguez-Gonzalez, with one count of assault in the first degree with a deadly weapon enhancement. CP 1-2. Following a trial before the Honorable James J. Stonier, a jury found Rodriguez-Gonzalez guilty as charged on January 21, 2010. CP 58, 59; 8RP 54-57. On January 21, 2010, the court sentenced Rodriguez-Gonzalez to 147 months in confinement and 36 months of community custody. CP 65. Rodriguez-Gonzalez filed this timely appeal. CP 74.

2. Substantive Facts

At around 9:30 p.m. on October 11, 2009, Cowlitz County deputies responded to a report of a stabbing at an apartment in Longview. 6RP 47, 56-57, 153-54. Deputies arrived at the apartment complex and saw a man in the parking lot down on his hands and knees and breathing pretty heavily. 6RP 58. When they approached the man on the ground, he rolled over onto his back and they saw that he was bleeding from a chest wound. The deputies called for an ambulance and began questioning three men and two women who were at the scene. 6RP 58-59, 72-73. They were all

¹ There are nine volumes of verbatim report of proceedings: 1RP - 11/17/09; 2RP - 12/15/09; 3RP - 01/07/10; 4RP - 01/14/10; 5RP - 01/19/10; 6RP - 01/20/10 a.m.; 7RP - 01/20/10 p.m.; 8RP - 01/21/10; 9RP - 01/28/10.

Cuban and spoke predominantly in Spanish, but one of the deputies managed to ascertain their names and learned that the incident took place in Lakeesha Brooks' apartment. After receiving Brooks' permission, the deputies inspected the apartment and saw beer cans on the kitchen table and a globe missing from a chandelier. They noticed a smudge of blood on the outside of the front door but no other signs of a struggle. 6RP 65-68, 76-78. The deputies secured an SUV in the parking lot associated with the wounded man who was taken to St. Johns Medical Center. 6RP 48, 61, 77.

Amet Asencio-Marquez, moved from Cuba to the United States and had been living in Portland, Oregon for about eight years. While in Portland, he was convicted of third degree robbery in 2005. 19RP 60-61. Amet testified through a translator that on October 11, 2009, he called his friend Alberto and went over to his house for a drink. 19RP 61-62.² Shortly after meeting at Alberto's house, they decided to go socialize with other Cuban friends who had gathered at another house. Amet had one or two drinks with Alberto's friends, Alex and Alane, who were at the house. After talking for awhile, Alex and Alane wanted to go up to Longview to visit a girlfriend. Amet agreed to drive the four of them to Longview and they stopped at a liquor store for a bottle of rum on the way. 19RP 62-64.

² The lay witnesses are referred to by their first name for clarity and consistency.

They arrived at an apartment at Longview where Amet met two girls, one was dark-skinned and the other was white. Shortly thereafter, another girl came with a man. Amet learned that the girl, named Diabla, was Alex's girlfriend and the man was the white girl's boyfriend. 5RP 65-66. Amet and Diabla went to the corner store to buy beer and at some point they got into an argument. 5RP 66-67. After several hours, Amet told the others that he needed to get back to Portland. Alberto also said he had to go home, but Alex and Alane wanted to stay overnight. 5RP 67-69. Amet explained that he could not stay and started walking toward the door. As he reached to open the door, he turned around and saw Alane right behind him and then "Alexander comes from behind Alane -- in truth, I don't know what he used, a knife, I don't know, and he stretched his arm out and stabbed me right in the heart." 5RP 69. He saw something made of metal in Alex's hand but could not tell if it was a knife. 5RP 83. Amet felt a pain and saw that he was bleeding so he tried to get to his car to drive to the hospital but collapsed on the ground. Amet recalled hearing people yelling, "call 911," and being transported by ambulance before losing consciousness. 5RP 70-73.

Amet acknowledged that he told a detective at the hospital that Alane was the one who stabbed him but he was certain that it was Alex. 5RP 76-77. He admitted drinking throughout the night but denied being

drunk. 5RP 78-79. When asked if he resorted to violence before the stabbing, such as throwing a chair, he replied, "I did nothing violent." 5RP 84.

