



**TABLE OF CONTENTS**

	Page
A. <u>ARGUMENT IN REPLY</u> .....	1
1. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE AS STATEMENTS AGAINST INTEREST UNDER ER 804(b)(3) WITHOUT FINDING THAT THE DECLARANT WAS UNAVAILABLE. ....	1
2. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING INADMISSIBLE HEARSAY. ....	4
3. THE PROSECUTOR COMMITTED MISCONDUCT DURING CLOSING ARGUMENT. ....	5
4. REVERSAL IS REQUIRED BECAUSE CUMULATIVE ERROR DENIED RODRIGUEZ- GONZALEZ HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL. ....	6
B. <u>CONCLUSION</u> .....	7

## TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>In re Personal Restraint of Lord,</u> 123 Wn.2d 296, 868 P.2d 835 (1994) .....	6
<u>State v. Charlton,</u> 90 Wn.2d 657, 585 P.2d 142 (1978) .....	6
<u>State v. Mathes,</u> 47 Wn. App. 863, 737 P.2d 700 (1987) .....	2
<u>State v. McFarland,</u> 127 Wn.2d 322, 899 P.2d 1251 (1995) .....	1
<u>State v. Roberts,</u> 80 Wn. App. 342, 908 P.2d 892 (1996) .....	4
<u>State v. Sanchez,</u> 42 Wn. App. 225, 711 P.2d 1029 (1985), <u>review denied</u> , 105 Wn.2d 1008 (1986) .....	4
<u>State v. Saunders,</u> 132 Wn. App. 592, 132 P.3d 743 (2006) .....	1
<u>State v. Sims,</u> 77 Wn. App. 236, 890 P.2d 521 (1995) .....	1
<u>State v. Warren,</u> 165 Wn.2d 17, 195 P.3d 940 (2008) .....	6

**TABLE OF AUTHORITIES**

	Page
<u>RULES, STATUTES, OTHER</u>	
ER 801(c) .....	5
ER 802 .....	5
RAP 2.5(a)(3) .....	1
U.S. Const. amend. VI .....	1
Wash. Const. article I, section 22 (amend. 10) .....	1

A. ARGUMENT IN REPLY

1. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE AS STATEMENTS AGAINST INTEREST UNDER ER 804(b)(3) WITHOUT FINDING THAT THE DECLARANT WAS UNAVAILABLE.

The State argues that appellant is precluded from raising this issue for the first time on appeal because defense counsel did not object and “agreed that Ms. Daniels was unavailable to testify.” Brief of Respondent at 6-11. To the contrary, “a claim of error may be raised for the first time on appeal if it is a ‘manifest error affecting a constitutional right.’ ” State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)(citing RAP 2.5(a)(3)). The Washington Supreme Court recognized that “constitutional errors are treated specially under RAP 2.5(a)(3) because they often result in serious injustice to the accused and may adversely affect public perceptions of the fairness and integrity of judicial proceedings.” Id. Accordingly, the issue of whether the trial court erred in admitting statements by Diabla Daniels is properly before this Court because the statements implicate Rodriguez-Gonzalez’s constitutional right to confrontation. U.S. Const. amend. VI; Wash. Const. article I, section 22 (amend. 10).

The State mistakenly relies on State v. Sims, 77 Wn. App. 236, 890 P.2d 521 (1995); State v. Saunders, 132 Wn. App. 592, 132 P.3d 743

(2006); and State v. Mathes, 47 Wn. App. 863, 737 P.2d 700 (1987), which have no application here because they do not involve constitutional errors. In Saunders, the Court specifically concluded that “Saunders does not contend that the admission of evidence of fault amounted to error of constitutional magnitude, therefore he may not raise it for the first time before this court.” 132 Wn. App. at 607.

Furthermore, the State misconstrues a comment made by defense counsel at the start of trial:

[T]he one concern I have is the issue of statements that I think the prosecutor intends to elicit from a witness who’s not available, and I think they would typically be hearsay, and I believe they are aiming at the co-conspirator/exception to the hearsay, and I have some concerns that that would not be appropriate, but I guess we’ll have to deal with that when we get to that point.

5RP 4-5.

The State argues that “[i]t is clear from this statement that appellant’s trial counsel agreed that Ms. Daniels was unavailable to testify.” Brief of Respondent at 6. As reflected in the record, defense counsel merely brought to the court’s attention that the State would be asserting that a witness who is not available made statements that are an exception to hearsay. Contrary to the State’s claim, defense did not state the he agreed that the witness was unavailable.

