

FILED
Jun 27, 2016
Court of Appeals
Division III
State of Washington

NO. 32228-9-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

DANIEL CHRISTOPHER LAZCANO,

Defendant/Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT,

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ARGUMENT

Daniel Christopher Lazcano filed an Additional Statement of Grounds for Review on January 12, 2016. By letter dated May 26, 2016 the Court of Appeals has requested respective counsel to address a number of issues designated by bullet points in that letter.

DR. REYNOLDS' EXPERT TESTIMONY

ER 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Dr. Jeffrey Reynolds testified as an expert witness on behalf of the State. Dr. Reynolds is a forensic pathologist. He testified concerning both cause of death and ballistics.

Ballistics is defined as follows:

1. the science or study of the motion of projectiles, as bullets, shells, or bombs. **2.** the art or science of designing projectiles for maximum flight performance.

WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (6th ed.)

Dr. Reynolds testified that he was a forensic pathologist. He stated:

A. I'm called in by assorted county coroners and medical examiners to do autopsies on people who die in criminal or unknown circumstances to determine cause of death.

Q. And what do you mean by "cause of death"?

A. How a person died, why they're dead instead of alive.

Q. Do you also investigate the manner and mechanism of death?

A. Yes.

Q. Can you explain those terms for the jury?

A. Mechanism of death would be cause of death ...

...

If ... you lost control of your car, your manner of death would be accidental. If some drunk driver hit you and caused the accident

and killed you, then the manner of death becomes negligent homicide. ...

(RP 1347, ll. 5-13; RP 1347, l. 23 to RP 1348, l. 2)

Dr. Reynolds went on to testify about his training and educational background which included degrees in mechanical engineering and medicine. (RP 1348, ll. 11-15)

Dr. Reynolds was also a medic in the military and testified that he was familiar with bullet wounds. It was this portion of his background where the State attempted to qualify him as an expert on ballistics. (RP 1348, l. 16 to RP 1349, l. 12)

Generally, a party may introduce expert testimony as long as the expert is qualified, relies on generally accepted theories, and assists the trier of fact. ER 702. Determining the admissibility of evidence is largely within a trial court's discretion. *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). “[T]he exercise of [such discretion] will not be disturbed by an appellate court except for a very plain abuse thereof.” *Hill v. C & E Constr. Co.*, 59 Wn.2d 743, 746, 370 P.2d 255 (1962) (quoting *Wilkins v. Knox*, 142 Wash. 571, 577, 253 P. 797 (1927)).

Marriage of Katare, 175 Wn.2d 23, 38, 283 P.2d 546 (2012).

Initially, Mr. Lazcano contends that Dr. Reynolds was not a qualified expert with regard to ballistics. He could testify as to the paths of the

respective bullets; but not as to their caliber. Dr. Reynolds merely recovered fragments which were unidentifiable. (RP 643, l. 20; RP 644, ll. 10-18; 1368, ll. 7-16)

The State discussed certain measurements which Dr. Reynolds made of the wound. It was 9 mm in diameter and could have been caused by a bullet as small as 7 mm. (RP 1366, ll. 2-3; RP 1366, l. 24 to RP 1367, l. 5)

In connection with the estimated size of the bullet Dr. Reynolds indicated that there are multiple weapons that use the same bullet for every country who is a member of NATO. (RP 1367, ll. 6-17)

Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is discretion manifestly unreasonable or exercised on untenable grounds, or for untenable reasons.

State ex rel Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Under the facts and circumstances of Mr. Lazcano's case the trial court abused its discretion by allowing Dr. Reynolds to present expert ballistic testimony contrary to and beyond his practical experience.

The admissibility of expert testimony under this rule [ER 702] depends on whether (1) the witness qualifies as an expert; (2) the opinion is based upon an explanatory theory generally accepted in the scientific commu-

nity; and (3) the expert testimony would be helpful to the trier of fact.

State v. Flett, 40 Wn. App. 277, 284, 699 P.2d 774 (1985).

If the State had called in a ballistics expert instead of a forensic pathologist, no issue would exist. The only ballistics expert who testified was for the defense. Dr. Reynolds' opinion was not theoretically based. It was rather speculative and/or conjectural as to the weapon that may have fired the fatal bullet(s). In the absence of an intact bullet, and the presence of only unidentifiable fragments, the testimony was highly prejudicial to Mr. Lazcano's case.