Lakeesha Brooks was leasing the two-bedroom apartment in Longview where she lived with her two young children. 5RP 87, 95. Brooks testified that on the evening of October 11, 2009, she was at home with Diabla, Rosabella, and Quentin. 5RP 88-90.³ Her boyfriend Alane, and Diabla's boyfriend Alex, arrived at the apartment with Alberto and Amet, who drove up from Oregon. 5RP 89-91. They "were very intoxicated at the time." 5RP 93. As the evening progressed, Brooks noticed that Diabla and Amet were arguing in Spanish but she did not understand what they were saying. 5RP 94-95. Later that night, a disagreement arose when Diabla and Alex were in Brooks' bedroom and told her they wanted to spend the night in her room. When Amet tried to intervene on Brooks' behalf, a fight ensued in the living room. 5RP 95-98. Alex charged at Amet and swung at him which caused Amet to fall backwards. Amet who was "really intoxicated" got up and threw a chair at Alex. 5RP 98-99, 102. Then Alex and

³ Diabla is a nickname for Charlene and she will be referred to as Diabla to maintain consistency.

Alberto pulled out “their knives and they were coming at each other.” 5RP 99. Brooks did not see who stabbed Amet. 6RP 17-20.

Brooks admitted that she initially told the police that a “Cholo,” or Mexican guy stabbed Amet and ran away. 6RP 13. Diabla made up the story and Brooks went along with it because she was scared and afraid for the safety of her family. 6RP 13-14. She eventually told “the truth” during an interview with Detective Schallert. 6RP 13-15. Over defense counsel’s objection, the court allowed Brooks to testify that Diabla told her that she wiped Alex’s fingerprints off the knife and threw it up on the balcony of an upstairs apartment. 6RP 131-32.

Rosabella Harms had been staying with her friend, Lakeesha, since the end of September 2009. 6RP 134. Harms testified that she, Lakeesha, Diabla, and her boyfriend, Quentin, were all at LeKeesha’s apartment on October 11, 2009. That evening, Alex, Alane, Alberto, and Amet came over, “when they got there, they seemed intoxicated.” 6RP 135. Amet cooked dinner and everyone was “hanging out,” but throughout the night Amet and Diabla were cussing and calling each other names. 6RP 135. Around 9 p.m., an argument erupted between Alex and Amet. Harms saw a chair thrown that hit a chandelier. Then Alex stuck Amet in the rib cage or heart and Amet fell down, “it looked like a punch to me.” 6RP 138-41. Over defense counsel’s objection, Harms stated that she heard Diabla say,

“Get him baby; something like that.” 6RP 138-39. Harms saw Amet get up bleeding and all the men went outside. Suddenly, Alberto ran back into the house with Alex following him. Then Alex went to the kitchen, grabbed a knife, and confronted Alberto. 6RP 141-43, 147-52.

When the police arrived, Harms told Detective Lincoln that the knife that Alex had used was in the kitchen drawer. 6RP 143-44. Over defense counsel’s objection, Harms stated that Diabla said she wiped Alex’s fingerprints off of a knife and it was on the porch upstairs. Diabla wanted Harms’ boyfriend to retrieve the knife. 6RP 144.

Alex testified in his defense through an interpreter. 7RP 199-200. On October 11, 2009, Amet gave Alex and Alane a ride from Portland to a party at Lakeesha’s apartment in Washington. 7RP 200-01. Diabla, who is a prostitute, called him and invited him to the party. 7RP 206-08. When they arrived at the apartment around 6 or 6:30 p.m., people were drinking and dancing. Although Alex did not normally drink, he had two or three shots of whiskey that night which made him sick. He threw up and felt dizzy so he went to sleep and Diabla laid down with him in the bedroom. 7RP 201-03. At about 9 p.m., Diabla woke him up and said Amet was hurt and needed help. Alex ran outside and saw Amet lying on the ground in the parking lot. He told Lakeesha to call 911 on her cell phone. After an ambulance took Amet to the hospital, Alex asked the

others what happened. They said a Mexican "Cholo," which means "somebody that is part of a gang," stabbed Amet. Diabla described the man but Alex did not believe her and he thought everybody was hiding something. 7RP 203-06. At the time that Alex fell asleep, everyone was partying and doing well and he did not hear anything except the music. 7RP 204.