The State argues further that even if the trial court erred, the error was harmless because “[g]iven the overwhelming evidence arrayed against the appellant, any error cannot be said to have prejudiced him significantly,” but the State’s argument is unsubstantiated by the record. The State asserts that Amet “was certain that appellant” stabbed him, but omits the fact that he also admitted that he told a detective that “it was Alane that did it, I remember saying there was two people there.” 6RP 77. Consistent with Amet’s admission, Detective Schallert testified that 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. Rosebella Harms said that she saw Alex strike Amet but “it looked like a punch to me from where I was at.” 6RP 41. According to Harms, all the men went outside after the fight then Alex followed Alberto back into the house and grabbed a knife from the kitchen and confronted Alberto. When the police arrived, Harms showed them the knife put back in the kitchen drawer. 6RP 141-52. Lakeesha Brooks testified that she saw Alex swing at Amet which caused him to fall backwards and both Alex and Alberto had knives but she did not see who stabbed Amet. 5RP 98-99, 17-20. Brooks recalled that Amet was “really intoxicated” and threw a chair at Alex. 5RP 102. But Amet denied being drunk and throwing a chair, claiming that he “did nothing violent.” 5RP

78-79, 84. However, lab exams indicated that Amet's alcohol level was .176, over twice the legal limit. 6RP 42-43.

In light of the confusing and contradictory testimony, it is evident that the trial court's erroneous admission of Daniels' statements which connected Rodriguez-Gonzalez to the knife found on the balcony materially affected the outcome of the trial. Reversal is therefore required. State v. Sanchez, 42 Wn. App. 225, 231, 711 P.2d 1029 (1985), review denied, 105 Wn.2d 1008 (1986). See Brief of Appellant at 10-14.

2. THE TRIAL COURT ABUSED ITS DISCRETION  
IN ADMITTING INADMISSIBLE HEARSAY.

The State argues that testimony that Daniels said, "get him, baby," was not hearsay because it was offered only to show that she said it and it had an effect on the listener, the appellant, citing State v. Roberts, 80 Wn. App. 342, 352-53, 908 P.2d 892 (1996). Brief of Respondent at 13-14. The State's reliance on Roberts is misplaced. The police found a marijuana grow operation in the basement of Robert's home while he was subleasing the basement to a tenant. 80 Wn. App. at 344, 348. Roberts was charged and convicted of possession of marijuana with intent to deliver or manufacture. 80 Wn. App. at 344-45. Division One of this Court determined that the trial court erred in precluding Roberts from testifying that the grow operation was the tenant's and that he was afraid

to notify the police because the tenant threatened him. The Court concluded that Robert's testimony was relevant to show how the threat affected his state of mind, i.e., to cause him not to report the grow operation to the police. Id. at 352-53.

Unlike in Roberts, Daniel's alleged statement was not admissible to show state of mind because there was no evidence that Rodriguez-Gonzalez actually heard and reacted to the statement. Harms claimed that she heard Daniels say, "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 139. Harms did not testify that Daniel's statement prompted Alex to strike Amet. 6RP138-41. Consequently, Daniel's statement constituted inadmissible hearsay and the court's erroneous admission of the statement was not harmless because Harms' testimony prejudiced Rodriguez-Gonzalez's defense while bolstering the State's case. ER 801(c); ER 802. See Brief of Appellant at 14-16.

3. THE PROSECUTOR COMMITTED  
MISCONDUCT DURING CLOSING  
ARGUMENT.

The State argues that the prosecutor did not commit misconduct by accusing Rodriguez-Gonzalez of lying and stating that he committed the crime because his remarks were based upon the facts at trial and not his personal opinion. Brief of Respondent at 14-17. The State overlooks the

important fact that the prosecutor's remarks undoubtedly influenced the jury. "As a quasi-judicial officer representing the people of the State, a prosecutor has a duty to act impartially in the interest only of justice" because the jury knows that the prosecutor is an officer of the State. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). "Prosecutorial misconduct may deprive the defendant of a fair trial. And only a fair trial is a constitutional trial." State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). It is evident from the record that the prosecutor's improper remarks combined with the trial court's errors denied Rodriguez-Gonzalez of a fair trial under the doctrine of cumulative error.

4. 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 of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). The record here 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 Rodriguez-Gonzalez's defense; 3) the prosecutor committed misconduct during closing argument by improperly expressing his personal opinion that Rodriguez-Gonzalez was lying and he committed the crime.

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse Mr. Rodriguez-Gonzalez's conviction because cumulative error produced a trial that was fundamentally unfair.

DATED this 3<sup>rd</sup> day of January, 2011.

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 James Smith, Cowlitz County Prosecutor's Office, 312 SW First Avenue, Kelso, Washington 98626.

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

DATED this 3<sup>rd</sup> day of January, 2011 in Kent, Washington.



VALERIE MARUSHIGE

Attorney at Law

WSBA No. 25851

COURT OF APPEALS  
DIVISION II  
11 JAN -4 PM 12:12  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY