

NO. 49191-5-II

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

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STATE OF WASHINGTON, Respondent

v.

EDWIN ALEJANDRO LIZARRAGA-CANCHE, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-00278-1

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BRIEF OF RESPONDENT

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Attorneys for Respondent:

ANTHONY F. GOLIK  
Prosecuting Attorney  
Clark County, Washington

Rachael R. Probstfeld, WSBA #37878  
Senior Deputy Prosecuting Attorney  
OID# 91127

Clark County Prosecuting Attorney  
1013 Franklin Street  
PO Box 5000  
Vancouver WA 98666-5000  
Telephone (360) 397-2261

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## RESPONSE TO ASSIGNMENTS OF ERROR

- I. Lizarraga-Canche's statements to police were properly admitted at trial.**
- II. The trial court properly allowed the State to re-open its case.**
- III. There was no prosecutorial misconduct.**
- IV. Lizarraga-Canche received effective assistance of counsel.**
- V. The State is not requesting appellate costs.**

## STATEMENT OF THE CASE

Edwin Lizarraga-Canche (hereafter 'Lizarraga-Canche') was charged by Information with Possession of a Stolen Motor Vehicle for an incident that occurred on February 2, 2016. CP 3-4. The State later amended the information to add a second count, Bail Jumping, for an allegation that Lizarraga-Canche failed to appear at a required court date for a readiness hearing on April 7, 2016. CP 8. Prior to trial the court conducted a hearing pursuant to CrR 3.5 to determine the admissibility of the statements Lizarraga-Canche had made to police. RP 46-94.

At the 3.5 hearing, Officer Kathryn Endresen of the Vancouver Police Department testified that she contacted Lizarraga-Canche during a traffic stop at about 5a.m. on February 2, 2016. RP 46-48. The stop was

initiated because the vehicle did not have license plates, the rear window was completely frozen over, and the driver (Lizarraga-Canche) was texting while driving. RP 48. Officer Endresen made contact with Lizarraga-Canche in the City of Vancouver, Clark County Washington. RP 48. Upon contacting the driver, Officer Endresen asked him if the vehicle was his. Lizarraga-Canche told her that he had just bought the vehicle. RP 49. The officer then asked him for registration, his driver's license and proof of insurance. RP 49. Lizarraga-Canche then told her the vehicle was actually his friend's. RP 49.

Lizarraga-Canche produced his driver's license and an insurance card for a different vehicle. RP 49. Officer Endresen and the other officer involved, Officer Brandon Schoolcraft, checked the vehicle's identification number (VIN) in their system and the vehicle had been listed as stolen. RP 49. At this point, Officer Endresen asked Lizarraga-Canche to turn off his vehicle. RP 49. At this request, Lizarraga-Canche started looking around the vehicle; Officer Endresen asked him what he was looking for and he told her he was looking for a screwdriver. RP 50. Officer Endresen removed Lizarraga-Canche from the vehicle and frisked him and escorted him to her patrol car. RP 50. Lizarraga-Canche was detained and Officer Endresen read him the *Miranda* warnings from her department-issued card. RP 50. Officer Endresen told Lizarraga-Canche,

You have the right to remain silent. Anything you say can be used against you in the court of law. You have the right at this time to talk to a lawyer and have him present while – with you while you are being questioned. If you cannot afford a lawyer one will be appointed to represent you before any questioning if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand each of these rights I have explained to you? Having these rights in mind do you wish to talk – talk to me now?

RP 51. Lizarraga-Canche told Officer Endresen he could not hear her; he explained the radio was too loud. RP 51-52. Officer Endresen's car radio was up to the maximum volume at the time. RP 52. Officer Endresen turned the radio off and then re-read the warnings to Lizarraga-Canche exactly how she had previously read them. RP 52. Lizarraga-Canche confirmed he could hear her this time and said he understood his rights. RP 52.

Officer Endresen observed that Lizarraga-Canche spoke English with an accent. RP 53. He told her that he spoke Spanish. RP 53. Officer Endresen asked Lizarraga-Canche if he was comfortable speaking in English, and he told her he was. RP 53. Lizarraga-Canche volunteered that he had lived with a white woman so he could speak English. RP 54. Officer Endresen and Lizarraga-Canche proceeded to have a conversation in English; Lizarraga-Canche did not ask for explanation of any of her questions, and he gave appropriate answers. RP 55-56.

Officer Schoolcraft also testified at the CrR 3.5 hearing. RP 61-65. He testified that he responded to Officer Endresen's traffic stop of Lizarraga-Canche on February 2, 2016. RP 61-62. Officer Schoolcraft testified he did not pay close attention to the conversation occurring between Officer Endresen and Lizarraga-Canche, but heard them speaking in English and heard Lizarraga-Canche speaking in complete sentences. RP 63.

Lizarraga-Canche testified at the CrR 3.5 hearing. RP 67-80. He indicated he grew up in Mexico and speaks Spanish. RP 67. He came to the United States in 2002 at the age of 17. RP 68. He has friends with whom he speaks both Spanish and English. RP 69. He watches TV and listens to the radio in both Spanish and English. RP 70. Lizarraga-Canche confirmed he lived with a "white woman," by which he meant an English-speaker, for two years. RP 69-70. Lizarraga-Canche testified that when Officer Endresen read him the *Miranda* warnings he did not understand the rights and told her that he did not understand them. RP 71. Lizarraga-Canche testified however that he understood the questions Officer Endresen asked him about the vehicle, where he got it from, where he was going, etc. RP 73. Lizarraga-Canche testified that had he understood his rights he would not have spoken to Officer Endresen, but instead would have waited for an attorney. RP 74.

The trial court ruled the statements made by Lizarraga-Canche both before and after he was read the *Miranda* warnings were admissible. RP 91-94. Specifically, the trial court ruled the statements Lizarraga-Canche made prior to being put in the officer's patrol car were non-custodial statements. RP 91-92. The court ruled that the *Miranda* warnings were properly given and his responses after that were admissible. RP 92. Specifically regarding Lizarraga-Canche's ability to understand the warnings, the court found that Lizarraga-Canche had lived in the U.S. for thirteen years, that he lived with an English-speaker for two years, he watches TV in both English and Spanish and both police officers observed him speaking in English. RP 92. The court found that Officer Endresen asked Lizarraga-Canche if he was fine speaking English and he said he was. RP 92. The trial court found Officer Endresen read Lizarraga-Canche the warnings, he said he could not hear her because of the radio, so she turned the radio down and re-read him the warnings. RP 93. Lizarraga-Canche then told Officer Endresen he understood and was okay proceeding in English. RP 93. The trial court found Lizarraga-Canche's credibility on the stand at the CrR 3.5 hearing was affected, and noted a change in his testimony from what he told officers on February 2, 2016. RP 92. The trial court allowed the statements to be admitted at trial. RP 93-94.

At trial, the State called Officer Endresen as its first witness. She testified similarly to the testimony she gave in the CrR 3.5 hearing, with some additions. RP 102-40, 153-60. Specifically, Officer Endresen indicated that when she asked Lizarraga-Canche to turn off the vehicle, he told her he needed a screw driver to turn the vehicle off. RP 107. At that point she looked at the ignition and observed it was punched out, meaning the silver slot where you normally put a key in was gone. RP 108. You could see wires and the internal workings of the ignition. RP 110. She also noticed the vehicle's radio was missing. RP 108. Officer Endresen testified that during her conversation with Lizarraga-Canche after she put him in the back of her patrol car that he told her he got the car from a friend named Ricardo Rodriguez the day before because he needed a vehicle. RP 112. Lizarraga-Canche gave multiple different answers about when and where he picked up the vehicle from Ricardo, and was unable to give Officer Endresen a phone number or contact information for him. RP 113-14. Officer Endresen offered to go talk to Ricardo so they could clear up the issue with the vehicle, but Lizarraga-Canche did not want to. RP 116.

Officer Endresen asked Lizarraga-Canche if he had ever operated his prior vehicles with a screwdriver and Lizarraga-Canche said no and he did find that "a little weird." RP 115. Officer Endresen also asked

Lizarraga-Canche if he found it weird that the vehicle did not have license plates, and he told her that he really needed a car and didn't see the license plates inside the vehicle until later. RP 117. Officer Schoolcraft found the vehicle's license plates inside the vehicle. RP 117. Lizarraga-Canche had some property in the stolen vehicle, including a car seat and bags and clothes in the trunk. RP 117-18. Officer Endresen testified that the vehicle had an altered temporary permit located in the back window. RP 120-21. The officers also found two screwdrivers in the vehicle, both within arm's reach of the driver's seat. RP 122.

Officer Brandon Schoolcraft testified at the trial that he assisted Officer Endresen on the stop of Lizarraga-Canche and investigation that followed. RP 163-64. He noticed a trip permit in the back window of the vehicle that appeared to be altered. RP 164. He observed blank stickers stuck over the validity date of the permit, and numbers written on top of the white stickers. RP 164-65. Officer Schoolcraft checked the VIN and dispatch informed him the vehicle was stolen. RP 166. Officer Schoolcraft then called the owner of the vehicle and that person came to the scene and gave permission for the officers to look through the vehicle. RP 167. Officer Schoolcraft identified two screwdrivers and a pair of pliers that he found around the driver's seat of the vehicle. RP 172-73; Ex. 28. Officer Schoolcraft also found four license plates in the vehicle, one set from the

State of Oregon that belonged to the vehicle Lizarraga-Canche was driving, and another set from the State of Washington that belonged to a different vehicle that had been reported as stolen. RP 175.

Jason Jenista testified at trial that he lives in Vancouver, Washington and that he is the owner of the 1996 Honda Accord involved in this case. RP 282-83. Mr. Jenista testified he bought the gold/silver-ish Honda in June 2015 off of Craigslist. RP 283-84. Mr. Jenista paid \$1,000 and received the bill of sale, a title to the vehicle and its registration. RP 284. On June 15, 2015 Mr. Jenista noticed his vehicle was no longer in the parking space where he had left it. RP 285. The vehicle went missing from his parking space at his apartment overnight. RP 285-86. Mr. Jenista still had the keys to the vehicle, and he confirmed with his fiancée that she did not know what happened to the vehicle, and also confirmed with his apartment manager that his vehicle had not been towed. RP 286. After that, Mr. Jenista called the police to report the theft and his insurance company. RP 286. Prior to the theft of his vehicle, the ignition was intact and worked normally, and there was a radio in the vehicle. RP 287.

On February 2, 2016, Mr. Jenista received a telephone call from a Vancouver Police Officer telling him that they had recovered his stolen vehicle. RP 288. Mr. Jenista went to the scene of the traffic stop and saw his vehicle on the side of the road with two police officers nearby. RP 289.

Mr. Jenista answered the officers' questions, showed them the bill of sale and title and the keys to the vehicle that he still had. RP 289. Mr. Jenista did not know Lizarraga-Canche. RP 290. Police then searched the vehicle and confirmed with Mr. Jenista that none of the items found in the vehicle belonged to him. RP 290. Mr. Jenista then took possession back of his car; he noticed the radio was missing and the ignition was damaged - the cylinder lock had been removed. RP 291-92. The vehicle also smelled of mold and had mold on the interior door panels. RP 297.

Jeannie Bryant testified at trial that she is a Senior Deputy Prosecuting Attorney with the Clark County Prosecuting Attorney's Office and in that capacity she handles dockets in Superior Court. RP 194-95. Ms. Bryant was in court handling many cases for the State on a docket on February 17, 2016. RP 197. At that time, Ms. Bryant appeared on behalf of the State at the arraignment for Lizarraga-Canche on a charge of Possession of a Stolen Motor Vehicle, a Class B felony. RP 198. At that arraignment, the trial court set two future court dates for Lizarraga-Canche, including a readiness hearing and a trial date. RP 198-99. The Court entered a scheduling order signed by Ms. Bryant and Lizarraga-Canche that the court entered on February 17, 2016. RP 199-200; Ex. 3. The scheduling order indicated that Lizarraga-Canche was required to

reappear in court for a readiness hearing on “4-7-16.” RP 201; Ex. 3; CP 14.

Ms. Bryant testified she was also present in court on April 7, 2016 when Lizarraga-Canche’s case was called at the readiness hearing. RP 210-11. Lizarraga-Canche did not appear in court at that time. RP 211-12.

The State rested its case, at which time Lizarraga-Canche moved to dismiss the bail jumping count on the grounds that the State presented insufficient evidence to prove knowledge because the State had not presented testimony from the interpreter who was present in court at the time Lizarraga-Canche was arraigned. RP 300-03. The trial court stated... “I will say that the State has met their – has shown – made some minimal showing of each of the elements of the crime...” RP 304. The trial court then indicated it would take the motion under advisement and rule at a later time. RP 311-17. The court then discussed whether it could allow the State to re-open its case to have the interpreter testify. RP 317. After a recess, the court heard argument on the State’s motion to re-open its case and the court granted the motion. RP 327. The court clarified that it did not dismiss the bail jumping charge, but heard the State’s motion to re-open its case and granted that under its discretion and upon reliance of *State v. Brinkley*. RP 341.

The State then called Korine Wells, a court-certified interpreter of Spanish. RP 343. She testified that she worked as an interpreter on February 17, 2016 at Lizarraga-Canche's arraignment and she interpreted the dates the court gave Lizarraga-Canche to return. RP 346, 350-51.

The Defense then called Sara Scuito, also known as Sara Santos to testify. Ms. Scuito testified Lizarraga-Canche is a friend of her significant other's and that they worked together. RP 367. Ms. Scuito testified she gave Lizarraga-Canche a ride in January 2016 to pick up a car in the Hockinson area of Clark County. RP 368-70.

Next defense called Hernan de Jesus Romero-Garcia, also known as Tuey. RP 375. Tuey testified he lives in Battle Ground on a property with a whole lot of cars. RP 394. They belong to the property owner, not to Tuey. RP 395. One of the vehicles on the property was a tan Honda Accord that did not run. RP 396. Tuey knew Lizarraga-Canche and they had spoken about the fact that Lizarraga-Canche needed a vehicle. RP 397. Tuey told Lizarraga-Canche he needed the Honda off of his property because the property owner had told him he needed to move it, but he did not offer the vehicle to Lizarraga-Canche. RP 397-98. Tuey then told Lizarraga-Canche he could take the Honda, but that he didn't know if it was stolen or not, and did not know where it came from. RP 398. Tuey

told Lizarraga-Canche the vehicle had been abandoned on his property. RP 398. Lizarraga-Canche then fixed the vehicle and took it. RP 399.

Lizarraga-Canche also testified in his own defense. RP 406. He indicated that he needed a vehicle so he asked a guy named Tuey for the car. RP 408. Lizarraga-Canche had seen the Honda on Tuey's property before and Tuey told him he was going to get rid of the car, so Lizarraga-Canche said if he was just going to get rid of it he would take it. RP 410. Tuey told Lizarraga-Canche that he didn't know if the vehicle was stolen, but only that it had been abandoned there. RP 410-11. Lizarraga-Canche did some work on the car and got it running, using a screwdriver to start it. RP 411-12. The vehicle was wet on the inside with some green mold growing, and it smelled badly. RP 412. Lizarraga-Canche had the car about a week before he was pulled over by Officer Endresen. RP 413-16. He testified that he had intended to get the title to the vehicle at the DMV, but had not yet had time to do so. RP 415-16.

Regarding the missed court date, Lizarraga-Canche testified that his copy of the release order looked like the court date was April 17, 2016, not April 7, 2016. RP 424.

During closing arguments, the prosecutor made the following argument:

There's only one reasonable inference ladies and gentlemen that can be drawn from the facts in this case. When taken together they draw a very clear picture that when the Defendant was contacted by Officer Endresen in possession of Jason Jinista's-Jenista's stolen vehicle he knew perfectly well that that vehicle was stolen. No futile attempt to maintain ignorance in the light of such clear facts and circumstances can change the fact that he knew.

To find the defendant not guilty ladies and gentlemen you have to say that any person can escape criminal responsibility by simply ignoring the facts that are readily available and which they actually know – that a Defendant can avoid all consequences by wishing away knowledge. So ladies and gentlemen he did know.

RP 482-83. The prosecutor immediately continued with her argument, discussing the evidence the State had presented that showed Lizarraga-Canche was notified of the date he was required to appear in court, that that date was translated to him into Spanish by an interpreter. RP 483. The prosecutor ended this argument stating:

Because the defendant was in possession of the vehicle which he knew to be stolen and because the Defendant failed to appear at the Readiness Hearing on April 7<sup>th</sup> which he knew he had to be at – there is only one verdict that you can return ladies and gentlemen – to both counts. And that is guilty. Thank you.

RP 483. Defense did not object to any of the prosecutor's arguments. RP 482-83.

The jury found Lizarraga-Canche guilty of both Possession of a Stolen Motor Vehicle and Bail Jumping. CP 94-95. The trial court

sentenced Lizarraga-Canche to a standard range sentence on both counts.

CP 126. This appeal timely follows. CP 135.

## ARGUMENT

### **I. Lizarraga-Canche's statements to police were properly admitted at trial.**

Lizarraga-Canche argues the trial court improperly admitted statements he made to Officer Endresen after he was in custody for *Miranda* purposes. The trial court properly considered the testimony of the witnesses and the law and correctly found that the statements were admissible. The trial court's ruling should be affirmed.

This Court reviews a trial court's denial of a motion to suppress by determining whether substantial evidence supports the trial court's findings of fact and whether the findings support the conclusions of law. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999); *State v. Teran*, 71 Wn.App. 668, 671, 862 P.2d 137 (1993). Findings of fact are supported by substantial evidence when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). This Court only reviews those findings that the appellant has assigned error to; unchallenged findings of fact are verities on appeal. *Id.* Lizarraga-Canche

did not assign error to any of the trial court's findings of fact; therefore they are treated as verities on appeal.

When a suspect is "in custody" and "interrogated," police must first advise him of the right to remain silent, that anything said may be used as evidence against him, and that he has the right to an attorney before being questioned. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *State v. Templeton*, 148 Wn.2d 193, 208, 59 P.3d 632 (2002). A suspect may waive his rights and choose to speak to police, provided the waiver is made knowingly, voluntarily, and intelligently. *State v. Terrovona*, 105 Wn.2d 632, 646, 716 P.2d 295 (1986) (citing *Miranda*, 384 U.S. at 444). A waiver is voluntary if it is the result of a free and deliberate choice. *State v. Corn*, 95 Wn.App. 41, 57-58, 975 P.2d 520 (1999). When making a determination about whether a suspect's choice to waive his rights was voluntary and whether he understood the rights, this court must take the "totality of the circumstances surrounding the interrogation" into consideration. *Id.* at 58. A valid waiver may be either express or implied. *Terrovona*, 105 Wn.2d at 646. Such a waiver may be inferred when "the record shows that a defendant's answers were freely and voluntarily made without duress, promise or threat and with a full understanding of his constitutional rights." *Id.* at 646-67.

A language barrier does not automatically render a suspect's waiver of his *Miranda* rights invalid. *State v. Teran*, 71 Wn.App. 668, 672, 862 P.2d 137 (1993). In *Teran*, a flawed translation of the *Miranda* warnings into Spanish did not render a defendant's waiver invalid because there was sufficient evidence that he understood his rights. *Id.* The trial court's specifically addressed whether there was sufficient evidence that Lizarraga-Canche understood the rights as the police officer read them to him. The trial court specifically relied upon its findings that Lizarraga-Canche had lived in the U.S. for thirteen years and had lived with an English speaker for two years, that he watches both English and Spanish TV and that both police officers observed him speaking in English. RP 92. Officer Endresen asked Lizarraga-Canche if he preferred to speak in Spanish and he said he was fine to continue in English. RP 92. Lizarraga-Canche told the officer that he understood his rights and was okay proceeding in English. RP 93. Lizarraga-Canche spoke freely and never asked to stop his conversation with the police officer. RP 93. Based on these findings, the trial court admitted Lizarraga-Canche's statements at trial.

The totality of the circumstances in Lizarraga-Canche's case show that he understood his *Miranda* rights and knowingly, voluntarily, and intelligently waived them. Lizarraga-Canche's argument that he did not

understand his rights in English is not supported by the record. The trial court specifically found his credibility to be lacking. RP 93. See *State v. Haack*, 88 Wn.App. 423, 435, 958 P.2d 1001(1997), *rev. denied*, 134 Wn.2d 1016, 958 P.2d 314 (1998) (stating “credibility determinations [at a CrR 3.5 hearing] are for the trier of fact and are not subject to review by this court.”). Substantial evidence supports the trial court’s finding that Lizarraga-Canche understood his rights well enough to make a knowing, voluntary and intelligent waiver of those rights. The trial court’s decision to admit the statements should not be disturbed.

**II. The trial court properly allowed the State to re-open its case.**

Lizarraga-Canche claims the trial court erred in allowing the State to re-open its case to present additional evidence after the State had rested. However, the State’s motion to re-open its case was properly considered and ruled upon by the trial court, and the trial court did not abuse its discretion in allowing the State to re-open its case. Lizarraga-Canche’s claim should be denied.

The State’s motion to re-open its case to present additional evidence is a motion that is addressed in the sound discretion of the trial court. *State v. Vickers*, 18 Wn.App. 111, 113-14, 567 P.2d 675 (1977) (citing to *Jarstad v. Tacoma Outdoor Recreation, Inc.*, 10 Wn.App. 551,

519 P.2d 278 (1974)). The trial court's ruling on such a motion is reviewed for a manifest abuse of discretion. *Id.* A trial court abuses its discretion when its decision is based on untenable grounds or made for untenable reasons. *State v. Sanchez*, 60 Wn.App. 687, 696, 806 P.2d 782 (1991) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Many cases in Washington have held that allowing the State to reopen its case to present further evidence after the defense has moved for dismissal on the basis of insufficient evidence is proper. In *In re Estes v. Hopp*, 73 Wn.2d 263, 438 P.2d 205 (1968), the Supreme Court affirmed the trial court's decision to allow the State to re-open its case to present proof of ownership of a stolen vehicle. *Estes*, 73 Wn.2d at 264-65. In *Vickers, supra*, the Court of Appeals affirmed the trial court's decision to allow the State to re-open its case to present proof of jurisdiction. *Vickers*, 18 Wn.App. at 113. And in *Seattle v. Heath*, 10 Wn.App. 949, 520 P.2d 1392 (1973), the Court of Appeals affirmed the trial court's decision to allow the prosecution to re-open its case to present proof of a defendant's driving record. *Heath*, 10 Wn.App. at 953. Our Courts have also upheld a trial court's decision to allow the State to re-open its case after the defense had rested to address a specific question of the trial court or jury. *State v.*

*Johnson*, 1 Wn.App. 602, 464 P.2d 442 (1969); *State v. Brinkley*, 66 Wn.App. 844, 848, 837 P.2d 20 (1992).

Generally, it is appropriate for this Court to consider whether the trial court's decision to allow the State to re-open its case resulted in prejudice or unfairness to the defendant. *Brinkley*, 66 Wn.App. at 850. The fact that the additional evidence presented was harmful or prejudicial to the defendant does not render the trial court's decision an abuse of discretion. *Id.* (citing to *State v. Menke*, 25 N.J. 66, 135 A.2d 180, 183 (1957)). Proper considerations are whether the State deliberately withheld the evidence until the later time in an attempt to prevent the defendant from presenting rebuttal evidence or to cause the defendant greater damage in some other way. *Id.* (citing *Menke, supra* and *State v. McGuire*, 327 Mo. 1176, 39 S.W.2d 523 (Sup.Ct. 1931) and *State v. Hernandez*, 36 N.M. 35, 7 P.2d 930 (Sup.Ct. 1931)).

In Lizarraga-Canche's case, there's no evidence that the State took the action it did to put Lizarraga-Canche in a worse position or to prevent him from presenting any rebuttal evidence. As in *Brinkley, supra*, Lizarraga-Canche "was faced with evidence which could have been presented during the State case in chief and there is no suggestion that the impact of this additional evidence was intensified due to the timing of its presentation." *Brinkley*, 66 Wn.App. at 851. Accordingly, the trial court

did not abuse its discretion in allowing the State to re-open its case. The trial court's decision should be affirmed.

### **III. The State did not commit prosecutorial misconduct.**

Lizarraga-Canche alleges the prosecutor committed misconduct during closing argument by misstating the law regarding knowledge and by shifting the burden of proof to the defendant. The prosecutor's statements were proper and no misconduct occurred.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained-of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997))). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the error unless the remark is "so

flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has “wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.* The court should review a prosecutor’s comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

In arguing the law, a prosecutor is confined to correctly characterizing the law stated in the court’s instructions. *State v. Burton*, 165 Wn. App. 866, 885, 269 P.3d 337 (2012) (citing *State v. Estill*, 80 Wn.2d 196, 199-200, 492 P.2d 1037 (1972)). It can be misconduct for a prosecutor to misstate the court’s instruction on the law, to tell a jury to

acquit you must find the State's witnesses are lying, or that they must have a reason not to convict, or to equate proof beyond a reasonable doubt to everyday decision-making. *Id* (citing to *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984), *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996), *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009), and *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008)). Contextual consideration of the prosecutor's statements is important. *Burton*, 165 Wn. App. at 885.

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

*Davenport*, 100 Wn.2d at 762-63.

Specifically, Lizarraga-Canche assigns error to the following passage from the prosecutor's closing argument:

There's only one reasonable inference ladies and gentlemen that can be drawn from the facts in this case. When taken together they draw a very clear picture that when the Defendant was contacted by Officer Endresen in possession of Jason Jinista's-Jenista's stolen vehicle he knew perfectly well that that vehicle was stolen. No futile attempt to maintain ignorance in the light of such clear facts and circumstances can change the fact that he knew.

To find the defendant not guilty ladies and gentlemen you have to say that any person can escape criminal responsibility by simply ignoring the facts that are readily available and which they actually know – that a Defendant can avoid all consequences by wishing away knowledge. So ladies and gentlemen he did know.

RP 482-83. The prosecutor immediately continued with her argument, discussing the evidence the State had presented that showed Lizarraga-Canche was notified of the date he was required to appear in court, that that date was translated to him into Spanish by an interpreter. RP 483. The prosecutor ended this argument stating:

Because the defendant was in possession of the vehicle which he knew to be stolen and because the Defendant failed to appear at the Readiness Hearing on April 7<sup>th</sup> which he knew he had to be at – there is only one verdict that you can return ladies and gentlemen – to both counts. And that is guilty. Thank you.

RP 483.