“... [I]t is well established that conclusory or speculative expert opinions lacking in adequate foundation will not be admitted.” “In addition, when ruling on somewhat speculative testimony, the court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert.”

Miller v. Likins, 109 Wn. App. 140, 148, 34 P.3d 835 (2001), quoting *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 177, 817 P.2d 861 (1991), review denied, 118 Wn.2d 1010 (1992); *Davidson v. Mun. of Metro. Seattle*, 43 Wn. App. 569, 571-72, 719 P.2d 569, review denied, 106 Wn.2d 1009 (1986).

The prejudice to Mr. Lazcano's case becomes more evident when Dr. Reynolds' testimony is compared to the State's closing argument. The testimony concerning the bullet fragments included

Q. Okay. And did you remove any of these fragments as you performed the autopsy?

A. Yes.

Q. Did you remove a lot of fragments?

A. A few.

Q. Just a couple?

A. Ah. Three or four. I don't remember. It was -- they were pretty small.

(RP 1369, l. 20 to RP 1370, l. 2)

Q. Where do you believe the bullet ended?

A. In his pelvis where all of the other fragments are.

...

Q. Okay. Again, did you remove a lot in the way of fragments from this area (indicating)?

A. I think we removed some fragments, but I don't recall how many.

(RP 1371, ll. 1-2; LL. 18-21)

Q. Okay. All right. There's lot of metal fragments in this picture; is that right?

A. Yes.

Q. Okay. But you didn't remove a lot of that, did you?

A. Just removed a few representative samples, yeah.

(RP 1372, ll. 21-25)

The State, during its rebuttal case questioned Dr. Reynolds more extensively on the bullet fragments and dove into the realm of speculation and/or conjecture as follows:

Q. Good afternoon, Doctor. You're aware that there's been some testimony that -- from a 7.62 X 39 - millimeter round, a round from an AK-47, that there's often a sizeable piece left over in addition to the small fragments that you saw?

A. Yes.

Q. Okay. **Is it possible** that there could be a chunk of that size that doesn't appear on

the x-rays but would be below where the x-rays were taken?

A. Sure.

Q. Okay. **Could it appear** that a sizeable chunk could be in those x-rays as you see them -- as you've seen them in court?

A. Yes.

Q. And **how would it appear on the x-ray if it was in there?**

A. Well, it's in a -- it would be an irregular fragment, as all of them are, since they've been distorted by going through bone. But again, the question is whether the x-ray is looking at it this way or this way (indicating), how big it appears on the x-ray since the x-ray is only one direction.

Q. **So it's possible** it could be in the x-ray but edge-on?

A. Yes.

(RP 1822, l. 17 to RP 1823, l. 11) (Emphasis supplied.)

Q. Based upon what Mr. Christianson just asked you, does that change your answer that the bullets could have landed below where the x-rays were taken?

A. Where the x-rays were taken is the only area I have direct knowledge of whether there were bullet fragments in or not.

Q. And **it is possible** that the path could have traveled below the x-rays that were taken?

A. The one coming down from the shoulder **could have** continued downward, yes.

(RP 1833, ll. 8-16) (Emphasis supplied.)

It his closing argument the prosecuting attorney stated:

Dr. Reynolds also told you that -- remember when he was up here on the witness stand and he was describing how the bullet went down the body and he said, "And it ended back here in the musculature (indicating)," and he pointed to his own lower butt? **Dr. Reynolds also told you that in addition to**

this (indicating), **that below the point of this x-ray he expects that, yes, there could well be a large remainder chunk in the lower butt or down or down in the thigh.**

(RP 2051, l. 23 to RP 2052, l. 5) (Emphasis supplied.)

This is Gaylan Warren's testimony. The defense suggests to you that, scientific fact, it could not have been the AK-47. That's true if -- if a couple other things are true. This is what Mr. Warren said, the ballistics expert, when he said scientific certainty it couldn't have been, but he had a couple underlying assumptions. Number one, if the remainder chunk is not in the body, he said, if the remainder chunk is not in the body, he's -- number one, **he said there would be a remainder chunk from a bullet the size of an AK-47** (indicating). There would -- and if that is not in the body, number one, and there's no exit wound -- **of course, there was a little exit wound** but not big enough

for a big remainder chunk. If the big chunk is not in the body and there's no exit wound, then, number three, it must be true to a scientific certainty it was not shot with an AK - - with an AK-47-sized round, that big round. Couldn't be, because there would have to be a remainder chunk and it would have to be in the body.

Okay, Mr. Warren, that is absolutely true. Certainly. Does that prove that Marcus Schur was not shot with that AK-47 right over there (indicating)? It doesn't. It doesn't come close, because what Dr. Reynolds told you is that there was a chunk (indicating) in the x-ray edge-on and there was a chunk in the lower butt or upper thigh.

(RP 2053, l. 21 to RP 2054, l. 18) Emphasis supplied.)

When all of the evidence is considered, including closing arguments, there was never any proof whatsoever that an intact bullet existed.

It was pure speculation on the part of the State that either an intact bullet or a significant remainder chunk was in an area of the body not x-rayed.

The speculative testimony of Dr. Reynolds, along with the conjectural argument of the State, were aimed specifically at the expert testimony of Gaylan Warren, the only ballistics expert to testify. This acted to undermine Mr. Lazcano's defense that an AK-47 was not the murder weapon. It significantly prejudiced that defense.

DUE PROCESS

The Fourteenth Amendment to the United States Constitution and Const. art. I, § 3 both guarantee a criminal defendant due process under the law.

... [D]ue process in criminal prosecutions requires fundamental fairness and a meaningful opportunity to present a complete defense. *State v. Wittenbarger*, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994) (citing *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed.2d 413 (1984)). To comport with due process, the prosecution has a duty not only to disclose material exculpatory evidence, but it also has a related duty to preserve the evidence. *Wittenbarger*, 124 Wn.2d at 475. If the evidence meets the standard as materially exculpatory, criminal charges against the defendant must be dismissed if the State fails to preserve it. *State v. Copland*, 130 Wn.2d 244, 279, 922 P.2d 1304 (1996) (citing *Wittenbarger*, 124 Wn.2d at 475).

State v. Burden, 104 Wn. App. 507, 511, 17 P.3d 1211 (2001).

If, indeed, as the State contended, a large remaining chunk of the bullet was still in Mr. Schur's body, it would be an item of evidence not only potentially useful to the defense, but moreover materially exculpatory based upon the testimony of the ballistics expert - Gaylan Warren.

Evidence is materially exculpatory only if it meets a two-fold test: (1) its exculpatory value must have been apparent before the evidence was destroyed, and (2) the nature of the evidence leaves the defendant unable to obtain comparable evidence by other reasonably available means.

State v. Burden, *supra* 512.

Both *Wittenbarger* (*State v. Wittenbarger*, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994)) and *Burden* rely upon *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed.2d 281 (1988).

Mr. Warren, the ballistics expert, (RP 1632, l. 3 to RP 1633, l. 17), reviewed Dr. Reynolds' report and the report from Glenn Davis, the forensic scientist at the Washington State Patrol Crime Lab who examined the AK-47 and bullet fragments. He indicated that the fragments were unidentifiable just as Mr. Davis had. (RP 1634, ll. 14-22)

Mr. Warren went on to indicate the following:

Q. ... [W]hat is the significance of having
no exit wounds?

A. Well, if you don't have an exit wound, then everything that goes in should still be there and so --

Q. Now, does the -- I'm sorry. Go ahead.

A. So you need to look for what is there and then if there is no exit, you have to assume that what is there is the sum total of what was fired.

(RP 1650, l. 20 to RP 1651, l. 2)

Q. So the jacket and the bullet should both be inside?

A. Yes.

(RP 1651, ll. 18-19)

Q. Okay. Are you still looking for that big chunk of bullet? ...

A. These little piles of fragments are consistent with the little bits of fragments we see there (indicating). But this bullet with no exit, the rest of it and what we would call a bullet, because it's the bulk of it, needs to be in there somewhere (indicating). **If**

there's no exit and there's no bullet, it wasn't this kind of cartridge that was fired.

(RP 1656, ll. 7-17) (Emphasis supplied).

Q. So if this was to be done with an AK-47 with no exit wound, what would you be expecting to find down here?

A. I would be expecting to find two bullets and fragmentation (indicating). The only thing I can see in the x-rays, all of them, is fragmentation. And from what was recovered, there was no jacket recovered. So what was recovered was just lead fragmentation. **It's my opinion that it's not this kind of bullet.**

(RP 1660, ll. 5-12) (Emphasis supplied.)

The fact that Dr. Reynolds did not remove all of the fragments that were observable in the x-rays acted to detract from his conclusions and impeded Mr. Warren's ability to make any determination other than that an AK-47 did not fire the bullets that killed Mr. Schur.

When X-rays show bullet fragments that a forensic pathologist ignores and does not recover during an autopsy, it deprives a defendant of the ability to have those fragments analyzed in the absence of an exhumation of the body.

Bullet fragments in a homicide case, where the weapon involved is in question, makes those fragments a critical aspect of the case. They are materially exculpable.

PROSECUTORIAL MISCONDUCT

The prosecuting attorney used Dr. Reynolds' speculative testimony in closing argument as a battering ram. Moreover, the prosecuting attorney's demeaning of defense counsel's argument acted to direct the jury away from critical aspects of the expert testimony from both the defense and State.

Defense says the government hasn't proved anything in this case. Like *Alice Through the Looking Glass*, the defense would like to take you to Wonderland, ladies and gentlemen, where down is up and black is white, where the government hasn't proven anything and, my goodness, we don't know what happened. Come back through the

looking glass into reality, ladies and gentlemen. Come back. Do not go down that rabbit hole. Come back into the cold, clear light of a December day and examine this evidence.

(RP 2055, ll. 13-21)

The particular excerpt from the closing argument pertains directly to the expert testimony on the bullet and AK-47. It is comparable to the misconduct found in *State v. Lindsay*, 180 Wn.2d 423, 438, 326 P.3d 125 (2014) wherein the prosecuting attorney in closing argument referred to testimony as “funny,” “disgusting,” “comical,” and “the most ridiculous thing I’ve ever heard.” And calling closing argument by defense counsel a “crook.” The Court stated:

The prosecutor’s “crook” comment was a comment on both defense counsel’s closing argument and the defendant[’s] testimony, because the two are to some degree inseparable. The prosecutor’s argument that ... the statement ... was “the most ridiculous thing I’ve ever heard” was an even more direct statement of the prosecutor’s personal opinion as to ... veracity. An isolated use of the term “ridiculous” to describe a witness’s testimony is not improper in every circumstance. But labeling testimony “the most ridiculous thing *I’ve ever heard*” is an obvious expression of personal opinion as to credibility. There is no other reasonable in-

terpretation of the phrase. Given that comment, in context with the “crock” accusation and the “sit here and lie” argument, we hold that the prosecutor in this case impermissibly expressed his personal opinion about the defendant’s credibility to the jury.

Under the facts and circumstances of Mr. Lazcano’s case, the prosecuting attorney’s comments impacted the credibility of the defense expert’s testimony and defense counsel’s closing argument.

Moreover, the continued reference by the prosecutor to an intact bullet, not appearing on the x-rays, further exacerbated the prejudicial impact of Dr. Reynolds’s speculative/conjectural testimony. It undermined the fairness of the trial under the due process clauses of the respective Constitutions. (RP 1822, ll. 17-23; RP 1823, ll. 1-11; RP 2045, l. 24 to RP 2055, l. 1)

IMPEACHMENT/SUBSTANTIVE EVIDENCE

It is error to admit the prior inconsistent un-cross-examined written statements of a witness unless, on cross-examination, the witness has been confronted with the self-contradiction and has been given the opportunity to explain it or to reconcile it with his testimony. [Citations omitted.]

...

It is elementary that impeaching evidence should affect only the credibility of the witness. It is incompetent to prove the substantive facts encompassed in such evidence.

State v. Sandros, 186 Wash. 438, 58 P.(2d) 362; *State v. Bogart*, 21 Wn.(2d) 765, 768, 153 P.(2d) 507, 133 A.L.R. 1454. When so used it may be prejudicial.

State v. Flieman, 35 Wn.(2d) 243, 245, 212 P.(2d) 794 (1949).

The State in cross-examining Jamie Whitney and Travis Carlon used prior statements made by them to law enforcement personnel for impeachment purposes. The State did not establish that any of those statements were given under oath. Rather, the State argued that the plea agreements with these individuals required them to testify truthfully.

