

No. 41103-2-II

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

STATE OF WASHINGTON,
Respondent

v.

JOSE GASTEAZORO-PANIAGUA,
Appellant.

APPELLANT'S REPLY BRIEF

Jeffrey E. Ellis #17139
B. Renee Alsept #20400
Attorneys for Mr. Gasteazoro-Paniagua
Law Office of Alsept & Ellis
621 SW Morrison St., Ste 1025
Portland, OR 97205
JeffreyErwinEllis@gmail.com
ReneeAlsept@gmail.com

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ARGUMENT	2
A.	The Trial Court Violated Gasteazoro-Paniagua’s Right to Be Present During Critical Phases of His Trial	2
B.	The Trial Court Erred When It Admitted Gasteazoro-Paniagua’s Custodial Statement Because He Made an Unequivocal Request For Counsel	6
C.	The Trial Court Erred by Refusing to Give an Instruction to Treat the Testimony of a Paid Informant With Caution	7
D.	The Trial Court Erred by Permitting the Introduction of Inconsistent Statements by Victim Muro Without First Asking Him About Those Statements	9
E.	The Trial Court Erred By Not Granting a New Trial Where a Police Officer Testified that Their Investigation Led to the Conclusion that Gasteazoro-Paniauga Was the Shooter	12
F.	The Trial Court Erred by Permitting the Backdoor Admission of Testimonial Hearsay	13
G.	The Prosecutor’s Arguments That Jurors Should Find Gasteazoro-Paniagua Guilty Because He Had Not Proved Someone Else Shot the Victim Was Flagrant and Ill Intentioned	17
H.	The Trial Court Erred by Instructing Jurors That They Must Be Unanimous to Acquit Gasteazoro-Paniagua of the Firearm Enhancement	20
III.	CONCLUSION	23

TABLE OF AUTHORITIES

US Supreme Court Cases

<i>Davis v. United States</i> , 512 U.S. 452 (1994)	7
<i>Dutton v. Evans</i> , 400 U.S. 74 (1970)	16
<i>Hicks v. Oklahoma</i> , 447 U.S. 343 (1980)	21
<i>Snyder v. Massachusetts</i> , 291 U.S. 97 (1934)	4
<i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993)	21

State Cases

<i>McCall v. Washington Co-op Farmer's Assoc.</i> , 35 Wn.2d 337, 212 P.2d 813 (1947)	10
<i>State v. Becker</i> , 132 Wn.2d 54, 935 P.2d 1321 (1997)	20
<i>State v. Brown</i> , 147 Wn.2d 330, 58 P.3d 889 (2002)	19
<i>State v. Evans</i> , 154 Wn.2d 438, 114 P.3d 627 (2005)	19
<i>State v. Fisher</i> , 165 Wash.2d 727, 202 P.3d 937 (2009)	18
<i>State v. French</i> , 101 Wash.App. 380, 4 P.3d 857 (2000)	19
<i>State v. Gregory</i> , 158 Wash.2d 759, 147 P.3d 1201 (2006)	18
<i>State v. Horton</i> , 116 Wash.App. 909, 68 P.3d 1145 (2003)	11
<i>State v. Irby</i> , 170 Wash.2d 874, 246 P.3d 796 (2011)	4, 5
<i>State v. McKenzie</i> , 157 Wn.2d 44, 134 P.3d 221 (2006)	18
<i>State v. O'Hara</i> , 167 Wash.2d 91, 217 P.3d 756 (2009)	20
<i>State v. Shutzler</i> , 82 Wash. 365, 144 P. 284 (1914)	4

Other Jurisdictions

<i>Abela v. Martin</i> , 380 F.3d 915 (6 th Cir. 2004)	7
<i>Favre v. Henderson</i> , 464 F.2d 359 (5th Cir.1972)	15
<i>Hutchins v. Wainwright</i> , 715 F.2d 512 (11th Cir.1983)	16
<i>United States v. Garcia</i> , 528 F.2d 580 (5th Cir.1976)	9
<i>United States v. Luck</i> , 611 F.3d 183 (4 th Cir. 2010)	8
<i>United States v. Ogbuehi</i> , 18 F.3d 807 (9th Cir.1994)	7
<i>United States v. Okafor</i> , 285 F.3d 842 (9th Cir.2002)	6
<i>United States v. Perkins</i> , 608 F.2d 1064 (5th Cir.1979)	7
<i>United States v. Silva</i> , 380 F.3d 1018 (7th Cir.2004)	15
<i>United States v. Williams</i> , 59 F.3d 1180 (11th Cir.1995)	9

I. INTRODUCTION

The State's case started to fall apart when the victim stated he was not sure whether the defendant shot him. Perhaps that is why the State sought to admit evidence in violation of the constitution. Or, put more charitably, perhaps that is why the State had such a great need to rely on suspect evidence. When the State's case is the weak, the need to admit questionable evidence is high.