Detective Pat Schallert went to the apartment the following day and spoke with Alex who was sitting in bed. 6RP 174-75. Schallert testified that Alex told her that he had been sick and was throwing up and did not know about the stabbing because he was in bed all night. 6RP 176. Schallert also interviewed Amet at the hospital. When she asked him about the stabbing, he "held up two fingers and told me it was one of two people, Alexander or Alane. He stated that he was pretty certain it was Alexander." 6RP 178. On October 16, 2010, Schallert returned to the apartment with several other deputies. She interviewed Lakeesha again who maintained that an unknown Mexican "Cholo" stabbed Amet. When Schallert placed Lakeesha under arrest, she said that she was afraid of Alex and Diabla. 6RP 185-86. Later that day, Alex was arrested and taken to the Cowlitz County Sheriff's office. 6RP 186. Schallert interviewed Alex using an interpreter and he denied stabbing Amet,

explaining that he was sick and asleep in bed during the incident. 6RP 187-88, 7RP 196.

Detective Kelly Lincoln recovered a folding knife from the balcony of an upstairs apartment which was vacant. 6RP 162-64. Lincoln also retrieved a paring knife from a kitchen drawer in Lakeesha's apartment. 6RP 165. The folding knife was sent to the lab for testing but Lincoln did not know the results of the lab report. 6RP 169-70.

Dr. Mario Forte was called to the emergency room at St. John's Medical Center to examine Amet. 6RP 33-34. Forter examined a one inch laceration to his left chest that was consistent with a stab wound. 6RP 34-35. Forte and the emergency room doctor became concerned when Amet's blood pressure dropped precipitously and his pulse rate went up. 6RP 35. An ultrasound examination revealed blood around the heart, which required opening up his chest and evacuating the blood from around the heart. Forte was not experienced enough to perform the surgery but he successfully performed a temporary procedure and Amet was airlifted to Oregon Health Sciences which provides a higher level of care. 6RP 36-41. Forte acknowledged that lab exams indicated that Amet's alcohol level was .176, over twice the legal limit. 6RP 42-43.

C. ARGUMENT

REVERSAL IS REQUIRED BECAUSE CUMULATIVE ERROR DENIED RODRIGUEZ-GONZALEZ HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Under the cumulative error doctrine, a defendant may be entitled to a new trial where errors cumulatively produced a trial that was fundamentally unfair. In re Personal Restraint Petition of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). The doctrine applies to instances where there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a fair trial. Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992).

1. The trial court erred in admitting evidence as statements against interest under ER 804(b)(3) without finding that the declarant was unavailable.

Under the Rules of Evidence, a statement against interest is not excluded by the hearsay rule if the declarant is unavailable as a witness:

Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be

true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

ER 804(b)(3).

ER 804(a)(5) provides that a declarant is unavailable as a witness if he is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means.

Hearsay is only admissible under ER 804 if the court finds that the declarant is unavailable. State v. Whisler, 61 Wn. App. 126, 134, 810 P.2d 540 (1991). Although an out-of-court statement may meet the requirements for a hearsay exception under ER 804, it is only admissible against an accused if it satisfies confrontation clause concerns. State v. Palomo, 113 Wn.2d 789, 794, 783 P.2d 575 (1989), cert. denied, 498 U.S. 826, 111 S. Ct. 808, 112 L. Ed. 2d 53 (1990); U.S. Const. amend VI; Wash. Const. article I, section 22 (amend. 10). An out-of-court declaration may be admitted under the confrontation clause if the declarant is unavailable at the time of trial and the prior testimony is marked with adequate indicia of reliability. Whisler, 61 Wn. App. at 133, citing Ohio v. Roberts, 448 U.S. 56, 65-66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980).

Under ER 804, before a witness can be said to be unavailable, the party offering the out-of-court statement should be required to present to the court that it made an effort to secure the witness' attendance at trial. State v. Aaron, 49 Wn. App. 735, 740, 745 P.2d 1316 (1987). The proponent of the evidence must make a good faith effort to obtain the witness' presence at trial and use any available means to compel the presence of the witness. State v. Sweeney, 45 Wn. App. 81, 85-86, 723 P.2d 551 (1986). Implicit in the good faith requirement to obtain the witness' presence at trial is also "the duty to use reasonable means to prevent a present witness from becoming absent." United States v. Mann, 590 F.2d 361, 368 (1st Cir. 1978).