Mr. Lazcano argued in his original brief that introduction of the plea agreements with the witnesses that they “testify truthfully” violated his rights under the auspices of *State v. Ish*, 170 Wn.2d 189, 241 P.3d 389 (2010).

Moreover, Mr. Lazcano, in his Additional Statement of Grounds for Review, properly calls the Court’s attention to *State v. Sua*, 115 Wn. App. 29, 40-49, 60 P.3d 1234 (2003) which comprehensively reviews ER 801(c) and (d). *Sua* deals with the use of prior statements of a witness and whether or not they constitute hearsay.

Under the facts and circumstances of Mr. Lazcano’s case, since the State did not establish that the prior statements given by Mr. Carlon and

Ms. Whitney were made under oath, those prior statements were improperly used at trial.

Mr. Lazcano recognizes that not every evidentiary error calls for reversal of a conviction. However, when each error addressed in Mr. Lazcano's original brief, the reply brief, this supplemental brief, and the Additional Statement of Grounds for Review is considered, their cumulative impact requires reversal. *See: State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981 (1998).

CONFRONTATION CLAUSE

The Sixth Amendment to the United States Constitution provides that an individual charged with a crime has the right to confront the witnesses against him. Mr. Lazcano was denied that right when Frank Lazcano claimed his Fifth Amendment right not to incriminate himself. Thereafter, the State utilized statements made by Frank Lazcano during interviews made with law enforcement.

What is particularly damaging is the prosecuting attorney's use of Frank Lazcano's statements in closing:

What does Frank say? "I'll take the fall for Dan." For Dan, not for Jim, not for anybody else. "I'll take the fall for Dan." Why not? "Because he won't do well in prison." And

why else? “Because he’s the smart one. He’s going to college. He can get a job and support both of our families.” Support Jamie Whitney’s kids as well as Dan Lazcano’s kids. That’s what was discussed. Uncontroverted that is what was discussed and that is who was there to have that discussion.

(RP 1977, ll. 11-18)

The foregoing excerpt was based upon Ben Evensen’s testimony. It is a hearsay statement of Frank Lazcano implicating Dan Lazcano as the shooter. It was totally inadmissible under any exception to the hearsay rule and violated Daniel Lazcano’s right to confront the witnesses against him.

Insofar as the motion in limine pertaining to the testimony of James Holdren, it would appear that that issue is now controlled by *State v. Wilcoxon*, 185 Wn.2d 324, 331-35 (2016) (dealing with non-testimonial hearsay).

UNDERSHERIFF ROCKNESS

Undersheriff Rockness conducted an interview of Mr. Lazcano on March 30, 2012. Mr. Lazcano was under arrest at the time. (CP 278; Finding of Fact A)

The trial court conducted a CrR 3.5 hearing on January 9, 2013. Findings of Fact and Conclusions of Law were entered on December 10, 2013.

The trial court identified a series of fifteen (15) statements that Undersheriff Rockness made to Mr. Lazcano. (CP 279-80; Finding of Fact C)

The trial court acknowledged the fact that Mr. Lazcano made certain head movements in an up and down manner in response to a number of the statements.

During the course of his contact with Undersheriff Rockness Mr. Lazcano also made a number of other statements which were not in response to any questions. (CP 280; Findings of Fact D and E)

The trial court ruled that Mr. Lazcano was in custody and that he clearly and unequivocally invoked his right to remain silent. (CP 280-81; Conclusions of Law 1 and 2)

The trial court concluded that only the nod following the first statement was admissible in evidence. However, it reserved the right for

the State to use the nods for purposes of impeachment if Mr. Lazcano elected to testify. (CP 281, Conclusions of Law 3 and 4)

ER 801 provides various definitions for hearsay exceptions. Sub-paragraph (a) states: “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(c) provides: “‘Hearsay’ is **a statement**, other than one made by the declarant while testifying at the trial or hearing, **offered in evidence to prove the truth of the matter asserted.**” (Emphasis supplied.)

The State’s cross-examination of Mr. Lazcano did not amount to impeachment. Rather, it constituted an effort to introduce his nods as substantive evidence. The sole purpose was to empower the prosecuting attorney to use those nods as evidence of guilt in his closing argument.

The testimony was inadmissible under two (2) theories:

- (1) A violation of Mr. Lazcano’s Fifth Amendment right to remain silent; and/or
- (2) Violation of ER 801(d)(1).