The State was, of course, free to strike the hardest possible blows the facts and the law would admit at trial. Instead, the State struck foul blows—using the “back door” to admit hearsay evidence in violation of the right to confront, eliciting improper opinion testimony, and making ill intentioned arguments.

Other errors abounded, including conducting portions of trial during defendant's absence and failing to give an instruction cautioning jurors to evaluate the testimony of an informant carefully. Mr. Gasteazoro-Paniagua's custodial statements were admitted despite his invocation of his right to counsel.

If the State had tried a clean case, this Court would obviously need to respect the jury verdict. The State did not try a clean case. Mr. Gasteazoro-Paniagua's case was riddled with error. As a result, this Court can have no confidence in the outcome. This Court should reverse and remand for a new trial.

II. ARGUMENT

A. The Trial Court Violated Gasteazoro-Paniagua's Right to Be Present During All Critical Phases of His Trial.

Introduction

Mr. Gasteazoro-Paniagua was not present for a number of discussions between counsel and the court concerning both substantive and procedural trial matters in violation of his state and federal constitutional rights. Neither the court at trial nor the State on appeal advances any reason for defendant's exclusion.

Nevertheless, the trial court repeatedly encouraged defendant to waive his presence and assured Gasteazoro-Paniagua, if he left, the court and lawyers would only discuss "scheduling" matters.

Although the court and parties briefly discussed scheduling matters, the hearings went further than promised.

For example, while defendant was absent the court discussed Melissa Ibanez's (defendant's wife) role in the investigation and trial of this case (RP 909); ruled that it would give a limiting instruction if the State impeached Mr. Muro's statement (RP 1205-06; 1503); ruled what the limiting instruction would say and gave directions to the prosecutor and witness regarding Detective Buckner's testimony (RP 1504-05, RP 1508-13.); told defense counsel that it would deny a motion to dismiss based on insufficient evidence at the close of the

State's case (RP 1489); and reached a stipulated agreement about the admissibility of Gasteazoro-Paniagua's criminal history (RP 1503-04).

When defendant was brought back to court by the jailers, the court would assure him: "We just talked a little bit about scheduling again." RP 1516.

Gasteazoro-Paniagua Did Not Knowingly Waive His Presence

The State's waiver argument is easy to dispatch. Gasteazoro-Paniagua only waived his right to be present at "scheduling" matters. The matters discussed in court exceeded defendant's waiver of his right to be present. A limited waiver of the right to be present does not extend to any matter the court chooses to bring up in a defendant's absence.

The Right to Be Present During One's Own Trial

The question is whether Mr. Gasteazoro-Paniagua had a right to be present or whether these hearings could have taken place in defendant's absence without a waiver.

The State says "yes." However, the State's argument depends on a narrower right to be present than the law provides. The State argues that the right to be present extends only to hearings where facts are contested, but not to hearings involving the law. *Response,*

p. 14.

The Washington Supreme Court recently held otherwise in *State v. Irby*, 170 Wash.2d 874, 246 P.3d 796 (2011).¹ There were no facts discussed when the court and parties excused jurors for cause *via* the exchange of emails in *Irby*.

Irby explains that a defendant does not have a right to be present only when facts are being presented. The federal constitution guarantees a defendant a right to be present at a proceeding “whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.” *Snyder v. Massachusetts*, 291 U.S. 97, 105–06 (1934), *overruled in part on other grounds sub nom. Malloy v. Hogan*, 378 U.S. 1 (1964). Under the state constitution a defendant has a right to be present at every stage of the trial when his “substantial rights” may be affected. *State v. Shutzler*, 82 Wash. 365, 367, 144 P. 284 (1914).