Here, the State moved to admit evidence that Diabla told Lakeesha and Rosabella on separate occasions that she wiped Alex's fingerprints off of the knife and threw it up on the balcony of the upstairs apartment. The State claimed that Diabla's statements constitute statements against interest, an exception to hearsay. 6RP 107-08. The prosecutor merely stated, "we do not expect to hear from Ms. Daniels in this trial, as she cannot be located." 6RP 108. The trial court did not ascertain whether the State made a good faith effort to secure Diabla's presence and the court did not make a finding that Diabla was unavailable at the time of trial. Nonetheless, the court found that the statements were admissible as

statements against penal interest over defense counsel's objection. 6RP 126-30.

During closing argument, the State used Diabla's statements to seal its case:

Now what happens to the knife? Because what happens to the knife also tells us the guilty party. Rosabella and Lakeesha both hear the Defendant's girlfriend/fiancé, Diabla, say, you know what? After the stabbing, I took the knife, wiped Alex's fingerprints off it, and I threw it up on the balcony. And you might think that's just a story, but for one important fact. The police find a knife right where his girlfriend said it would be.

8RP 25.

The record substantiates that the trial court erred in admitting the highly prejudicial statements without determining that the State used reasonable means to compel Diabla's presence and prevent her absence. The court's failure to find that Diabla was unavailable before admitting the out-of-court statements violated ER 804(b) and the confrontation clause of our state and federal constitutions. Furthermore, the court's error was not harmless because the State's case was not overwhelming in light of the contradictory testimonies of Amet, Lakeesha, and Rosabella, which raised reasonable doubt. Reversal is required because the admission of Diabla's statements which connected Alex to the knife found on the balcony materially affected the outcome of the trial. State v.

Sanchez, 42 Wn. App. 225, 231, 711 P.2d 1029 (1985), review denied, 105 Wn.2d 1008 (1986).

2. The trial court erred in admitting inadmissible hearsay.

“Hearsay” is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. ER 801(c). A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion. ER 801(a). Absent an exception, hearsay is inadmissible. ER 802.

During its direct examination of Rosabella, the prosecutor asked her if she heard Diabla saying anything to her boyfriend, Alex, during the commotion in reference to Amet. Defense counsel objected on the basis of hearsay and the prosecutor responded, “Offered simply to indicate that it was said, Your Honor.” 6RP 138. The court told the prosecutor to rephrase the question and instructed Rosabella to only answer “yes” or “no” and she replied, “yes.” 6RP 138. The prosecutor proceeded with the same line of questioning:

Q. (By Mr. Smith:) And what was it that you heard her saying?

MR. SURYAN: Objection.

THE COURT: Sustained.

MR. SMITH: Could we approach, Your Honor?

THE COURT: You may.

(Side bar not reported.)

THE COURT: Repeat the question, Counsel.

Q. (By Mr. Smith:) Ma'am, what was it that you heard her say, at that point?

THE COURT: So, there was an objection; the objection is overruled, for the record.

All right, let's proceed.

You may answer the question.

THE WITNESS: Okay. She had said -- how -- what -- what part do you want me to --

Q. (By Mr. Smith:) What did you hear her say to the defendant right before the commotion?

A. Oh, okay. Get him, baby; something like that. But it was all so fast, you know, so I just heard "Get him, baby," or whatever, so --

6RP 138-39.

It is evident that Rosabella's statement was admitted for the truth of the matter asserted because it supported her testimony that throughout the night Diabla and Amet were cussing and calling each other names. 6RP 135. Furthermore, as reflected in the State's closing argument, the statement bolstered the State's theory that Alex was defending his girlfriend's honor:

And what do we hear from Ms. Harms, also? She says right before the stabbing, right before Amet is hit by the Defendant, she hears Charlene, his girlfriend, telling the Defendant, “Get him. Get him, Baby. Get him.” And then he does what he did, to avenge his honor, his sense of his woman who had been disrespected, whatever was in his mind at the time.