The prosecutor's argument, when viewed in the context of the entire argument, and especially the paragraphs before and after the complained-of statements, it is clear the prosecutor correctly argued and

explained the law to the jury. The prosecutor's argument did not infer that the defendant did not need to know the vehicle he was in was stolen in order to convict him or that he did not need to know he had to be in court on a certain date. The prosecutor emphasized simply that a defendant cannot wish away his knowledge by claiming he did not know when all the evidence shows he did know. The prosecutor's argument did not amount to arguing that he should have known and therefore he did know as Lizarraga-Canche now claims. This argument also in no way shifts the burden of proof to the defendant.

Furthermore, Lizarraga-Canche cannot show these statements were so flagrant and ill-intentioned that they could not have been cured by an instruction to the jury. Had defense objected and the trial court instructed the jury to disregard the prosecutor's argument, or reinstructed the jury on the knowledge instruction, it is evidence the instruction would have cured any potential misconduct. The question at this point is whether there is a significant likelihood that the prosecutor's statements affected the jury's verdict and thereby denied the defendant a fair trial. Not only were the prosecutor's statements a correct argument of the law, but they were not so significant that a trial court's order to the jury to disregard the statement would not have cured any potential prejudice that resulted. Lizarraga-Canche has failed to show the prosecutor's argument was improper or that

he suffered prejudice as a result of these statements. Lizarraga-Canche's claim of prosecutorial misconduct fails.

**IV. Lizarraga-Canche received effective assistance of counsel.**

Lizarraga-Canche argues his trial attorney was ineffective for failing to object to the prosecutor's closing argument. Lizarraga-Canche's attorney was not ineffective as none of the prosecutor's statements in her closing argument warranted objection, and no alleged error resulted in prejudice to Lizarraga-Canche. Lizarraga-Canche's claim fails.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires

showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

*Thomas*, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); see also *State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyлло*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the

theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that “there is no conceivable legitimate tactic explaining counsel’s performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. “The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that “but for counsel's deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing

court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the “distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from the counsel’s perspective at the time.” *Id.* at 689. The reviewing courts should be highly deferential to trial counsel’s decisions. *State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel’s performance *Strickland*, 466 U.S. at 689-91.

“Counsel’s decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions.” *State v. Johnston*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007) (citing *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662 (1989)). The failure to object only establishes ineffective assistance of counsel in the most egregious of circumstances. *Id.* This Court presumes that the failure to object was the result of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption. *Id.* at 20 (citing *In re Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004)). As discussed above, Lizarraga-Canche’s claim regarding prosecutorial misconduct is meritless. His

attorney was not expected to object to frivolous issues, and she was not ineffective for failing to do so. Not only were the prosecutor's arguments proper, as discussed above, if there was any improper argument, it was minimal in light of the entire argument, and any error was quickly corrected by the prosecutor's emphasis that the evidence showed Lizarraga-Canche had actual knowledge of the fact that the vehicle was stolen and that he was required to be in court on April 7<sup>th</sup>. Any improper argument was minimal and harmless. As it was harmless, the argument did not result in prejudice to Lizarraga-Canche and thus he cannot sustain his claim of ineffective assistance of counsel.

**V. The State is not requesting appellate costs.**

The State will not seek appellate costs if it substantially prevails in this appeal, therefore Lizarraga-Canche's argument on this matter is moot.

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**CONCLUSION**

Lizarraga-Canche has failed to support any of his claims of error.  
The trial court should be affirmed in all respects.

DATED this 27th day of February 2017.

Respectfully submitted:

ANTHONY F. GOLIK  
Prosecuting Attorney  
Clark County, Washington

By:

  
\_\_\_\_\_  
Rachael R. Probstfeld, WSBA #37878  
Senior Deputy Prosecuting Attorney  
OID# 91127

**CLARK COUNTY PROSECUTOR**

**February 27, 2017 - 3:11 PM**

**Transmittal Letter**

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