If the application of the “for cause” standards during jury selection is unquestionably a “stage of the trial” at which a defendant's “substantial rights may be affected,” which violated

¹ The Washington Supreme Court also accepted review and will decide the question: “Whether the trial court violated a criminal defendant’s constitutional right to be present when it responded to jury inquiries without notifying the defendant or his attorney.” No. 85227-8 (consol. w/85557-9 & 85558-7), *State v. Jasper; State v. Moimoi; State v. Cienfuegos*.

Irby's right to "appear and defend in person" under article I, section 22 as well as the due process clause of the Fourteenth Amendment, then the trial court's discussions of limiting instructions, evidentiary privileges, the use of defendant's prior conviction at trial, and whether the court would entertain a motion to dismiss were also portions of trial to which the right to be present attached. These were matters which involved the application of the facts to the law. Mr. Gasteazoro-Paniagua's presence was as meaningful because he could have assisted counsel's full understanding of the facts and expressed his thoughts regarding strategy. A defendant has a right to meaningful assist counsel. Mr. Gasteazoro-Paniagua was denied that opportunity when the court took up matters it promised would not be discussed in defendant's absence.

Gasteazoro-Paniagua Was Harmed

The State bears the burden to prove the absence of harm beyond a reasonable doubt. *Irby*, at 509. The State has not even attempted to meet this burden. Instead, the State mistakenly argues that Gasteazoro-Paniagua bears the burden (*Response*, p. 17).

The State cannot prove that defendant presence would have been meaningless. This Court should reverse and remand for a new trial.

B. The Trial Court Erred When It Admitted Gasteazoro-Paniagua's Custodial Statement Because He Made an Unequivocal Request For Counsel

When Mr. Gasteazoro-Paniagua told the interrogating officers: "I mean, I guess I'll just have to talk to a lawyer about it....," (RP 89), he was not expressing uncertainty or equivocation about wanting to talk to a lawyer. Instead, he was simply using language deferential to the authority of those arresting officers.

Phrases like "I mean" and "I guess" are common in conversational English. It is not unusual for those in a subordinate position to use phrases like "I mean," "I guess," or "I think," to those in authority. These phrases do not imply equivocation. In this case, the words reflect the dominance of the police officers and the deference of Mr. Gasteazoro-Paniagua when telling them that he wanted counsel and did not wish to speak with them.

The question for this Court is what Gasteazoro-Paniagua meant. The State understandably does not attempt to argue that the admission of Gasteazoro-Paniagua's custodial statement, if error, was harmless. Instead, the State confines its response to arguing that the court's decision to admit the statement was correct because Gasteazoro-Paniagua's words were equivocal.

Courts review the voluntariness of a waiver of *Miranda* rights *de novo*. *United States v. Okafor*, 285 F.3d 842, 846–47 (9th

Cir.2002). The question is whether the words a defendant used actually invoked the right to counsel. *United States v. Ogbuehi*, 18 F.3d 807, 812 (9th Cir.1994). The determination of whether appellant's request was equivocal is based on the "totality of the circumstances." *Davis v. United States*, 512 U.S. 452, 458 (1994).

Appellant concedes there is not a singular meaning for "I guess," or "I mean." Sometimes those phrases express equivocation. Sometimes those words do not. It is the context that matters. See *e.g., Abela v. Martin*, 380 F.3d 915, 926 (6th Cir. 2004) ("maybe" I should talk to my lawyer who was named by defendant was unequivocal); *United States v. Perkins*, 608 F.2d 1064, 1066 (5th Cir.1979) ("I think I want to talk to a lawyer" was an unequivocal request for counsel).

Reading all of Gasteazoro-Paniagua's words in context reveals his intent. He wanted counsel. Because the trial court found otherwise and improperly admitted his custodial statements, this Court should reverse.

C. The Trial Court Erred by Refusing to Give an Instruction to Treat the Testimony of a Paid Informant With Caution.

Washington law has long *allowed* an instruction that jurors should treat the testimony of an accomplice with caution. See WPIC 6.05. Given the relatively large number of wrongful convictions

produced by this type of testimony, this Court should hold that this instruction is *required* when an accomplice testifies. That instruction should not be required only where accomplice testimony is the only evidence supporting a conclusion. An accomplice instruction should be required whenever accomplice testimony is material to the decision to convict or acquit.

Jury instructions are a classic and crucial vehicle for shaping verdicts. The evaluation of informant testimony is central to the criminal justice system. The accomplice testimony instruction should be read in every case where an accomplice testifies to material facts.

This Court should follow the lead of *United States v. Luck*, 611 F.3d 183 (4th Cir. 2010). In that case, the court acknowledged a jury needs to be instructed to scrutinize informant testimony more carefully than other witnesses, even biased witnesses, because of the potential for perjury born out of self-interest. *See* Alexandra Natapoff, *Snitching* 77 (2009) (“[W]hen defendants do go to trial, numerous exonerations reveal just how often juries believe lying criminal informants, even when juries know that the informant is being compensated and has the incentive to lie. A report by the Center on Wrongful Convictions at Northwestern School of Law describes fifty-one wrongful capital convictions, each one involving

perjured informant testimony accepted by jurors as true.”). See also *See United States v. Williams*, 59 F.3d 1180, 1183-84 (11th Cir.1995) (stating that sole function of an informant instruction is to make jury aware that an informant's testimony is to be viewed with caution); *United States v. Garcia*, 528 F.2d 580, 587-88 (5th Cir.1976) (“When the case is close and the witness particularly unreliable ... this Court has declared that the failure to give a cautionary instruction amounts to plain error.”).

This Court should find that the failure to give the instruction was error. By doing so, this Court can take an important step to guard against wrongful convictions—in this case and in future cases.

D. The Trial Court Erred by Permitting the Introduction of Inconsistent Statements by Victim Muro Without First Asking Him About Those Statements; Where the Court Failed to Give a Limiting Instruction for One of Those Statements; and Where the Prosecutor Unfairly Implied that Jurors Could Use the Statements as Substantive Evidence.

Jose Muro, the victim in this case, was shot. The question for the jury was whether Gasteazoro-Paniagua shot him. At trial, Muro said he did not know. The State was allowed to impeach Muro with prior statements implicating defendant. However, the State did not confront Muro with those statements or ask him to explain.

In response to this assignment of error, the State argues that it was not required to ask Muro first about the particular inconsistent

statements it sought to admit. Instead, according to the State, all that matters is that the out-of-court statements were generally inconsistent with Muro's testimony.

Appellant concedes Muro's prior statements were inconsistent with his testimony. Thus, the State's central "whole impression" argument is irrelevant. *Response*, p. 34-42.

Instead, what is important is that Muro was never given an opportunity to explain the apparent inconsistencies. In *McCall v. Washington Co-op Farmer's Assoc.*, 35 Wn.2d 337, 212 P.2d 813 (1947), the court held:

The question to determine is whether there was a sufficient foundation laid for the impeachment of the witness by prior inconsistent statements. In *Webb v. City of Seattle*, 22 Wash.2d 596, 157 P.2d 312, 319, 158 A.L.R. 810, and *Kellerher v. Porter*, 29 Wash.2d 650, 189 P.2d 223, 229, we discussed that subject. In the *Webb* case we said:

'When the attention of the witness is called to what it is claimed he had previously said, the time when, the place where, and the person with whom the alleged conversation was had should be stated.'

In the *Kellerher* case we said:

'It is also true that it is the general rule in this state that before impeaching evidence can be introduced concerning contradictory statements made out of court by a witness, the time when, the place where, and the circumstances under which the contradictory statements were made by the witness must be given and opportunity afforded the witness to deny, admit, or explain them.'"

35 Wn.2d at 332. See also, *State v. Horton*, 116 Wash.App. 909, 68 P.3d 1145 (2003).

The State does not attempt to defend the admission of the statements by arguing that a sufficient foundation was laid. Instead, the State changes the subject arguing that the statements were admissible as statements of “identification, even without a foundation. Of course, the State neglects to remind this Court that jurors were instructed to consider the statements as impeachment of Muro, not as identification. Thus, Gasteazoro-Paniagua was harmed because jurors were expressly authorized to use the statements to evaluate Muro’s credibility, despite not giving Muro a chance to explain. Just as importantly, the trial court did not admit the statements on the issue of identification, an issue the State did not cross-appeal. RP 1227-28; CP 97. As a result, this Court should not consider that argument.

Because the State did not lay the necessary foundation, Muro’s impeachment was improper. Gasteazoro-Paniagua was harmed because Muro’s credibility was key to this case, although it was the State who was interested in undermining that credibility.

Because the State unlawfully undermined Muro’s credibility, reversal is required.