The prosecuting attorney argued:

But what about this? Why is it that **when the defendant nods**, that that **is after the**

statements that are true, that we know now are true, and he doesn't nod when the officer said something that we know is not true? Let's talk about those statements. The first one: "Frank and you were looking for Marcus for about one week prior to the murder." Thought about it and then nodded. About one week; **we know that to be true; he nodded.**

Second one: "You are not in Spokane. You were in Malden with Frank at the time of the murder." **A nod. We know that that's accurate.**

(RP 1982, ll. 11-21) (Emphasis supplied.)

The prosecuting attorney went on to go through all fifteen (15) statements that Undersheriff Rockness made to Mr. Lazcano. (RP 1982, l. 22 to RP 1984, l. 15)

The prosecutor then states: "**Why does he nod only on the things that we know to be true and does not nod on things that we know are not true? Coincidence? Mm.**" (RP 1984, ll. 16-18) (Emphasis supplied.)

What is decisive is that the prosecuting attorney never cross examined Mr. Lazcano concerning his interview with Undersheriff Rockness. Thus, Mr. Lazcano was not properly impeached.

ER 613(b) provides:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision **does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).**

(Emphasis supplied.)

ER 801(d)(2) states:

The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity, or **(ii) a statement of which the party has manifested an adoption or belief in its truth**, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

(Emphasis supplied.)

ER 801(d)(2) uses the word "statement." The word "statement" is defined in ER 801(a). It includes nonverbal conduct.

Allowing Undersheriff Rockness to introduce Mr. Lazcano's nods to the statements made by the Undersheriff amounts to a violation of Mr. Lazcano's right to remain silent.

Mr. Lazcano contends that this particular issue is now controlled by *State v. I.B.*, 187 Wn. App. 315 (2015).

The *I.B.* case involved a fifteen (15) year-old who responded with a negative head nod when asked if he was willing to talk. The police continued their questioning even after that nod and I.B. made inculpatory statements.

In analyzing the Fifth Amendment and its relationship to head nods the *I.B.* Court ruled at 320-21:

The Fifth Amendment to the United States Constitution provides that “[n]o person ... shall be compelled in any criminal case to be a witness against himself.” To counteract the inherent compulsion of custodial interrogation, police must administer *Miranda* warnings. ... Once a suspect invokes his right to remain silent, police may not continue the interrogation or make repeated efforts to wear down the suspect. [Citation omitted.]

A suspect need not verbally invoke his right to remain silent. In fact, *Miranda* sets a low bar for invocation of the right: “If the individual indicates *in any manner* at any time prior to or during questioning, that he wishes to remain silent, the interrogation

must cease.” *Miranda*, 384 U.S. at 473-74 (emphasis added). ...

The test as to whether a suspect’s invocation of his right to remain silent was unequivocal is an objective one, asking whether “a reasonable police officer in the circumstances would understand the statement” to be an invocation of *Miranda* rights. [Citations omitted.] ... Once a suspect has clearly invoked the right to remain silent, police questioning must immediately cease. [Citations omitted.]

The *I.B.* Court then went on to analyze cases from other jurisdictions, all of which confirm that a head nod is sufficient to invoke the right to remain silent. *State v. I.B.*, *supra*, 322-23

On this basis alone Mr. Lazcano contends that he is entitled to a reversal of his conviction and a new trial.

DATED this 27th day of June, 2016.

Respectfully submitted,

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NO. 32228-9-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	WHITMAN COUNTY
Plaintiff,)	NO. 12 1 00051 9
Respondent,)	
)	CERTIFICATE
v.)	OF SERVICE
)	
DANIEL CHRISTOPHER LAZCANO,)	
)	
Defendant,)	
Appellant.)	
)	

I certify under penalty of perjury under the laws of the State of Washington that on this 27th day of June, 2016, I caused a true and correct copy of the *SUPPLEMENTAL BRIEF OF APPELLANT*, to be served on:

RENEE S. TOWNSLEY, CLERK
Court of Appeals, Division III
500 North Cedar Street
Spokane, Washington 99201

E-FILE

CERTIFICATE OF SERVICE

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E-FILE

DANIEL CHRISTOPHER LAZCANO #372108
Washington State Penitentiary
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U.S. MAIL

s/Dennis W. Morgan

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CERTIFICATE OF SERVICE