8RP 23.

The record substantiates that Diabla’s statements clearly constitute hearsay and the trial court therefore erred in allowing Rosabella’s testimony. Furthermore, the court’s error was not harmless because the statements implicated Alex by providing a motive for the stabbing. The statements damaged Alex’s defense while shoring up the State’s case.

3. The prosecutor committed misconduct during closing argument.

“A prosecuting attorney’s duty is to see that an accused receives a fair trial.” State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). A prosecutor may never assert his personal opinion as to the credibility of a witness or the guilt or innocence of an accused. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness. State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008)(citing State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)). The courts will find the error prejudicial if it is “clear and unmistakable” that a counsel is expressing a personal

opinion. Brett, 126 Wn.2d at 175 (citing State v. Sargeant, 40 Wn.App. 340, 344, 698 P.2d 598 (1985)). When a defendant does not object at trial, he must prove that the prosecutor's comments were so flagrant and ill-intentioned that a curative instruction would have been ineffective to cure the resulting prejudice. State v. Classen, 143 Wn. App. 45, 64, 176 P.3d 582 (2008), review denied, 164 Wn.2d 1016, 195 P.3d 88 (2008)

During closing argument, the prosecutor committed misconduct by expressing his personal opinion as to Alex's guilt and the credibility of his testimony:

Detective Lincoln gets up through the vacant apartment and finds one thing in that apartment: A knife, sitting on the balcony, where it had been thrown in an attempt by his girlfriend to conceal the crime. **The crime that he committed.**

8RP 25. (Emphasis added.)

His defense is: I'm asleep, and the prostitutes and the guys are conspiring against me. How does that story make any sense? It's not a sensible story, his testimony is not credible, and what does it tell us? It tells us again, he's trying to get out of it. **He's lying.** He has a stake, because he doesn't want to be found guilty [inaudible].

8RP 48. (Emphasis added.)

By blatantly accusing Alex of lying, the prosecutor was clearly and unmistakably expressing his personal opinion that Alex's testimony was unbelievable and should be discounted by the jury. The record

substantiates that the prosecutor's improper remarks were unsupported by the evidence because Alex's testimony was no less credible than the conflicting testimonies of Amet, Lakeesha, and Rosabella. Furthermore, the prosecutor clearly and unmistakably expressed his personal opinion that Alex stabbed Amet. It is "reprehensible for one appearing as a public prosecutor to assert in argument his personal belief in the accused's guilt." Reed, 102 Wn.2d at 145 (citing State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956)). Although defense counsel did not object, in any event, the remarks were prejudicial under the doctrine of cumulative error.

4. Cumulative error denied Rodriguez-Gonzalez a fair trial.

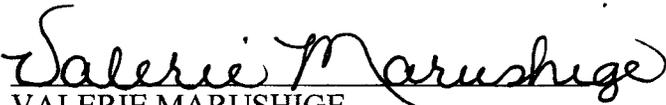
The record establishes that the accumulation of errors affected the outcome of the trial: 1) the trial court erred in admitting highly prejudicial statements as statements against interest under ER 804(b) without finding that the declarant was unavailable at the time of trial; 2) the trial court erred in admitting inadmissible hearsay prejudicial to Alex's defense; 3) the prosecutor committed misconduct during closing argument by improperly expressing his personal opinion that Alex was lying and he committed the crime.

D. CONCLUSION

For the reasons stated, this Court should reverse Mr. Rodriguez-Gonzalez' conviction because cumulative error produced a trial that was fundamentally unfair. In re Lord, 123 Wn.2d at 332.

DATED this 24th day of August, 2010.

Respectfully submitted,


VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Appellant, Alex Rodriguez-Gonzalez

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Susan I. Baur, Cowlitz County Prosecutor's Office, 312 SW 1st Avenue, Kelso, Washington 98626-1799 and Alex Rodriguez-Gonzalez, DOC # 337789, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, Washington 98520.

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

DATED this 24th day of August, 2010 in Kent, Washington.



VALERIE MARUSHIGE

WSBA No. 25851

Attorney at Law

10-01111-01
10-01111-01
10-01111-01
10-01111-01