E. The Trial Court Erred By Not Granting a New Trial Where a Police Officer Testified that Their Investigation Led to the Conclusion that Gasteazoro-Paniauga Was the Shooter.

The investigating officers were permitted to testify that their investigation led them to conclude that Gasteazoro-Paniagua shot Muro. RP 601-02. This opinion testimony also filled in the “gap” when the trial court ruled that Mr. Muro could not be impeached with the person he identified as his shooter.

The State defends the admission of this testimony by arguing that it was a trivial irregularity and that defendant was not harmed. *Response*, p. 48-49.

The State is wrong. While Deputy O’Dell’s reference was brief, it was sweeping. O’Dell admitted that he could not identify the shooter from the video. But, then he was permitted to say that the police investigation led to that one conclusion.

As a result, Officer O’Dell was permitted to summarize all of the evidence—admissible and inadmissible—and tell the jury that it led in only one direction: to Mr. Gasteazoro-Paniagua. That was improper and highly prejudicial.

This error was compounded by the following error.

F. The Trial Court Erred by Permitting the Backdoor Admission of Testimonial Hearsay.

When Detective Buckner testified about the course of the investigation, he was permitted to introduce testimonial hearsay. Specifically, he was permitted to say that by talking to various family members he learned that Gasteazoro-Paniagua was Muro's shooter. RP 838-40.

The State understandably does not attempt to defend by arguing that these statements were not testimonial hearsay. They were the very definition of testimonial hearsay: out-of-court statements made to an interrogating police officer. Instead, the State argues that the statements were not admitted for the truth of the matter. Admitting these statements through the "back door" makes no difference.

Crawford was concerned with ensuring that out-of-court testimonial statements, taken *ex parte* and without trial-like protections, were not used as evidence before the jury if the speaker could not be cross-examined. Permitting a police officer to summarize or outline an out-of-court statement in no way corrects for the affront to the purpose of the Clause, as it was explained in *Crawford*. The Confrontation Clause provides a procedural check on "[t]he involvement of government officers in the production of

testimonial evidence.” *Crawford*, 541 U.S. at 53. Where the government officers have not only “produced” the evidence, but then condensed it into a conclusory affirmation for purposes of presentation to the jury, the difficulties of testing the veracity of the source of the evidence are not lessened but exacerbated. With the language actually used by the out-of-court witness obscured, any clues to its truthfulness provided by that language—contradictions, hesitations, and other clues often used to test credibility—are lost, and instead, a veneer of objectivity conveyed.

Labeling such digested testimony as a mere “outline” of, rather than a description or summary of, the substance of out-of-court statements cannot reasonably alter these conclusions or toss the testimony outside the reach of the Confrontation Clause as interpreted in *Crawford*. Whatever locution is used, out-of-court statements admitted at trial are “statements” for the purpose of the Confrontation Clause both pre- and post-*Crawford* if, fairly read, they convey to the jury the substance of an out-of-court, testimonial statement of a witness who does not testify at trial.

The First Circuit recently held that “the right to cross-examine an out-of-court accuser applies with full force” even in circumstances where “the actual statements” of the out-of-court declarant were not admitted. *United States v. Meises*, 645 F.3d 5 at

21, 2011 WL 1817855 at *12 (1st Cir. May 13, 2011). Relying on *Crawford*, the First Circuit concluded that “[i]t makes no difference that the government took care not to introduce [the out-of-court declarant's] ‘actual statements’ ” because “[t]he opportunity to cross-examine the declarant ‘to tease out the truth,’ *Crawford*, 541 U.S. at 67, is no less vital when a witness indirectly, but still unmistakably, recounts a [declarant's] out-of-court accusation.” *Id.* The First Circuit went on to reason that “if what the jury hears is, in substance, an untested, out-of-court accusation against the defendant, particularly if the inculpatory statement is made to law enforcement authorities, the defendant's Sixth Amendment right to confront the declarant is triggered.” *Id.*

Other circuits agree. The Seventh Circuit, relying on *Crawford*, has recognized that allowing police to refer to the substance of witnesses' statements as they “narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the defendant's rights under the sixth amendment.” *United States v. Silva*, 380 F.3d 1018, 1020 (7th Cir.2004). Similarly, in *Favre v. Henderson*, 464 F.2d 359 (5th Cir.1972), the Fifth Circuit held that the defendant's confrontation rights, as defined by the Supreme Court in *Dutton v. Evans*, 400 U.S.

74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), were violated because “testimony was admitted which led to the clear and logical inference that out-of-court declarants believed and said that [the defendant] was guilty of the crime charged.” *Favre*, 464 F.2d at 364. “Although the officer never testified to the exact statements made to him by the informers, the nature of the statements ... was readily inferred.” *Id.* at 362.

The Fifth Circuit has applied the same logic in at least one post-AEDPA habeas case: In *Taylor v. Cain*, 545 F.3d 327 (5th Cir.2008), the Fifth Circuit relied on *Ohio v. Roberts* on the salient point in granting habeas in a case with facts similar to those here. The court held that “[p]olice officers cannot, through their trial testimony, refer to the substance of statements given to them by nontestifying witnesses in the course of their investigation, when those statements inculcate the defendant.” *Id.* at 335.

Finally, the Eleventh Circuit, also held that the Confrontation Clause is violated when police testify to the substance of inculpatory out-of-court statements. *Hutchins v. Wainwright*, 715 F.2d 512, 516 (11th Cir.1983); *see id.* (“Although the officers' testimony may not have quoted the exact words of the informant, the nature and substance of the statements suggesting there was an eyewitness and what he knew was readily inferred”).

In sum, it is both clearly established Supreme Court law to regard summarizing—or “outlining”—the substance of out-of-court testimonial statements, directly or in a way from which “the nature of the statement ... [can be] readily inferred,” *see Favre*, 464 F.2d at 362, as incapable of violating the Confrontation Clause. Instead, if the substance of an out-of-court testimonial statement is likely to be inferred by the jury, the statement is subject to the Confrontation Clause. See also *Ocampo v. Vail*, 649 F.3d 1098 (9th Cir. 2011).

In this case, the trial court admitted the critical substance of testimonial statements implicating defendant that he had no opportunity to cross-examine. Gasteazoro-Paniagua’s federal constitutional right to confront the witnesses against him was therefore violated. Reversal is required because the State cannot show that the error was harmless beyond a reasonable doubt.

- G.1. The Prosecutor’s Arguments That Jurors Should Find Gasteazoro-Paniagua Guilty Because He Had Not Proved Someone Else Shot the Victim Was Flagrant and Ill Intentioned.
- G.2. The Prosecutor’s Argument That Gasteazoro-Paniagua’s Testimony Should Be Disbelieved Because He Testified After Other Witness Was Misconduct, Especially Where the Prosecutor Did Not Establish Those Facts During Cross-Examination.
- G.3. Mr. Gasteazoro-Paniagua Was Denied Effective Assistance of Counsel When Counsel Failed to Object to These Arguments.

During closing argument, the trial prosecutor struck several foul blows. The prosecutor argued that defendant was guilty because he failed to prove who shot Muro. In addition, he criticized Gasteazoro-Paniagua's testimony as contrived, put together after hearing the testimony of others so that the testimony appeared to be truthful.

The State argues, even if these arguments were error, Gasteazoro-Paniagua bears the burden of showing harm. Once again, the State is wrong.

Prosecutorial misconduct is grounds for reversal if "the prosecuting attorney's conduct was both improper and prejudicial." *State v. Fisher*, 165 Wash.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wash.2d 759, 858, 147 P.3d 1201 (2006)). Instead of examining improper conduct in isolation, Washington courts determine the effect of a prosecutor's improper conduct by examining that conduct in the full trial context, including the evidence presented, "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

When prosecutorial misconduct infringes on a constitutional right, court apply a constitutional harmless error standard. See *e.g.*, *State v. Evans*, 154 Wn.2d 438, 454, 114 P.3d 627 (2005) (citing *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002)); *see also State v. Evans*, 96 Wn.2d 1, 4, 633 P.2d 83 (1981). Under that standard, a reviewing court will vacate a conviction unless it necessarily appears, beyond a reasonable doubt, that the misconduct did not affect the verdict. In such cases, the burden is on the State. See, *e.g.*, *State v. French*, 101 Wash.App. 380, 386, 4 P.3d 857 (2000); *State v. Contreras*, 57 Wash.App. at 473, 788 P.2d 1114. The Court of Appeals held in *State v. Traweek* that a prosecutor’s comment is “subject to the stricter standard of constitutional harmless error” if it “also affects a separate constitutional right, such as the privilege against self-incrimination.” 43 Wash.App. 99, 107–08, 715 P.2d 1148 (1986), *overruled on other grounds by State v. Blair*, 117 Wash.2d at 485–86, 816 P.2d 718.

In this case, the prosecutor’s remarked infringed on defendant’s right to be present during his trial, by arguing that he gained a testimonial advantage by choosing to attend his own trial. In addition, the State argued Gasteazoro-Paniagua’s guilt should be inferred from the fact that he did not prove who actually shot Muro. By arguing that Gasteazoro-Paniagua should be penalized as a result

of exercising a constitutional right and by switching the burden of proof, the State's arguments went beyond mere trial error.

H. The Trial Court Erred by Instructing Jurors That They Must Be Unanimous to Acquit Gasteazoro-Paniagua of the Firearm Enhancement.

The State implicitly concedes that the instruction telling jurors unanimity was required to acquit Gasteazoro-Panigua of the firearm enhancement was error. Instead, the State argues that it was not a plain error and, if it was, it was not a harmful error.

The failure to give a correct instruction regarding how many jurors are needed to acquit is an issue that can be raised for the first time on appeal. The failure to give a correct unanimity instruction is a manifest constitutional error. *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997) (a reviewing court will “consider a claimed error in an instruction if giving such instruction invades a fundamental right of the accused.”). In *State v. O’Hara*, 167 Wash.2d 91, 217 P.3d 756 (2009), the Washington Supreme Court listed the failure to give a proper unanimity instruction as an example of a manifest error which can be raised for the first time on appeal.

While the Constitution certainly does not require only one vote in order to “acquit” a defendant of a firearm enhancement, where the statute sets that requirement a jury instruction that instead

tells jurors they must be unanimous to acquit is no difference than an erroneous reasonable doubt instruction. It is impossible to say what the jury would have done if they had been instructed properly.

The United States Supreme Court held that an erroneous “reasonable doubt” instruction is a structural error which automatically mandates reversal because it defies traditional prejudice analysis. *Sullivan v. Louisiana*, 508 U.S. 275 (1993). See also *Arizona v. Fulminante*, 499 U.S. 279 (1991).

The Supreme Court explained in *Sullivan*:

It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt. Our *per curiam* opinion in *Cage*, which we accept as controlling, held that an instruction of the sort given here does not produce such a verdict. Petitioner's Sixth Amendment right to jury trial was therefore denied.

508 U.S. at 278. Traditional harmless review cannot take place with respect to an erroneous reasonable doubt instruction because “to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.” *Id.* at 279.

The same is true when a jury is mis-instructed about the unanimity requirement. Like an erroneous reasonable doubt instruction, an erroneous unanimity instruction categorically vitiates *all* of the jury's findings related to that instruction.

While the Legislature was not required to adopt a rule that unanimity is not required to return a "no" verdict, once the Legislature adopted that requirement the instructions must properly inform the jury of that requirement. See generally *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

This Court in *Bashaw* strongly suggested its decision is grounded in due process. This Court identified the error as "the procedure by which unanimity would be inappropriately achieved," and referred to "the flawed deliberative process" resulting from the erroneous instruction. The court then concluded the error could not be deemed harmless beyond a reasonable doubt, which is the constitutional harmless error standard. The court refused to find the error harmless even where the jury expressed no confusion and returned a unanimous verdict in the affirmative. That reasoning implies that the Court properly views the error as structural.

//

//

//

III. CONCLUSION

Based on the above, this Court should reverse and remand for a new trial.

DATED this 22nd day of December, 2011.

/s/ Jeffrey E. Ellis

Jeffrey E. Ellis #17139

/s/ Renee Alsept

B. Renee Alsept # 20400

Attorneys for Appellant

Law Office of Alsept & Ellis

621 SW Morrison St., Ste 1025

Portland, OR 97205

JeffreyErwinEllis@gmail.com

ReneeAlsept@gmail.com

ALSEPT & ELLIS LAW OFFICE
December 22, 2011 - 11:53 AM
Transmittal Letter

Document Uploaded: 411032-Reply Brief.pdf

Case Name: State v. Gasteazoro-Paniagua

Court of Appeals Case Number: 41103-2

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Renee Alsept - Email: **reneelsept@gmail.com**

A copy of this document has been emailed to the following addresses:

jeffreyerwinellis@gmail.com

Abbie.Bartlett@clark.wa.gov